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15. Whether granting of time by Court for filing objections against award saves limitation?
16. Is an income-tax assessment order a "property" or "valuable security" within meaning of S. 420, Penal Code?
17. Is court-fee payable on cross-objection preferred for claiming interest under S. 34, Land Acquisition Act?
18. Whether conversion of self-acquired property into hotchpot is gift?
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21. "Real and genuine (transaction) gift made to evade liability resulting from application of Taxing Acts but not to evade discharge of any legal obligation already incurred is not illegitimate" (1909) A C 633 (636-637) (P C).

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COMMENCEMENT OF AN ACT OF PARLIAMENT (or its provision)

Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 65 — Enforcement of — Said S. 65 shall come into force on 25-2-1970. Gaz. of India, 25-2-1970, II S. 3 (i), Ext. p. 145

Motor Vehicles (Amendment) Act, 1969 (56 of 1969), S. 1 (2) — Appointed date under — 2-3-1970, appointed as the date on which provisions other than those contained in Ss. 9 and 13, Cl. (a) of S. 16, Cl. (b) of S. 17, Cl. (e) of S. 29, Ss. 33, 34, 36 and 37, sub-cl. (i) of Cl. (a) of S. 41, Ss. 44, 45, 56, 76 and 82 of the said Act shall come into force. Gaz. of India, 27-2-1970, Pt. II-S. 3 (ii), Ext. P. 253.

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Registration of Births and Deaths Act, 1969 (18 of 1969), S. 1 (3) — Appointment of enforcement date — Said Act shall come into force on 1-4-1970 in the whole of the following States and Union territories, namely: 1. Andhra Pradesh; 2. Bihar; 3. Gujarat; 4. Haryana; 5. Kerala; 6. Madhya Pradesh; 7. Maharashtra; 8. Mysore; 9. Orissa; 10. Punjab; 11. Rajasthan; 12. Tamil Nadu and 13. Uttar Pradesh, States and 1. Chandigarh; 2. Dadra and Nagar Haveli; 3. Himachal Pradesh and 4. Laccadive, Minicoy and Amindivi Islands, Union territories. Gaz. of India, 21-3-1970, Pt. II-S 3 (i), P. 966.

Road Transport Corporations Act, 1950 (64 of 1950), S. 1 (3) — Appointed date under — 10-3-1970 appointed as the date on which the said Act shall come into force in the State of Assam. Gaz. of India, 14-3-1970, II-S. 3 (ii) P. 1311.

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—S. 9 — Bar to jurisdiction of civil courts — Bar does not apply to orders which are a nullity—See Tenancy Laws—Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953), S. 39(1)

Madh Pra 91 A (C N 22)

—S. 9—Special statute ousting jurisdiction of Civil Court — Construction of — See Civil P. C. (1908), Pre

Orissa 76 D (C N 31)

—S. 11, Explanation (iii) — Suit by plaintiff for possession of land — Land described as tenanted land while in earlier suit for partition it was described as rayati land — Evidence showing that plaintiff and defendants were under bona fide mistake of fact as to character of land at that time — No issue whether nature of land was directly or substantially or was incidentally or collaterally in issue in that suit — Held, defendant could not claim benefit of explanation (iii) to S. 11

Civil P. C. (contd.)

— Question not having been adjudicated on that point in previous suit cannot operate as *res judicata* in suit for possession — Orissa 87 B (C N 34)

— S. 11 and O. 23, R. 3 — Compromise decree — S. 11 is not applicable — Raj 104 (C N 23)

— S. 24 — Dispute regarding jurisdiction — Existence of — No bar to High Court ordering transfer — Andh Pra 194 (C N 27)

— S. 47 — Decree for pre-emption — Compliance with O. 20, R. 14 by pre-emptor — Subsequent sale of land under decree — Recital in sale-deed as to delivery of possession to vendee — Vendee cannot execute decree — Proper remedy is to file suit for possession — 94 Punjab Record 1902 and 78 Punjab Record 1896, **Overruled** — See Civil P. C. (1908), O. 21, R. 16 — Punj 215 (C N 32) (FB)

— S. 48 — Execution though started more than 12 years before still continuing — Plea of bar under section is not sustainable as there is no question of fresh execution in the case — Cal 206 A (C N 37)

— Section 52 — Decree against legal representative — Extent of liability — Suit by vendee for refund of consideration against heirs and legal representatives of deceased vendor on ground that vendor had no subsisting title — Defendant cannot be personally liable but will only be liable to pay same out of the assets of deceased in their hands — (Obiter) — Orissa 89 B (C N 35)

— S. 60 — Amount provided in budget for payment to particular institution — Does not by itself become property of institution nor is it debt due to institution and is not attachable — See Civil P. C. (1908), O. 21, R. 52 — Andh Pra 162 A (C N 23)

— S. 60 (1) (c) — 'Agriculturist' — Who is — Raj 108 (C N 24)

— S. 73 — Income Tax Act (1922), S. 46 — Priority of debts due to Government — Right of priority is a common law right recognised in India and preserved under Article 372 of the Constitution — Mad 190 A (C N 49)

— Section 73 — Income Tax Act (1922), Section 46 — Government debt — Priority of — Lots attached by decree-holder — Government must apply to Executing Court before particular sale proceeds are distributed to decree holder after sale of those particular lots — Government's claim cannot be enforced against the amount realised in execution by sale of lots and paid over to attaching decree holder long before the application by Government — Mad 190 B (C N 49)

— S. 96 — Summary disposal of appeal without calling for the record — Procedure when to be followed — See Civil P. C. (1908), O. 41, R. 11 — Mys 138 (C N 31)

Civil P. C. (contd.)

— S. 100 — Appeal under — No inhibition against interference on facts — Comparison with powers under S. 100, Civil P. C. — See Letters Patent (Mad) Cl. 15 — Mad 200 B (C N 53)

— S. 115 — Appellate order under S. 17 of the Payment of Wages Act — Revision to High Court under S. 115 Civil P. C. lies — Appellate authority under S. 17 of that Act is 'Court' — The "authority" hearing application under S. 15 of the Act is not 'Court' but a *persona designata* — Orissa 76 A (C N 31)

— S. 115 — Concurrent finding of fact — See Payment of Wages Act (1936), S. 15 — Orissa 76 C (C N 31)

— S. 115 — Revision — New plea — See Civil P. C. (1908), O. 39, R. 2 (3) — Raj 83 C (C N 17)

— Ss. 144 and 145 (as amended by U. P. Act 24 of 1954) and O. 21, R. 60 — Release of property from attachment — Effect of — Restitution can be claimed — Liability of surety is enforceable at instance of person entitled to enforce that liability against supurdar, whether he be a judgment-debtor or a third party claimant: 1962 All LJ 539 and AIR 1920 All 245(1), **Overruled** — All 261 A (C N 43) (FB)

— S. 145 (as amended by U. P. Act 24 of 1954) — Release of property from attachment — Restitution can be claimed — Liability of surety is enforceable at instance of person entitled to enforce that liability against supurdar, whether he be a judgment-debtor or a third party claimant — See Civil P. C. (1908) S. 144 — All 261 A (C N 43) (FB)

— S. 145 and O. 21, Rr. 60, 90 — Release of property attached — Property sold away by surety and sale proceeds misappropriated — Order for recovery and execution for the same under S. 145 — Properties of surety sold in execution of that order — No appeal filed by supurdar — Order under S. 145 cannot be challenged as nullity by way of an objection to sale — All 261 B (C N 43) (FB)

— S. 146 — Decree for pre-emption — Compliance with O. 20, R. 14 by pre-emptor — Subsequent sale of land under decree — Recital in sale-deed as to delivery of possession to vendee — Vendee cannot execute decree by invoking S. 146 — 94 Punjab Record 1902 and 78, Punjab Record 1896, **Overruled** — See Civil P. C. (1908), O. 21, R. 16 — Punj 215 (C N 32) (FB)

— Ss. 148 and 151 — Parties to suit fixing by consent time to make a deposit and also on default failure was to result in a forfeiture — No statutory time limit laid down for making that deposit — Court has ample power to grant relief

Civil P. C. (contd.)

against such forfeiture even without the consent of the parties

Cal 199 (C N 34)

—S. 151 — Parties to suit fixing by consent time to make a deposit and also on default failure was to result in a forfeiture — No statutory time limit laid down for making that deposit—Court has ample power to grant relief against such forfeiture even without the consent of the parties — See Civil P. C. (1908) S 148

Cal 199 (C N 34)

—O. 1, R. 3 — By reason of its being directed to appear and adduce evidence under S. 50 (2) of Land Acquisition Act (1894), local authority does not become necessary party in proceeding under Act — See Land Acquisition Act (1894) Section 50 (2) (as amended by Gujarat Act 20 of 1965)

Guj 81 B (C N 13)

—O. 1 R. 10 — Land Acquisition Act S. 50 (2) as amended by Gujarat Act 20 of 1965 — Local authority coming under S. 50 (2) cannot invoke provisions of O. 1 R. 10 Civil P. C. — See Land Acquisition Act (1894), S. 53

Guj 81 A (C N 13)

—O. 1 R. 10 — By reason of its being directed to appear and adduce evidence under S. 50 (2) of Land Acquisition Act (1894), local authority does not become proper party in proceeding under Act — See Land Acquisition Act (1894) S. 50 (2) (as amended by Gujarat Act 20 of 1965)

Guj 81 B (C N 13)

—O. 4, R. 1 and O. 9, R. 9 — Word 'suit' — Meaning — Application under Section 543, Companies Act is not a suit

Raj 91 C (C N 20)

—O. 6, R. 2 — Fixation of maintenance by Jagir Commissioner—Allegation that certain matters not taken into consideration — Specific plea in written statement necessary—See Tenancy Laws — Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953), S. 10

Madh Pra 91 C (C N 22)

—O. 6, R. 5 — Enquiry by University authorities — Charge of copying at examination — Procedure to be followed

Cal 207 A (C N 38)

—O. 9, R. 8 — Application for investigation into conduct of a past director is not a suit — See Companies Act (1956), S. 543

Raj 91 B (C N 20)

—O. 9, Rr. 9, 13 and O. 17, Rr. 3, 2 — Court purporting to act under O. 17, R. 3 — Actual order such as could be passed under O. 9 read with O. 17, R. 2 — Application for restoration can be entertained—AIR 1954 All 222 Overruled

All 257 (C N 42) (FB)

—O. 9, R. 9 — Application for investigation into conduct of a past director is

Civil P. C. (contd.)

not a suit — See Companies Act (1956), S. 543

Raj 91 B (C N 20)

—O. 9, R. 9 — Application under S. 543 Companies Act is not a suit — See Civil P. C. (1908), O. 4, R. 1

Raj 91 C (C N 20)

—O. 9, R. 13 — Court purporting to act under O. 17, Rule 3 — Actual order such as could be passed under O. 9 read with O. 17 R. 2 — Application for restoration can be entertained — AIR 1954 All 222 Overruled—See Civil P. C. (1908), O. 9, R. 9

All 257 (C N 42) (FB)

—O. 17 R. 2 — Court purporting to act under O. 17 R. 3—Actual order such as could be passed under O. 9 read with O. 17 R. 2 — Application for restoration can be entertained — AIR 1954 All 222 Overruled — See Civil P. C. (1908), O. 9, R. 9

All 257 (C N 42) (FB)

—O. 17, R. 3 — Court purporting to act under O. 17 R. 3 — Actual order such as could be passed under O. 9 read with O. 17 R. 2 — Application for restoration can be entertained — AIR 1954 All 222 Overruled — See Civil P. C. (1908), O. 9, R. 9

All 257 (C N 42) (FB)

—Order 19, Rule 1 — Affidavits — Verification of — Necessity — Affidavits not properly verified cannot be admitted in evidence

SC 652 B (C N 125)

—Order 20, Rule 14 — Preliminary decree for pre-emption — Defendant obtaining stay order from High Court — It has effect of staying deposit of purchase price — Dismissal of appeal gives fresh starting point for payment. A. F. A. D. No. 30 of 1962, D/- 14-10-1963 (Bom), Reversed

SC 750 (C N 155)

—O. 20, R. 14 — Pre-emptor's title accrues to the pre-empted property from the date of deposit of decretal price — See Civil P. C. (1908), O. 21, R. 16

Punj 215 (C N 32) (FB)

—O. 21, R. 16, Ss. 146, 47 and O. 20, R. 14 — Decree for pre-emption — Compliance with O. 20, R. 14 by pre-emptor — Subsequent sale of land under decree — Recital in sale-deed as to delivery of possession to vendee — Vendee cannot execute decree — Proper remedy is to file suit for possession—94 Pun Re 1902 & 78 Pun Re 1896, Overruled

Punj 215 (C N 32) (FB)

—O. 21, R. 46 — Amount provided in budget for payment to particular institution — Does not by itself become debt due to institution and cannot be attached — See Civil P. C. (1908), O. 21, R. 52

Andh Pra 162 A (C N 23)

—O. 21, Rr. 52, 58 to 63 and 46 and S. 60 — Amount provided in budget for payment to particular institution — Does not by itself become property of institution

Civil P. C. (contd.)

in hands of public officer nor is it debt due to institution and cannot be attached — Denial by public officer that he had any amount in his custody or denial of debt by garnishee — Provisions of Rr. 58 to 63 are not attracted

Andh Pra 162 A (C N 23)

—O. 21, Rr. 58 to 63 — Attachment of money under O. 21, R. 52 or attachment of debt under O. 21 R. 46 — Denial by public officer that he had any money in his custody or denial of debt by garnishee — Provisions of Rr. 58 to 63 are not attracted — See Civil P. C. (1908), O. 21 R. 52

Andh Pra 162 A (C N 23)

—O. 21, R. 60 — Release of property from attachment — Effect of—See Civil P. C. (1908), S. 144

All 261 A (C N 43) (FB)

—O. 21, R. 60 — Release of property attached — See Civil P. C. (1908), S. 145

All 261 B (C N 43) (FB)

—O. 21, R. 72 — Provincial Insolvency Act (1920), S. 52 — Execution — Sale — House purchased by decree-holder with permission of Court — Decretal amount is set off against price automatically

Raj 109 (C N 25)

—O. 21, R. 90 — Release of property attached — Property sold away by surety and sale proceeds misappropriated — Order for recovery and execution for the same under S. 145 — Properties of surety sold in execution of that order — No appeal filed by supurdar — Order under S. 145 cannot be challenged as nullity by way of an objection to sale — See Civil P. C. (1908), S. 145

All 261 B (C N 43) (FB)

—O. 22 — Object — Applicant for stage carriage permit dying pending his application — Substitution of his legal representative as applicant — Substitution not possible — See Motor Vehicles Act (1939), S. 59

Andh Pra 178 (C N 25)

—O. 22, R. 6 — Provisions apply to proceedings under S. 542, Companies Act by reason of S. 483 of that Act read with Rule 6 of Companies (Court) Rules, 1959 and Rule 44 of Rules framed by T. C. High Court under Banking Regulation Act 1949 — See Companies Act (1956), S. 542

Ker 120 C (C N 22)

—O. 23, R. 1 (2) — Power of appellate court — Bar to suit under S. 69 (2), Partnership Act affirmed in second appeal — Withdrawal of suit with liberty to institute fresh suit prayed for in appeal — Maintainability

Raj 99 B (C N 21)

—Order 23, Rule 3 — Provision of Rule 3 is mandatory — Compromise between parties to withdraw appeal — Factum and validity of compromise not disputed — Court must dismiss appeal—

Civil P. C. (contd.)

ILR (1968) 1 Punj 621, Reversed

SC 669 (C N 131)

—O. 23, R. 3 — Compromise decree — Section 11 is not applicable — See Civil P. C. (1908), S. 11

Raj 104 A (C N 23)

—O. 23, R. 3 — Evidence Act (1872), Section 115 — Consent decree — Binding nature of—Principle of estoppel by judgment — Applicability

Raj 104 B (C N 23)

—O. 26, R. 9 — Partition — Court refusing to admit proof of unregistered deed — Commission to ascertain details of partition, held, could not be issued — See Evidence Act (1872), S. 91

Cal 192 (C N 32)

—O. 27, R. 4 — Advocate on record does not hold an office under the client — See Constitution of India, Art. 191(1)(a)

SC 694 A (C N 140)

—O. 27, R. 8-B — Notification under— Does not amount to creation of "office" — See Constitution of India, Art. 191 (1) (a)

SC 694 A (C N 140)

—O. 30, R. 2 — Suit brought in name of firm — It is really against all partners — See Partnership Act (1932), S. 69 (2)

Raj 86 (C N 18)

—O. 32, Rr. 1 and 3 (7) (Mad) — Guardian ad litem — Order 32 does not prohibit appointment of person other than natural guardian

Mad 179 A (C N 46)

—O. 32, R. 1 — Guardian-ad-litem — Order does not prohibit appointment of person other than natural guardian— See Civil P. C. (1908), O. 32

Mad 179 A (C N 46)

—Order 32, R. 3 (1) and (5) (Mad) — Guardian-ad-litem — Appointment of — Person other than natural guardian appointed as guardian-ad-litem — Appointment does not result in permanent cessation of power of natural guardian as contemplated under the Guardians and Wards Act (1890)

Mad 179 B (C N 46)

—Order 32, Rule 3 (1) and (7) (Mad) — Irregularity in appointment of guardian-ad-litem — Irregularity cannot render decree against minor nugatory — Minor must prove that he was not effectively represented in suit

Mad 179 C (C N 46)

—Order 32, Rule 3 (7) — Guardian-ad-litem — Appointment of person other than natural guardian — Order does not prohibit such appointment — See Civil P. C. (1908), Order 32

Mad 179 A (C N 46)

—Order 32, Rule 9 — Mother representing her minor children as next friend in writ petition — One major son also a party to writ petition — Mother not taking effective steps to prosecute the case — Mother removed as guardian and

Civil P. C. (contd.)

next friend — Notice issued to major son asking him to act as next friend

Punj 205 (C N 30) (FB)

—O. 39, R. 2 (3) — Injunction against husband restraining him from entering into second marriage — Disobedience of order — Extent of proof necessary

Raj 83 B (C N 17)

—O. 39, R. 2 (3) and S. 115 — Order for temporary injunction restraining husband from entering into second marriage — Disobedience — Contempt proceedings — Duty of Court

Raj 83 C (C N 17)

—O. 39, R. 2 (3) — Scope — Proceedings under are not akin to criminal prosecution where proof beyond all reasonable doubt is required

Raj 83 D (C N 17)

—O. 40, R. 1 — Order for appointment of a receiver not actually naming receiver — Appeal against lies if there is a degree of finality—See Civil P. C. (1908), O. 43, R. 1 (s)

Mys 141 A (C N 33)

—O. 40, R. 1 — Power to appoint receiver — Principles to be followed by Court

Mys 141 B (C N 33)

—O. 41, R. 1 — Suit instituted after expiry of period of limitation was liable to be dismissed though limitation was not pleaded in written statement — Absence of plea did not cause plaintiff any prejudice — Appellate Court could allow defendant to raise plea of limitation for first time — See Tenancy Laws — Bihar Tenancy Act (8 of 1885), S. 184

SC 716 B (C N 144)

—O. 41, R. 5 — Stay of proceedings — Applicants using delaying tactics and taking undue advantage of stay — Stay can be vacated

Punj 205 B (C N 30) (FB)

—O. 41, R. 11 and S. 96—Summary disposal of appeal without calling for the record—Procedure to be followed only where perusal is unnecessary for disposal of appeal—Questions of fact in serious controversy — First appeal cannot be disposed of summarily

Mys 138 (C N 31)

—O. 43, R. 1 (s) and O. 40, R. 1 — Order for appointment of a receiver not actually naming a receiver — Appeal against, lies if there is a degree of finality about it. AIR 1951 Bom 41 & AIR 1920 All 149 & AIR 1938 Nag 540 & AIR 1958 Assam 171 and AIR 1932 Cal 194, Dissented from

Mys 141 A (C N 33)

CIVIL SERVICES

— All India Services (Appeal and Discipline) Rules (1955)

—R. 7 — Order suspending Government Servant — Reference to R. 7 not

Civil Services — All India Services (Appeal and Discipline) Rules (contd.) made in order — Effect

SC 652 A (C N 125)

—Bombay Civil Services (Conduct and Discipline) Rules

—R. 21 — Lecturer of a Government College — University appointing him as an examiner — Government, held, could have no control over him as an examiner — Fact that disciplinary action could be taken for his conduct as an examiner, no criterion — See Penal Code (1860), S. 161

Guj 97 A (C N 15)

—Central Civil Services (Classification, Control and Appeal) Rules, 1965

—Rule 14 — Contractual employee working as a lecturer in National Defence Academy under contract with the President of the Union — Termination of services for insubordination under relevant clause of contract following enquiry under R. 14 — Breach of rule not justiciable — See Constitution of India, Art. 310

Bom 180 (C N 33)

—Fundamental Rules

—R. 56 (as amended in 1963) — Age of retirement under R. 56 is 58 years and not 55 years

All 296 B (C N 47) (FB)

—R. 56 (a) (as amended in 1963) — Paragraph (1) of Proviso — Paragraph (1) of proviso to Rule 56 (a) violates Arts. 14 and 16 — AIR 1966 All 560, Overruled

All 296 A (C N 47) (FB)

—High Court Judges (Conditions of Service) Act (28 of 1954)

—Pre-Constitution Judge continuing to be Judge under Constitution — His right in respect of pension under Govt. of India (High Court Judges) Order 1937 is not affected by High Court (Conditions of Service) Act 1954 — See Constitution of India, Art. 221 (2)

All 268 B (C N 45) (FB)

—Railway Servants Conduct and Disciplinary Rules

—Rule 1713 — Finding on charge — No obligation on disciplinary authority to write order like judicial tribunal — Writ Appeal No. 205 of 1964, D/- 4-8-1965 (Ker), Reversed

SC 748 A (C N 154)

Companies Act (1 of 1956)

—S. 34 — Liability of past director for money owed by him to Company — Company alone entitled to sue — See Companies Act (1956), S. 295

Raj 91 A (C N 20)

Companies Act (contd.)

—S. 237 (b) — Order under — Prima facie reasons for, must exist — Reasons if found afterwards cannot justify order in retrospect. AIR 1966 Cal 151, Reversed Cal 183 (C N 31)

—Sections 295, 34 and 325 — Liability of past director for money owed by him to company — Company alone entitled to sue Raj 91 A (C N 20)

—S. 325 — Liability of past director for money owed by him to Company — Company alone entitled to sue — See Companies Act (1956), S. 295 Raj 91 A (C N 20)

—Ss. 433 (e) and 434 (c) — "Unable to pay its debts" — Assets not to include value of building and machinery without which company cannot function as such Mad 203 A (C N 54)

—Ss. 433 (e), 434 (c) and 466 — Winding up ordered—Appeal filed against order — Arrangement with third party — All original creditors paid up by third party — On date of hearing of appeal, company still unable to pay the third party—Company pleading coming into force of an automatic stay under the terms of the arrangement — Shareholders, intending to run the mills themselves raising funds from market — Held, company should be deemed unable to pay its debts; that there was no automatic stay of winding up and that in such a position the shareholders could not be given charge of the mills Mad 203 B (C N 54)

—S. 434 (c) — Unable to pay its debts — Assets not to include value of building and machinery without which company cannot function as such — See Companies Act (1956), S. 433 (e) Mad 203 A (C N 54)

—S. 434 (c) — Winding up ordered — Appeal filed against order — Arrangement with third party — See Companies Act (1956), S. 433 (e) Mad 203 B (C N 54)

—S. 466 — Winding up ordered — Appeal filed against order — Arrangement with third party — See Companies Act (1956), S. 433 (e) Mad 203 B (C N 54)

—S. 483 — Proceedings under S. 542 O. 22 R. 6 of Civil P. C. apply to proceedings by reason of S. 483 read with Rule 6 of Companies (Court) Rules, 1959 and Rule 44 of Rules framed by T. C. High Court under Banking Regulation Act 1949 — See Companies Act (1956), S. 542 Ker 120 C (C N 22)

—Section 542 — Liability for debts etc. — Extent of — Section seems to postulate some nexus between fraudulent trading or purpose and extent of liability of directors or other persons Ker 120 B (C N 22)

—Sections 542, 543 and 483 — Proceeding under Section 542 terminating into

Companies Act (contd.)

order — Subsequent death of delinquent party — No abatement of proceeding already terminating into order — Order 22, Rule 6 of Civil P. C. apply to proceedings Ker 120 C (C N 22)

—Sec. 542 — Scope and applicability— 'Primary' intention to defraud on the part of person sought to be proceeded against, is not requirement of section Ker 120 D (C N 22)

—Section 542 — Liability of Director — Liability of Director cannot be rested merely on his adoption at subsequent meeting of proceedings of previous meeting of Board of Directors Ker 120 E (C N 22)

—Sec. 542 — Carrying on business with fraudulent intent or purpose — Directors knowing that affairs of Banking company did not justify canvassing for or making of deposits — Such Directors themselves canvassing and requesting others to canvass for deposits — Held, their action amounted to carrying on business of Bank with requisite fraudulent intent or purpose under S. 542 Ker 120 F (C N 22)

—Sec. 542 — Liability of Directors — Held on facts that trust and confidence reposed in some respondents and members of Executive Committee was no defence Ker 120 G (C N 22)

—Sec. 542 — Scope—Court must decide extent of all debts or liabilities and if directors are to be made liable court must decide extent of their liability Ker 120 H (C N 22)

—Section 542 (1) — Scope — Retrospective operation — Section introduced for the first time in the Act — Making facts and circumstances prior to that date, foundation of proceeding or order does not amount to giving retrospective operation to section Ker 120 A (C N 22)

—S. 543 — Proceedings under S. 542 terminating, do not abate by reason of subsequent death of delinquent party — O. 22 R. 6 of Civil P. C. apply to proceedings — See Companies Act (1956), S. 542 Ker 120 C (C N 22)

—Section 543 — Application for investigation into conduct of a past director — Misapplication of funds of company alleged — Earlier suits brought by company for recovery of money against Director dismissed for default of plaintiff's appearance—No allegation of breach in the earlier suits — Application under Section 543 not barred as it is neither a suit nor is it for the same cause of action Raj 91 B (C N 20)

—S. 543 — Application under S. 543, Companies Act is not a suit — See Civil P.C. (1908), O. 4, R. 1 Raj 91 C (C N 20)

Companies (Court) Rules (1959)

—R. 6 — Provisions of O. 22 R. 6 of Civil P. C. apply to proceedings under S. 542, Companies Act by reason of S. 483 of that Act read with Rule 6 of Companies (Court) Rules, 1959 and Rule 44 of Rules framed by T. C. High Court under Banking Regulation Act, 1949 — See Companies Act (1956), S. 542

Ker 120 C (C N 22)

Constitution of India

—Pre. — Provisions of Statute or Constitution — Whether mandatory — Interpretation — Rule as to — See Constitution of India, Art. 173 (a)

SC 765 (C N 160)

—Articles 4, 73, 162, 309, Sch. 7, List 2, Entry 41 — States Reorganisation Act (1956), Section 115 — Power of integration does not belong exclusively to States — Central Government has certain controlling, supervisory, concurrent and overriding powers — State Government's power under Entry 41 of List 2 has to be exercised in subordination to those of Central Government

Ker 110 B (C N 21) (FB)

—Art. 14 — S. 297(2) (g) of Income Tax Act (1961) is not violative of Art. 14 of the Constitution — See Income Tax Act (1961), S. 297(2) (g)

SC 778 C (C N 164)

—Art. 14 — Paragraph (1) of Proviso to R. 56 (a) of Fundamental Rules violates Art. 14 — See Civil Services — Fundamental Rules (as amended in 1963), R. 56 (a)

All 296 A (C N 47) (FB)

—Arts. 14, 16 — Statute creating different classes — Validity — Principle of reasonable classification

All 296 A (C N 47) (FB)

—Art. 14 — Provisions of S. 25 are not violative of Art. 14 — See Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), S. 25

Andh Pra 180 G (C N 26) (FB)

—Art. 14 — Levy of market fee under S. 65 of Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966) — Impost is fee — It is only on first purchase of agricultural produce — S. 65 of that Act is not unconstitutional — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65

Mys 114 F (C N 30)

—Art. 14 — Representation of agriculturists on first market committee — Having regard to purpose of Act provision is valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 10

Mys 114 J (C N 30)

—Art. 14 — Classification made by S. 85 of Mysore Act 27 of 1966 is reasonable — Provisions are valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 85

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tion) Act (27 of 1966), S. 85

Mys 114 Q (C N 30)

—Article 16 — Paragraph (1) of the Proviso to Rule 56 (a) of Fundamental Rules violates Article 16 — See Civil Services — Fundamental Rules (as amended in 1963), R. 56 (a)

All 296 A (C N 47) (FB)

—Article 16 — Statute creating different classes — Validity — See Constitution of India, Article 14

All 296 C (C N 47) (FB)

—Articles 19 and 31 — Defence of India Act (1962), Section 29 (1) — Requisition of plot under — No violation of Articles 19 or 31

Goa 80 F (C N 14)

—Article 19 (6) and 19 (1) (g) — Purpose of Act is to avoid exploitation of producer through middlemen — Provision of Section 78 is not unreasonable even though commission includes storage and insurance charges — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 78

Mys 114 P (C N 30)

—Art. 19 (6) & 19 (1) (g) — Provisions in S. 66 as to deposit are reasonable — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 85

Mys 114 Q (C N 30)

—Art. 20 (2) — Principle of issue estoppel — Applicability — Proceeding under S. 107 on basis of specific incident — Rejection of evidence — Subsequent trial in respect of that incident is not barred — See Criminal P. C. (1898), S. 403

SC 771 (C N 162)

—Art. 21 — Word "life" in Art. 21 — Matters like individual status of person is not covered — See Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), S. 25 (2)

Andh Pra 180 D (C N 26) (FB)

—Art. 22 (5) — Representation of detenus — Procedure as to — Appropriate Government must itself expeditiously exercise judgment thereon before forwarding it to Advisory Board — See Public Safety — Preventive Detention Act (1950), S. 7

SC 675 (C N 135)

—Art. 31 — Requisition of plot under S. 29 of Defence of India Act (1962) — No violation of Art. 19 or 31 — See Constitution of India, Art. 19

Goa 80 F (C N 14)

—Arts. 32 and 145 — Supreme Court Rules 1966, O. 11, R. 1 — Conduct of petitioner — Refusal to swear affidavit in support of allegations in petition — Effect

SC 776 (C N 163)

—Art. 73 — State Government's powers under Entry 41 of List 2 have to be exercised in subordination to those of Central Government — See Constitution of India, Art. 4

Ker 110 B (C N 21) (FB)

Constitution of India (contd.)

—Art. 112 — Amount provided in budget for payment to particular institution — Does not by itself become property of institution nor is it debt due to institution and cannot be attached in execution of decree against institution — See Civil P. C. (1908), O. 21, R. 52

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—S. 562 — Conviction of accused — Court passing sentence of imprisonment and then observing that the accused is a young man directing his release on probation — Order is illegal — Accused cannot be punished and at the same time released on his entering into a bond — See Probation of Offenders Act (1958), S. 4 (1)

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Cal 212 B (C N 39)

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—S. 4 — Applicability of Act — Debts incurred between date when Act came into force and notified date — Act is not applicable to such debts

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Goa 80 A (C N 14)

—S. 3 — Defence of India Rules (1962), Part 12 (Gold Control) Rules 126-L, 126-M and 126-P — Rules do not suffer from vice of excessive delegation of legislative power — (Constitution of India, Art. 245)

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—S. 3 — Defence of India Rules (1962), Part 12-A (Gold Control) Rules 126-L, 126-M and 126-P — Validity of rules — Rules are reasonably related to purposes mentioned in Section 3 (1) and do not fall outside ambit of Section 3 — Constitution of India, Article 226

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—S. 3 (2) — Matters set out in Section 3 (2) are not restrictive of the generality of rule-making power under Section 3 (1) — Function of Section 3 (2) is merely an illustrative one

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—Ss. 29 (1) and (3), 1 (3) — Requisition and Acquisition of Immovable Property Act (1952) (as amended in 1968), Sections 25, 3, 6, Proviso — Requisition of plot for defence purpose — Period of requisition not required to be mentioned in requisition order — Purpose still existing — Requisition would be deemed to be under S. 3 of 1952 Act and all provisions of that Act

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would apply — Proviso to Section 6 of 1952 Act not attracted Goa 80 A (C N 14)
 —Ss. 29 (1), 41 — Requisition of plot for defence purpose — Extraction of metals from quarry for defence work — Remedy for acts of waste is by way of damages, but requisition will not be affected — No colourable exercise of statutory power vested in Central Government

Goa 80 B (C N 14)
 —S. 29 (1) — Union Territory — Order of requisition of plot for defence purpose passed by Administrator — Opinion of Administrator is opinion of Central Government
 Goa 80 C (C N 14)

—Ss. 29 (1), 40 — Union Territory — Order for requisition of plot for defence purpose by Administrator — Power to requisition though can be delegated under Section 40, delegation is not necessary as Administrator can make such order

Goa 80 D (C N 14)
 —S. 29 (1) — Order of requisition — Applicability of principle of natural justice — See Constitution of India, Article 226

Goa 80 E (C N 14)
 —S. 29 (1) — Requisition of plot under — No violation of Article 19 or 31 — See Constitution of India, Article 19

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 —S. 40 — Union Territory — Competency of Administrator to pass order for requisition of plot for defence purpose — See Defence of India Act (1962), Section 29 (1)

Goa 80 D (C N 14)
 —S. 44 — Requisition of plot for defence purpose — Extraction of metals from quarry for defence work — Remedy — See Defence of India Act (1962), Section 29 (1)

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—R. 3 and Part 12-A (Gold Control) Rule 126-L (2) — Words 'any person' in Rule 126-L (2) do not require that person must be authorised by name and not by description of his office — Though General Clauses Act, 1897, is not strictly applicable in construction of Gold Control Rules principle embodied in Section 15 of that Act can be relied on to hold that where power to appoint any person to execute any function is conferred, such appointment may be made either by name or by virtue of office — (General Clauses Act (1897), S. 15)

Cuj 108 D (C N 17)
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 —Part XII-A (Gold Control) Rule 126 L — Rule does not suffer from vice of excessive delegation of legislative power — See Defence of India Act (1962), Section 3

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—Part XII-A (Gold Control) Rule 126 L — Rule is reasonably related to purposes mentioned in Section 3 (1) of the Defence of India Act and does not fall outside ambit of Section 3 — See Defence of India Act (1962), S. 3 Cuj 108 H (C N 17)

—Part XII-A (Gold Control) Rule 126 L (2) — Words 'any person' in Rule 126 L (2) do not require that person must be authorised by name and not by description of his office — See Defence of India Rules (1962), R 3 Cuj 108 D (C N 17)

—Part XII-A (Gold Control) Rule 126-L (2) — Authorisation under, may be unconditional or it may be subject to fulfilment of condition Cuj 108 E (C N 17)

—Part XII-A (Gold Control) Rule 126-L (16) — Rule is not retrospective and must be construed as attracting penalty only in those cases where act or omission rendering gold liable to confiscation is done after coming into force of rule

Cuj 108 I (C N 17)
 —Part XII-A (Gold Control) Rule 126-M (16) — Offence contemplated by rule is not a continuing offence — (Penal Code (1860), Section 40 — Continuing offence)

Cuj 108 A (C N 17)
 —Part XII-A (Gold Control) Rules 126-M and 126-L — Seizure contemplated by Rule 126-M is seizure under Rule 126-L and, therefore, gold cannot be confiscated under Rule 126-M unless it has been seized in accordance with Rule 120-L

Cuj 108 A (C N 17)
 —Part XII-A (Gold Control) Rule 126-M — Rule does not suffer from vice of excessive delegation of legislative power — See Defence of India Act (1962), Section 3

Cuj 108 F (C N 17)

—Part XII-A (Gold Control) Rule 126-M — Rule is reasonably related to purposes mentioned in Section 3 (1) of the Defence of India Act and does not fall outside ambit of Section 3 — See Defence of India Act (1962), S. 3 Cuj 108 H (C N 17)

—Part XII (Gold Control) Rule 126 P — Rule does not suffer from vice of excessive delegation of legislative power — See Defence of India Act (1962), Section 3

Cuj 108 H (C N 17)
 —Part XII-A (Gold Control) Rule 126-P — Rule is reasonably related to purposes mentioned in Section 3 (1) of the Defence of India Act and does not fall outside ambit of Section 3 — See Defence of India Act (1962), S. 3 Cuj 108 H (C N 17)

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—R. 54 — Grant of licence in name of firm — Partners do not hold licence in their individual name — Rule provides for grant

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of licence to partnership firm — See Punjab Excise Act (1 of 1914), Section 43

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—R., 5.10 — Excise Commissioner deleting name of partner from license issued in name of firm — Writ challenging order objected to as infructuous because of expiry of annual term of licence — Provision for grant of licence from April to March does not contemplate issue of fresh licence every year — Right of holders of licence cannot be said to be extinguished on expiry of term, particularly when provision for renewal exists — Objection not sustainable — See Punjab Excise Act (1 of 1914), S. 43

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—S. 24 (1) and (2) — Cancellation of allotment order — Powers of Chief Settlement Commissioner — Nature

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—Ss. 7 and 10 — Proceeding under Act — Nature of — Petition by husband — Wife remaining ex parte — Court cannot act on uncorroborated evidence of petitioner

Mad 178 (C N 45) (SB)

—S. 10 — Petition by husband — Wife remaining ex parte — Court cannot act on uncorroborated testimony of petitioner — See Divorce Act (1869), S. 7

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—S. 10 — Dissolution of marriage — Petition by wife on ground of adultery coupled with cruelty — Proof of grave cruelty alone is not sufficient — Mere assertion of adultery is also not enough

Mad 188 A (C N 48) (SB)

—S. 22 — Decree nisi granted by District Judge dissolving marriage between parties — Reference under Sections 10 and 17 of the Act for confirmation — Cruelty alone proved and not adultery — High Court is competent under Section 22 to grant decree for judicial separation

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—University examination — Charge of copying at examination — Procedure to be adopted by Enquiry Committee — See Constitution of India, Art. 226

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—Vol. 2, Chap. II-A, Regn. 9 (2) — Fourth optional cannot be equated to any of the three main optionals — 'Excess marks obtained over minimum in fourth optional subject shall be added to aggregate for determining division — See Education — Utkal University Regulations, Vol. 2 Chap. II-A, Regn. 2 (1)

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—S. 2-A — 'Establishment' — Meaning of — It means house of business — Applicability of Act to employees in Office establishment — Mad 194 (C N 50)

—S. 2 (f) — Definition of 'employee' — Stress is laid on employee being employed 'in connection with work of establishment' — See Employees' Provident Funds Act (1952), S. 2 A — Mad 194 (C N 50)

—S. 16 (1) (b) — Period of infancy must be calculated from the first establishment of factory and not from the moment of time when figure of 20 or more is first reached — Decision of Punjab High Court, Reversed — SC 655 (C N 127)

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—S. 3 — Order under Section 3 — Preparation to commit offence — Not punishable under Act — Seizure of truck with paddy in Punjab Territory — No export within meaning of Para 2 — See Essential Commodities Act (1955), Section 8

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—S. 7A — Preparation to commit offence — Not punishable under Act — See Essential Commodities Act (1955), Section 8

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—S. 11 — Charge-sheet submitted by police officer stating facts relating to commission of offence under Section 7 of 1955 Act — It is report of police officer within meaning of Section 190 (1) (b) fulfilling condition of Section 11 of 1955 Act at the same time — Trial can proceed under Section 251A — See Criminal P. C. (189S), Section 251A Pat 159 (C N 25)

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—S. 90 — Person claiming to be Guzaredar claiming maintenance allowance under S. 10 Bhopal Abolition of Jagirs and Land

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—S. 91 — Partition — Court refusing to admit proof of unregistered deed — Commission to ascertain details of partition, held, could not be issued Cal 192 (C N 32)

—Ss. 101 to 104 — Suit governed by Article 142 Limitation Act — Burden of proof that cause of action for suit was within twelve years of suit is on plaintiff — See Limitation Act (1908), Article 142 All 289 A (C N 46) (FB)

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—S. 111 (g) — Grounds for detention — Service to detenus within prescribed period — Proof — Absence of affidavit by State and non-production of relevant files — Presumption — See Public Safety — J, and K. Preventive Detention Act (13 of 1964) (as amended in 1967), S. 8 (1) SC 698 A (C N 138)

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—S. 114 — Malicious prosecution — Suit for damages — Onus and presumption — See Tort — Malicious prosecution Orissa 91 C (C N 36)

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—S. 115 — Attachment under Order 21, Rule 52 or Order 21, Rule 46 C. P. C. — Denial by public officer that he had any money in his custody or denial of debt by garnishee — Provisions of Order 21 Rules 58 to 63 are not attracted to such case and public officer or garnishee is not precluded from so contending and challenging validity

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of attachment in spite of orders passed in those proceedings — See Civil P. C. (1908), Order 21, Rule 52

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—S. 115 — Plaintiff describing land as rayati land in partition suit and claiming it as Prajadakhali land in subsequent suit for possession — No evidence to show that plaintiff intentionally made false declaration in partition suit and defendant prejudiced by it — Declaration of land either as rayati or prajadakhali land not relevant in partition suit — Cannot operate as estoppel against plaintiff in suit for possession

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—S. 115 — Consent decree — Binding nature of — Principle of estoppel by judgment — Applicability — See Civil P. C. (1908), Order 23, Rule 3

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Expenditure Tax Act (29 of 1957)

—S. 2 (g) (ii) (b) — Assessee's impartible estate vested in Government under Estates Abolition Act — Compensation payable to coparceners as sharers — Coparcener takes his share of compensation absolutely — Expenditure by assessee's son for his foreign education, not includable in expenditure of the family — Son sharing in the compensation money is not a defendant under S. 2 (g) (ii) (b) — Neither provision under S. 4 (ii) nor that under Section 4 (i) applicable — See Expenditure Tax Act (1957), S. 4 (i)

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—Ss. 4 (i), 4 (ii), 19 and 2 (g) (ii) (b) — Assessee's impartible estate vested in Government under Estates Abolition Act — Compensation payable to coparceners as sharers — Coparcener takes his share of compensation absolutely — Expenditure by assessee's son for his foreign education not includable in expenditure of the family — Son sharing in the compensation money is not a defendant under S. 2 (g) (ii) (b) — Neither provision under Section 4 (ii) nor that under Section 4 (i) applicable

Andh-Pra 197 B (C N 28)

—S. 19 — Assessee's impartible estate vested in Government under Estates Abolition Act — Compensation payable to coparceners as sharers — Coparcener takes his share of compensation absolutely — Expenditure by assessee's son for his foreign education, not includable in expenditure of the family — Son sharing in the compensation money is not a defendant under S. 2 (g) (ii) (b) — Neither provision under Section 4 (ii) nor that under Section 4 (i) applicable — See Expenditure Tax Act (1957), Section 4 (i)

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Extra Provincial Jurisdiction Act (47 of 1947)

—S. 3 — Assam Sales Tax Act was validly extended to Shillong Administered Areas by Central Government by Notification of

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—S. 4 — Assam Sales Tax Act was validly extended to Shillong Administered Areas by Central Government by Notification of April 18, 1948 — Reply of Central Government is conclusive under Section 6 (2) — See Sales Tax — Assam Sales Tax Act (17 of 1947) Preamble

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—S. 6 — Question whether Dominion of India was entitled to exercise extra provincial jurisdiction over the Shillong Administered Areas on April 15, 1948, is not a pure question of fact but relating to a fact of State which is peculiarly within cognizance of Central Government

SC 724 A (C N 147)

—S. 6 (2) — Assam Sales Tax Act was validly extended to Shillong Administered Areas by Central Government by Notification of April 18, 1948 — Reply of Central Government is conclusive under Section 6 (2) — See Sales Tax — Assam Sales Tax Act (17 of 1947), Preamble

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Fatal Accidents Act (13 of 1855)

—S. 1-A — Motor accident — Negligence — Accident taking place on off-side of road — Presumption — Principle of res ipsa loquitur — Applicability

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—S. 1-A — Damages — Quantum of — Factors to be considered

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—S. 12 (1) — Submission of declaration in terms of Section 12 (1) — Validity

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—S. 3 (8), (58) (b) and (60) (c) — Union Territory — Order of requisition of plot for defence purpose passed by Administrator — Opinion of Administrator is opinion of Central Government — See Defence of India Act (1962), S. 29 (1)

Goa 80 C (C N 14)

—S. 3 (8) — Union Territory — Competency of Administrator to pass order for requisition of plot for defence purpose — See Defence of India Act (1962), S. 29 (1)

Goa 80 D (C N 14)

—S. 15 — Though General Clauses Act is not strictly applicable in construction of Gold Control Rules embodied in Ch. XIIA of Defence of India Rules, 1962 principle embodied in S. 15 can be relied on to hold that where power to appoint any person to execute any function is conferred, such ap-

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—S. 221 (2) — Pre-Constitution Judge continuing to be judge under Constitution — His right in respect of pension under Govt. of India (High Court Judges) Order 1937 under S. 221 (2) is not affected by High Court (Conditions of Service) Act 1954 — See Constitution of India, Article 221 (2) — All 268 B (C N 45) (FB)

Government of India (High Court Judges), Order, 1937

—Pre-Constitution judge continuing to be Judge under Constitution — His right to pension under Govt. of India (High Court Judges) Order 1937 is not affected by High Court (Conditions of Service), Act 1954 — See Constitution of India, Art. 221 (2) — All 268 B (C N 45) (FB)

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—Cl. 3 — Prosecution for exporting gur without permit — Repeal of Order — Prosecution relating to period prior to repeal can continue even after repeal of Order — SC 654 A (C N 126)

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—Marriage — Essential ceremonies — Saptapada — It is taking of seven steps by bridegroom and bride jointly before sacred fire — It is not taking of seven rounds around fire — Raj 83 A (C N 17)

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—S. 1 — Act applies even when a Hindu male dies intestate before 21-2-1929 but is succeeded by female heir who dies after that date — AIR 1934 Mad 133

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—S. 53-A (1A) — Order of eviction — Competent Authority must disclose details to delinquent — Bom 177 A (C N 32)

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—S. 2 (11) (i) (a) proviso — "Previous year", interpretation of — Expression "where in respect of a particular source of income, profits and gains", in proviso to S. 2 (11) (i) (a) — Meaning — SC 691 (C N 139)

—S. 23 (4) — Best judgment assessment — Power of — Power is not arbitrary — Assessment must be based on some relevant material — See Orissa Agricultural Income Tax Act (21 of 1947), S. 20 (4) — SC 679 (C N 132)

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—S. 33-B (3) — Remedy open under S. 33-B (3), filing writ petition — Strong case must be made out for entertaining writ petition — See Constitution of India, Article 226

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—Ss. 271 (1) and 297 (2) (g) — Assessee committing default under 1922 Act — Case falling within terms of Section 297 (2) (g) — Assessee will be liable to penalty as provided by Section 271 (1) — Section 271 applies mutatis mutandis to proceedings relating to penalty initiated in accordance with Section 297 (2) (g)

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—S. 271 (2) — Validity — Registered firm committing default attracting penalty — Section deeming it to be an unregistered firm for the purpose of imposition of penalty — No question of discrimination under Article 14 of the Constitution arises

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—S. 297 (2) (g) — Assessee committing default under 1922 Act — Case falling within terms of S. 297 (2) (g) — Assessee will be liable to penalty as provided by S. 271 (1) — S. 271 applies mutatis mutandis to proceedings relating to penalty initiated in accordance with S. 297 (2) (g) — See Income Tax Act (1961), S. 271 (1)

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—S. 2 (k) — Individual dispute in establishment espoused by outside Union having 25 per cent workmen of concerned establishment as members — Individual dispute held was transformed into 'industrial dispute'

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Insurance Act (4 of 1938)

—S. 31A — Plaintiff firm appointed as special representative of Insurance Company under an agreement dated 1-6-1954, for procuring business through employment of agents or field workers — Certain monthly allowance and flat rate commission fixed under agreement — Plaintiff neither insurance agent nor principal, Chief or special agent of insurance company — Held, as the Insurance Company was prohibited under Section 40 (1), of Insurance Act from making any payment to plaintiff in terms of agreement and as there was no legal liability on it no such liability could be binding on life Insurance Corporation — See Life Insurance Corporation Act (1956), S. 7

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—S. 40 — Plaintiff firm appointed as special representative of Insurance Company under an agreement dated 1-6-1954, for procuring business through employment of agents or field workers — Certain monthly allowance and flat rate commission fixed under agreement — Plaintiff neither insurance agent nor principal, Chief or special agent of insurance company — Held, as the Insurance Company was prohibited under Section 40 (1), of Insurance Act from making any payment to plaintiff in terms of agreement and as there was no legal liability on it no such liability could be binding on Life Insurance Corporation — See Life Insurance Corporation Act (1956), S. 7

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—S. 4 (1) (b) — Constitution of Jammu and Kashmir, Section 157 — Advice tendered by Board of Judicial Advisers is binding only so long as it is not expressly or impliedly overruled by the Supreme Court.

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J. & K. Preventive Detention Act (13 of 1964)

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Jammu and Kashmir Right of Prior Purchase Act (2 of Smt. 1983)

—Ss. 14 and 15 — Sale of agricultural land situated within town area limits — Right of prior purchase is to be governed by S. 14 and not S. 15 — Expression 'urban immovable property' as conceived by the Act does not embrace within its ambit agricultural lands situated in a town

J & K 72 A (C N 15) (FB)

—S. 15 — Sale of agricultural land situated within town area limits — Right of prior

J. and K. Right of Prior Purchase Act (contd.)
 purchase is to be governed by S. 14 and not S. 15 — Expression "urban immovable property" as conceived by the Act does not embrace within its ambit agricultural lands situate in a town — See Jammu and Kashmir Right of Prior Purchase Act (2 of 1983), S. 14 J & K 72 A (C N 15) (FB)

Land Acquisition Act (1 of 1894)

—S. 4 — Market value of land — Determination — Evidence — Acquired land agricultural — Agreement for sale of same land entered into about three months prior to notification under S. 4 — Evidentiary value — Purchaser and purpose of purchase bona fide — Such agreement though does not create "interest in property" as required by S. 54, Transfer of Property Act, is still best evidence — Under such agreement price fixed at Rs. 51,000 but earnest money only at Rs. 2,000 — Agreement also stipulating nine months, with provision of extension for six months more for vacation of land after payment of price — Yet such agreement reflects market value of that land as on date of notification under S. 4 — See Land Acquisition Act (1894), S. 23 Cuj 91 (C N 14)

—S. 18 — Jurisdiction of Court in reference under Section 18 — It cannot award compensation more than claimed before Collector — See Land Acquisition Act (1894), S. 25 Mad 184 B (C N 47)

—Ss. 23 and 4 — Market value of land — Determination — Evidence — Acquired land agricultural — Agreement for sale of same land entered into about three months prior to notification under S. 4 — Evidentiary value — Purchaser and purpose of purchase bona fide — Such agreement though does not create "interest in property" as required by S. 54, Transfer of Property Act, is still best evidence — Under such agreement price fixed at Rs. 51,000 but earnest money only at Rs. 2,000 — Agreement also stipulating nine months, with provision for extension for six months more for vacation of land after payment of price — Yet such agreement reflects market value of that land as on date of notification under S. 4 — (Transfer of Property Act (1852), S. 54) Cuj 91 (C N 14)

—S. 23 — Valuation — Site valued as house-site — Trees standing thereon cannot be valued as fruit-bearing trees — Value of trees as timber or fuel may be taken Mad 184 A (C N 47)

—Ss. 25, 53 and 18 — Jurisdiction of Court in reference under Section 18 — It cannot award compensation more than claimed before Collector Mad 184 B (C N 47)

—S. 50 (2) (as amended by Gujarat Act 20 of 1965) — Local authority taking advantage of Section 50 (2) cannot invoke provisions of Order 1, Rule 10, Civil P. C. —

Land Acquisition Act (contd.)

See Land Acquisition Act (1894), S. 53

Cuj 81 A (C N 13)
 —S. 50 (2) (as amended by Gujarat Act 20 of 1965) — By reason of its being directed to appear and adduce evidence under S. 50 (2), local authority does not become necessary or proper party in proceeding under Act — Expression 'to appear and adduce evidence' — Meaning — (1909) 13 Cal WN 116, Dissent. from — Civil P. C. (1908), O. 1, Rr. 3 and 10

Cuj 81 B (C N 13)
 —S. 53 — In view of specific provision under S. 50 (2) of Act for advantage of local authority having right to be before Court, it cannot invoke provisions of O. 1, R. 10 of Civil P. C. Cuj 81 A (C N 13)

—S. 53 — Jurisdiction of Court in reference under S. 18 — It cannot award compensation more than claimed before Collector — See Land Acquisition Act (1894), S. 25 Mad 184 B (C N 47)

Letters Patent

—(Cal) Cl. 15 — 'Judgment' meaning of Cal 212 A (C N 39)

—(Mad), Clause 15 — Appeal under — No inhibition against interference on facts — Comparison with powers under Sec. 100, Civil P. C. Mad 200 B (C N 53)

Life Insurance Corporation Act (21 of 1956)

—Ss. 7, 36 — Insurance Act (1938), Ss. 40, 31-A — Plaintiff firm appointed as special representative of Insurance Company under an agreement dated 1-6-1954, for procuring business through employment of agents or field workers — Certain monthly allowance and flat rate commission fixed under agreement — Plaintiff neither insurance agent nor principal, chief or special agent of insurance company — Held as the insurance Company was prohibited under S. 40 (1) of Insurance Act from making any payment to plaintiff in terms of agreement and as there was no legal liability on it no such liability could be binding on Life Insurance Corporation

Cal 193 (C N 33)
 —S. 36 — Plaintiff firm appointed as special representative of Insurance Company under an agreement dated 1-6-1954, for procuring business through employment of agents or field workers — Certain monthly allowance and flat rate commission fixed under agreement — Plaintiff neither insurance agent nor principal, chief or special agent of insurance company — Held as the Insurance Company was prohibited under S. 40 (1), of Insurance Act from making any payment to plaintiff in terms of agreement and as there was no legal liability on it no such liability could be binding on Life Insurance Corporation — See Life Insurance Corporation Act (1956), S. 7

Cal 193 (C N 33)

Limitation Act (9 of 1908)

— Art. 62 — Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953), S. 10 — Suit for arrears of maintenance by Guzaredar — Art. 62 is applicable

Madh Pra 91 F (C N 22)

— Articles 62, 97, 115, 116 and 120 — Applicability — Suit by vendee against vendor for refund of consideration — Sale found to be void for want of subsisting interest in vendor — Article 97 does not apply — Starting of limitation is date when money was received — Suit filed more than 6 years after such date held barred whether Article 62 or Article 115 or Article 116 or Article 120 is applicable

Orissa 89 A (C N 35)

— Article 97 — Suit by vendee against vendor for refund of consideration — Sale found to be void for want of subsisting interest in vendor — Article 97 does not apply — See Limitation Act (1908), Article 62

Orissa 89 A (C N 35)

— Article 115 — Suit by vendee against vendor for refund of consideration — Sale found to be void for want of subsisting interest in vendor — Whether Art. 62 or Article 115 or Art. 116 or Art. 120 is applicable — See Limitation Act (1908), Art. 62

Orissa 89 A (C N 35)

— Art. 116 — Applicability — See Limitation Act (1908), Art. 62

Orissa 89 A (C N 35)

— Articles 120 and 131 — Relative scope of Articles. AIR 1914 Mad 377 (FB), Diss.

Madh Pra 91 E (C N 22)

— Article 120 — Applicability — See Limitation Act (1908), Article 62

Orissa 89 A (C N 35)

— Article 131 — Relative scope of Article 131 and Article 120. AIR 1914 Mad 377 (FB), Diss. — See Limitation Act (1908), Article 120

Madh Pra 91 E (C N 22)

— Articles 142, 144 — Applicability — Disposition and adverse possession — Distinction — Burden of proof — Suit for possession — Title established but tenancy not proved — Article 144 and not Article 142 applies — Failure of defendant to prove adverse possession — Plaintiff is entitled to decree. AIR 1946 All 389, Overruled

All 289 A (C N 46) (FB)

— Articles 142, 144 — Suit for possession of immovable property — Adverse possession of defendant established — Suit must fail regardless of consideration whether Article 142 or Article 144 is applicable

All 289 B (C N 46) (FB)

— Article 142 — Terms "dispossession" and "discontinuation" — Meaning

All 289 C (C N 46)

Limitation Act (36 of 1963)

— Article 74 — Suit for damages for malicious prosecution — In criminal case protest petition filed by complainant against dropping of proceedings against accused — Pro-

Limitation Act (1963) (contd.)

test petition cannot be treated as continuation of the proceedings — Proceedings terminated on the day when they were dropped — Limitation will necessarily commence from that date of termination

Orissa 91 B (C N 36)

— Article 136 — Execution though started more than 12 years before still continuing — Plea of bar under section is not sustainable — See Civil P. C. (1908), S. 48

Cal 206 A (C N 37)

M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951)

See under Tenancy Laws

Madhya Pradesh General Clauses Act (3 of 1958)

— S. 2(24) — Movable property — Includes electric energy — See Sales Tax — Madhya Pradesh General Sales Tax Act (2 of 1959), S. 2(d) & (g)

SC 732 A (C N 149)

Madhya Pradesh General Sales Tax Act (2 of 1959)

See under Sales Tax

Madras Commercial Crops Markets Act (20 of 1933)

— S. 4 — Notification under S. 5 of Madras Act must be deemed to be notification under S. 3 of Mysore Act 27 of 1966 as per S. 15(1)(a) of the Mysore Act — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 3

Mys 114 V (C N 30)

— S. 11(1) — Market fee — Levy is on first sale by producer inside yard or outside market — Character of impost is that of fee and not that of tax — S. 65 of Mysore Act 27 of 1966 has striking resemblance with S. 11(1) of Madras Act — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65

Mys. 114 F (C N 30)

Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948)

See under Tenancy Laws

Madras Impartible Estates Act (2 of 1904)

See under Tenancy Laws

Maharashtra Municipalities Act (40 of 1965)

See under Municipalities

Maharashtra Municipalities Election Rules (1966)

See under Municipalities

Mahomedan Law

— Succession and administration — Devolution of inheritance — Death of Mahomedan intestate — Heirs take as tenants-

Mahomedam Law (contd.)

in-common in specific shares — Theory of representation not recognised — Widow and minor children left as heirs — Management of estate assumed by widow's father, and income spent for maintenance and education of heirs — Acquisition of new property in widow's name — No evidence to show that any surplus from income of estate was utilised for acquisition — Newly acquired property held not partible — Section 90, Trusts Act, did not apply — Order of Kailasam J. in A. S. No. 402 of 1961 (Mad), Reversed Mad 200 A (C N 53)

Motor Vehicles Act (4 of 1939)

—S 57 (2) — Application for grant of permit — Non-mention of date from which permit is sought to be effective — Application is not invalidated

Orissa 72 A (C N 30)

—Sec 57 (2) — Orissa Motor Vehicles Rules (1940), Rules 54, 52-E and 57 — Application for grant of permit — There being no vacancy, Secretary, State Transport Authority refusing to accept application under Rule 54 — Direction to apply afresh when called for — Omission to apply in terms of applications — Held, Secretary not being competent to refuse application, there was no proper disposal of application and it was still pending

Orissa 72 B (C N 30)

—Ss 57 (8), 58, 64, 64-A — Application for grant of permit for vehicles — Death of applicant — Regional Transport Authority can substitute person succeeding to possession of deceased's vehicles — AIR 1968 Pat 385, Reversed; AIR 1957 All 471, Overruled SC 759 (C N 158)

—S. 58 — Application for renewal of permit — Death of applicant — Regional Transport Authority can substitute person succeeding to possession of vehicles — See Motor Vehicles Act (1939), S. 57(8) SC 759 (C N 158)

—Ss. 59 and 61 — Applicant for stage carriage permit dying pending his application — Substitution of his legal representative as applicant — Substitution not possible Andh Pra 178 (C N 25)

—S. 61 — Applicant for stage carriage permit dying pending his application — Substitution of his legal representative as applicant — Substitution not possible — See Motor Vehicles Act (1939), S. 59 Andh Pra 178 (C N 25)

—S. 64 — Appeal — Death of appellant — Appellant's successor can be substituted — See Motor Vehicles Act (1939), S. 57(8) SC 759 (C N 158)

—S. 64-A — Revision — Death of applicant — Successor can be substituted — See Motor Vehicles Act (1939), S. 57(8) SC 759 (C N 158)

—S. 95 (2) (b) — Liability of Insurance Company — Bus involved in accident in-

Motor Vehicles Act (contd.)

sured against third party risks — Both the parents of claimant travelling in bus and meeting death — Insurance Company held liable under S. 95(2) (b) second part to pay Rs 2,000/- as compensation for each of the two passengers

Madh Pra 86 C (C N 21)

Multi-Unit Co-operative Societies Act (6 of 1942)

See under Co-operative Societies

MUNICIPALITIES**—Bombay Municipal Boroughs Act (18 of 1925)**

—S 61 — Competency of municipality to collect octroi — See Municipalities — Saurashtra Terminal Tax and Octroi Ordinance (47 of 1949), S. 3

SC 685 A (C N 137)

—Ss 99, 104, 105 — Settlement of accounts periodically under S. 99 — Furnishing of particulars by merchant is condition precedent

SC 685 B (C N 137)

—S 99 — Issue of demand notice in respect of octroi due without settling accounts — Grievance as to amount claimed — Proper remedy is to prefer appeal under S. 110 — See Municipalities — Bombay Municipal Boroughs Act (18 of 1925), S. 110

SC 685 C (C N 137)

—S 104 — Failure to furnish particulars under S. 99 — Effect — See Municipalities — Bombay Municipal Boroughs Act (18 of 1925), S. 99

SC 685 B (C N 137)

—S. 105 — Failure to furnish particulars under S. 99 — Effect — See Municipalities — Bombay Municipal Boroughs Act (18 of 1925), S. 99

SC 685 B (C N 137)

—Ss. 110, 99 — Issue of demand notice in respect of octroi dues without settling accounts — Grievance as to amount claimed — Proper remedy is to prefer appeal under S. 110

SC 685 C (C N 137)

—Maharashtra Municipalities Act (40 of 1965)

—Ss. 41, 48, 44, — Maharashtra Municipalities Election Rules (1966), Rule 63 — Occurrence of vacancy due to resignation by Councillor — Holding of by-election — Satisfaction by Collector that resignation is tendered validly is condition precedent Bom 170 (C N 31)

—S. 44 — Occurrence of vacancy due to resignation by Councillor — Holding of by-election — Satisfaction by Collector that resignation is tendered validly is condition precedent — See Municipalities — Maharashtra Municipalities Act (40 of 1965), S. 41 Bom 170 (C N 31)

Municipalities — Maharashtra Municipalities Act (contd.)

—S. 48 — Occurrence of vacancy due to resignation by Councillor — Holding of by-election — Satisfaction by Collector that resignation is tendered validly is condition precedent — See Municipalities — Maharashtra Municipalities Act (40 of 1965), S. 41 Bom 170 (C N 31)

—Maharashtra Municipalities Election Rules (1966)

—R. 63 — Occurrence of vacancy due to resignation by Councillor — Holding of by-election — Satisfaction by Collector that resignation is tendered validly is condition precedent — See Municipalities — Maharashtra Municipalities Act (40 of 1965), S. 41 Bom 170 (C N 31)

—Saurashtra Terminal Tax and Octroi Ordinance (47 of 1949)

—Ss. 3 and 4 — Framing of Octroi Rules under Section 4 by Government — Collection of Octroi by Municipality under those Rules — Framing of independent Rules by Municipality— Consequent withdrawal of Government Rules — Declaration of Municipal Rules as illegal, subsequently — Municipality can still collect octroi SC 685 A (C N 137)

—S. 4 — Competency of Municipality to collect octroi — See Municipalities — Saurashtra Terminal Tax and Octroi Ordinance (47 of 1949), S. 3 SC 685 A (C N 137)

—U. P. Municipalities Act (2 of 1916)

—S. 97 — Contract in writing — Contract need not be contained in one document signed by both parties SC 729 (C N 148)

Mysore Agricultural Produce Markets Act (16 of 1939)

—Preamble (now repealed by Act 27 of 1966) — Rule 4 under the Act is within rule-making power — See Mysore Agricultural Produce Markets Act (16 of 1939 now repealed by Act 27 of 1966), S. 17 Mys 114 C (C N 30)

—Ss. 3 (b), (d) and 4 — Notified area and Market — They do not have reference to same area — Notified area is Market area of new Act 27 of 1966 and Market is Market of new Act Mys 114 B (C N 30)

—S. 4 — Notified area and Market — They do not have reference to same area —Notified area is Market area of new Act 27 of 1966 and Market is Market of new Act — See Mysore Agricultural Produce Markets Act (16 of 1939 now repealed by Act 27 of 1966), S. 3 (b) Mys 114 B (C N 30)

Mysore Agricultural Produce Markets Act (contd.)

—S. 6 — Market Yard — Clear intendment of Act is that there should be Market Yard to which Rule 4 refers — R. 4 is within rule-making power — See Mysore Agricultural Produce Markets Act (16 of 1939 now repealed by Act 27 of 1966), S. 17 Mys. 114 C (C N 30)

—Ss. 17 and 6 and Preamble — Market Yard — Clear intendment of Act is that there should be Market Yard to which Rule 4 refers — Rule 4 is within rule-making power Mys 114 C (C N 30)

Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966)

—Preamble — Levy of Market fee — Validity — Pith and substance of subject-matter of Act falls within entries 26 and 28 of State List — Entry 65 in State List authorises legislation in respect of fees regarding all matters in the List—Imposition of fee with respect to sales made in course of inter-State trade and commerce is only incidental to main legislation and hence within competence of State Legislature — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65 Mys 114 G (C N 30)

—Preamble — Validity of S. 10 — Representation of agriculturists on first market committee — Having regard to purpose of Act provision is valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 10 Mys 114 J (C N 30)

—Preamble — Protection of interest of agriculturists is primary object of Act — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 41 Mys 114 M (C N 30)

—Preamble — Purpose of Act is to avoid exploitation of producer through middlemen — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1965), S. 78 Mys 114 P (C N 30)

—Preamble — Act does not empower market-committee to restrict purchase made by retailer — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148 Mys 114 Z (C N 30)

—S. 2(1)(iii) — Agricultural Produce — Definition of — Authority to State Government to declare produce not enumerated in definition as agricultural produce — Delegation is not beyond bounds of permissive delegation Mys 114 I (C N 30)

—S. 2(2) — Old market committee acquires status of market-committee under Act of 1966 within meaning of S. 2(2) — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148 Mys 114 U (C N 30)

—S. 2(2) — Agricultural produce — Meaning of — Jaggery is 'agricultural'

Mysore Agricultural Produce Marketing (Regulation) Act (contd.)
produce' within definition

Mys 114 X (C N 30)
—S. 2(8) — Commission agent under S. 78 is only del credere agent — He does not incur any risk by being del credere agent — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 78 Mys 114 P (C N 30)

—S. 2(37) — Act does not empower market-committee to restrict purchase made by retailer — Bye-law 23(11) (b) (i) of Bellary Market Committee is invalid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148 Mys 114 Z (C N 30)

—S. 3 — Levy of market-fee — Conditions precedent — There should be Market area, Market and Market Yard — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65

Mys 114 A (C N 30)
—Ss. 3 and 154(1)(a) — Scope — Notification under S. 5 of Madras Act must be deemed to be notification under Sec 3 of 1966 Act as per S 154(1)(a) — That agricultural produce under 1966 Act is called commercial crop under Madras notification is of no effect — Held that Items 3 to 16 enumerated in bye-law 12(1) of Bye-laws made by Bellary market-committee were already declared as commercial crops under Madras Act and, therefore, Bye-law 12(1) was valid

Mys 114 V (C N 30)
—S. 4 — Levy of market-fee — Conditions precedent — There should be Market area, Market and Market Yard — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65

Mys 114 A (C N 30)
—Ss. 4, 6 and 154(1), Proviso (a) — Markets and Market areas — Effect of Section 154(1), Proviso (a) — Though called by different names under repealed Acts they should be deemed to be Markets and Market areas under Act of 1966

Mys 114 D (C N 30)
—S. 4 — Levy of market-fee — Conditions precedent — There should be market yard — Non-existence of market-yards under repealed enactments — Whether fee could be recovered under Act of 1966 — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65

Mys 114 E (C N 30)
—S. 6 — Levy of market-fee — Conditions precedent — There should be market area, Market and Market Yard — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65

Mys 114 A (C N 30)
—S. 6 — Notified area and Market in repealed Act 16 of 1939 — They do not have reference to same area — Notified area is Market area of new Act 27 of 1966 and Market is Market of new Act — See Mysore Agricultural Produce Markets Act

Mysore Agricultural Produce Marketing (Regulation) Act (contd.)

(16 of 1939 now repealed by Act 27 of 1966), S. 3(b) Mys 114 B (C N 30)

—S. 6 — Markets and Market areas — Effect of S. 154(1) (a) — Though called by different names under repealed Acts they should be deemed to be Markets and Market areas under Act of 1966 — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 4

Mys 114 D (C N 30)

—S. 6 — Levy of market-fee — Condition precedent — There should be market yard — Non-existence of market-yards under repealed enactments — Whether fee could be recovered under Act of 1966 — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65

Mys 114 E (C N 30)
—S. 8 (1) (b), Proviso (ii) (b) — R. 76 is repugnant to provisions of Proviso (ii) (b) to S. 8(1) (b) of 1966 Act — Rule is invalid to that extent — See Mysore Agricultural Produce Marketing Rules (1968), R 70 Mys 114 S (C N 30)

—S. 8(1)(b), Proviso (ii) (b) — Purchase for retail sale — If trader makes purchase to which sub-clause refers, no license is necessary — License is not necessary even to make retail sale of goods so purchased Mys 114 T (C N 30)

—S. 10 and Preamble — Validity — Representation of agriculturists on first market committee — Having regard to purpose of Act provision is valid

Mys 114 J (C N 30)
—S. 10 — Bye-laws made by old market committees after coming into operation of 1960 Act — Validity — Election of market committee under S. 11 must be preceded by composition of nominated market-committee under S. 10 — Such bye-laws made by old market-committees are valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148

Mys 114 U (C N 30)
—S. 11 Proviso 4 — Validity — Composition of market committee — Provision that if persons belonging to any of categories specified in clauses (ii) to (vii) are not available, committee shall consist of persons of categories available — Provision is not void Mys 114 K (C N 30)

—S. 11 — Bye-laws made by old market-committees after coming into operation of 1966 Act — Validity — Election of market committee under S. 11 must be preceded by composition of nominated market-committee under S. 10 — Such bye-laws made by old market-committees are valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148 Mys 114 U (C N 30)

—S. 16(1) (a) — Representation of agriculturists — Disqualification — Purpose of — Provision is valid

Mys 114 L (C N 30)

Mysore Agricultural Produce Marketing (Regulation) Act (contd.)

—S. 41 and Preamble — Validity — Object of provision — Provision is valid
Mys 114 M (C N 30)

—S. 49(2) — Power to regulate proceedings of market-committee clearly emanates from S. 49(2) — Bye-law 35 made by Bellary Market-committee is valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148
Mys 114 Za (C N 30)

—S. 63 — Market committee is not empowered to delimit number of functionaries who may work as assistants under traders etc. — Bye-law 22(14) is invalid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148
Mys 114 Y (C N 30)

—Ss. 65, 3, 4 and 6 — Levy of market-fee — Conditions precedent — There should be Market area, Market and Market Yard
Mys 114 A (C N 30)

—Ss. 65, 4, 6 and 154(1), Proviso (a) — Levy of market-fee — Conditions precedent — There should be market yard — Non-existence of market yards under repealed enactments — Whether fee could be recovered under Act of 1966
Mys 114 E (C N 30)

—S. 65 — Market fee — Levy is on first sale by producer inside yard or outside market — Character of impost is that of fee and not that of tax — Section 65 is not unconstitutional
Mys 114 F (C N 30)

—S. 65 and Preamble — Levy of Market fee — Validity — Pith and substance of subject-matter of Act falls within entries 26 and 28 of State List — Entry 65 in State List authorises Legislation in respect of fees regarding all matters in State List — Imposition of fee with respect to sales made in course of inter-State trade and commerce is only incidental to main legislation and hence within competence of State Legislature — (Constitution of India, Art. 246 and Sch. 7 List 1 Entries 92-A and 96 and Sch. 7 List 2 Entries 26, 28 and 65)
Mys 114 G (C N 30)

—S. 65 — Delegation of power to fix market fee — Legislature fixing only maximum fee recoverable — Held there was no delegation of power with respect to any essential legislative function and hence provision was valid
Mys 114 H (C N 30)

—S. 65 — Bye-laws made by Bellary Market Committee, Bye-law 12(2) — Bye-law 12(2) is authorised by Ss. 65 and 82 of 1966 Act and, therefore, within competence of market-committee — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148
Mys 114 W (C N 30)

—Ss. 66 and 67 — Validity — Purpose of sections is enforcement of Act —

Mysore Agricultural Produce Marketing (Regulation) Act (contd.)

Power is confided to nominee of State Government and can be exercised only in proper case — There is no entrustment of unguided and uncanalised power without prescription of any standard — Provisions are valid
Mys 114 N (C N 30)

—S. 67 — Validity — There is no entrustment of unguided and uncanalised power without prescription of any standard — Provisions are valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 66
Mys 114 N (C N 30)

—S. 76 — Purpose and validity — Purpose of provision is to stop undercover sales — Provision is valid
Mys 114 O (C N 30)

—S. 76 — Validity of Bye-law 23(15) made by Mysore Market Committee — Bye-law is authorised by S. 76 — It is valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148
Mys 114 Zd (C N 30)

—Ss. 78, 2(8), 85 and Preamble — Validity — Purpose of Act is to avoid exploitation of producer through middlemen — Provisions of S. 78 is not unreasonable even though commission includes storage and insurance charges — Commission agent is only del credere agent — He does not incur any risk by being del credere agent
Mys 114 P (C N 30)

—S. 82 — Bye-laws made by Bellary Market Committee, Bye-law 12 (2) — Bye-law 12(2) is authorised by Ss. 65 and 82 of 1966 Act and, therefore, within competence of market-committee — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148
Mys. 114 W (C N 30)

—S. 85 — Provisions of S. 78 is not unreasonable even though commission includes storage and insurance charges — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 78
Mys 114 P (C N 30)

—Ss. 85 and 86 — Validity — Classification made by S. 85 is reasonable — Provisions as to deposit are reasonable — Provisions are valid
Mys 114 Q (C N 30)

—S. 85(1) (iv) — S. 85(1) (iv) does not restrict turnover of trader to fifteen thousand rupees — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148
Mys 114 Zb (C N 30)

—S. 86 — Validity — Provisions as to deposit are reasonable — Provisions are valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 85
Mys 114 Q (C N 30)

—S. 89(1), (2) — Validity — Powers of market-committee to impose penalties — Appeal lies under sub-section (2) to Chief

Mysore Agricultural Produce Marketing (Regulation) Act (contd.)

Marketing Officer — Provisions are valid
Mys 114 R (C N 30)

—S. 131 — Market committee is not empowered to delimit number of functionaries who may work as assistants under traders etc. — Bye-law 22(14) is invalid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148
Mys 114 Y (C N 30)

—Ss 148, 149, 154(1) Proviso (c), 10, 11 and 2(2) — Bye-laws made by old market-committees after coming into operation of 1966 Act — Validity — Under proviso (c) to S. 154(1) old market-committee has power to make bye-laws under S. 148 although no first bye-laws have been made under S. 149 — Old market committee acquires status of market-committee under Act of 1966 within meaning of S. 2(2) — Election of market committee under S. 11 must be preceded by composition of nominated market committee under S. 10 — Such bye-laws made by old market-committees are valid
Mys 114 U (C N 30)

—S. 148, Bye-laws under — Bye-laws made by market committee of Bellary — Bye-law 12(1) is valid — See Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 3
Mys 114 V (C N 30)

—S. 148, Bye-laws under — Bye-laws made by Bellary market committee Bye-law 12(2) — Validity — Bye-law 12(2) is authorised by Ss. 65 and 82 of 1966 Act and, therefore, within competence of market-committee
Mys 114 W (C N 30)

—S. 148, Bye-laws under — Bye-laws made by Bellary Market-committee. Bye-law 22(14) and Sections 63 (2), 148, 131 — Validity — Market committee is not empowered to delimit number of functionaries who may work as assistants under traders etc. — Section 148 or Section 131 does not confer such power — Bye-law 22(14) is invalid
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—S. 148, Bye-laws under — Bye-laws made by Bellary Market Committee. Bye-law 23(11) (b) (i), Section 2 (37) and Preamble — Validity — Act does not empower market-committee to restrict purchases made by retailers — Bye-law is invalid
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—S. 148, Bye-laws under — Bye-laws made by Bellary Market Committee. Bye-law 35 and Section 49 (2) — Validity — Power to regulate proceedings of market-committee clearly emanates from Section 49 (2) — Bye-law 35 is valid
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—S. 148, Bye-laws under — Bye-laws made by Mysore Market Committee. Bye-law 23 (10) (b) (ii) and Section 85(1) (iv) — Validity — Section 85(1) (iv) does not

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—S. 420 — Held on facts and circumstances that charges under Ss. 120-B and 420, I. P. C. have been established against all the four accused and under S. 419, I. P. C. against accused No. 3. Cr. Appeals Nos. 297 to 300 of 1965, D/- 23-3-1967 (AP), Reversed — See Evidence Act (1872), S. 3

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—Section 116-A — Election petition — Dismissal by High Court — Appeal to Supreme Court — Application for amendment of plea changing original nature of case — Maintainability SC 741 (C N 151)

Requisition and Acquisition of Immovable Property Act (30 of 1952)

- S. 3 (as amended in 1963) — Requisition of plot for defence purpose — Period of requisition not required to be mentioned in requisition order — Purpose still existing — Requisition would be deemed to be under S. 3 of 1952 Act and all provisions of that Act would apply — Proviso to S. 6 of 1952 not attracted — See Defence of India Act (1962), S. 29 (1) Coa 80 A (C N 14)
—S. 6 (as amended in 1963), Proviso — Requisition of plot for defence purpose — Period of requisition not required to be mentioned in requisition order — Purpose still existing — Requisition would be deemed to be under S. 3 of 1952 Act and all provisions of that Act would apply — Proviso to S. 6 of 1952 not attracted — See Defence of India Act (1962), S. 29 (1) Coa 80 A (C N 14)

- S. 8 — Requisition of plot for defence purpose — Extraction of metals from quarry for defence work — Remedy — See Defence of India, Act (1962), S. 29 (1) Coa 80 B (C N 14)

- S. 25 (as amended in 1963) — Requisition of plot for defence purpose — Period of requisition not mentioned — Purpose still existing — Requisition would be deemed to be under S. 3 of 1952 Act by applying legal fiction under S. 25 — See Defence of India Act (1962), S. 29 (1) Coa 80 A (C N 14)
Sale of Goods Act (3 of 1930)

- S. 2 — Trees agreed to be severed before sale or under the contract are goods — Contract to cut trees of certain measure — Held trees were not ascertained goods and property would pass only on cutting — See Tenancy Laws — Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act 1950 (1 of 1951), S. 3 SC 700 A (C N 142)
—S. 19 — Trees agreed to be severed before sale or under the contract are goods

Sale of Goods Act (contd.)

- Contract to cut trees of certain measure — Held trees were not ascertained goods and property would pass only on cutting — See Tenancy Laws — Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act 1950 (1 of 1951), S. 3 SC 706 A (C N 142)

SALES TAX

—Assam Sales Tax Act (17 of 1947)

- Preamble — Act was validly extended to Shillong Administered Areas by Central Government by Notification of April 15, 1948 — Reply of Central Government is conclusive under S. 6 (2) SC 724 B (C N 147)

- S. 30 (as amended) — Amendment requiring deposit of assessed tax and penalty as condition for filing appeal — Amendment coming into force on 1-4-1958 — Assessment for period ending on dates prior to 1-4-1958 completed after this date — Amended section applies SC 724 C (C N 147)

- S. 30 — "Otherwise directed" — Section does not give power to appellate authority to permit assessee to furnish security in lieu of cash amount of tax SC 724 D (C N 147)

—C. P. & Berar Sales Tax Act (21 of 1947)

- S. 2 (c) and (d) — 'Dealer' and 'Goods' — Electric energy is goods for purposes of Sales Tax — Statutory body like Electricity Board is 'dealer' in respect of its principal activity of sale and supply of electricity — See Sales Tax — Madhya Pradesh General Sales Tax Act (2 of 1959), S. 2 (d) & (g) SC 732 A (C N 149)

—Madhya Pradesh General Sales Tax Act (2 of 1959)

- S. 2 (d) and (g) — 'Dealer' and 'Goods' — Electric energy is goods for purposes of Sales Tax — Statutory body like Electricity Board is 'dealer' in respect of its principal activity of sale and supply of electricity — AIR 1968 Madh Pra 163, Reversed SC 732 A (C N 149)

- S. 2 (n) — Sale of goods and works contract distinguished — Electricity Board supplying steam to Nepa Mills on actual cost basis — Arrangement is works contract and not sale and as such not liable to tax S C 732 (C N 149)

—Punjab General Sales Tax Act (46 of 1948)

- S. 11 — Quarterly returns submitted by dealer — Assessment proceedings can be started on that basis even before expiry of relevant financial year. L. P. A. No. 262 of 1965, D/- 20-10-1965 (Pun), Reversed S C 744 (C N 152)

- S. 11 — Assessment order by Assessing Authority — Finality Punj 206 B (C N 31) (FB)

Sales Tax — Punjab General Sales Tax Act (contd.)

—Ss. 11, 11-A and 21 (1) — Best judgment assessment — Revisional authority exercising powers under Section 21 (1) suo motu setting aside assessment and remanding case for fresh assessment according to law — Fresh proceedings for assessment — Limitation prescribed by Section 11-A or by Section 11 (4), (5) and (6) applies

Punj 239 (C N 33) (FB)
—S. 11A — Power of revision under Section 21 (1) of the Act is not subject to period of limitation prescribed in S. 11 A — See Sales Tax — Punjab General Sales Tax Act (46 of 1948), Section 21 (1)

Punj 206 A (C N 31) (FB)
—S. 11-A — Best judgment assessment — Revisional authority exercising powers under Section 21 (1) suo motu setting aside assessment and remanding case for fresh assessment according to law — Fresh proceeding for assessment — Limitation prescribed by Section 11-A or by Section 11 (4), (5) and (6) applies — See Sales Tax — Punjab General Sales Tax Act (46 of 1948), S. 11

Punj 239 (C N 33) (FB)
—Ss. 21 (1) and 11-A — Power of revision under Section 21 (1) is not subject to period of limitation prescribed in S. 11-A

Punj 206 A (C N 31) (FB)
—S. 21 (1) — Best judgment assessment — Revisional authority exercising powers under Section 21 (1) suo motu setting aside assessment and remanding case for fresh assessment according to law — Fresh proceeding for assessment — Limitation prescribed by Section 11-A or by Section 11 (4), (5) and (6) applies — See Sales Tax — Punjab General Sales Tax Act (46 of 1948), Section 11

Punj 239 (C N 33) (FB)
—U. P. Sales Tax Act (15 of 1948)

—Ss. 10 (3) (1), 11 — Dismissal of revision application under Section 10 (3) on grounds of limitation — Question whether dismissal was right is question of law — Revising Authority is competent to make reference to High Court under Section 11 against such order. S. T. R. No. 556/1961, D/- 18-2-1963 (All), Overruled

All 266 (C N 44) (FB)
—S. 11 — Dismissal of revision application under Section 10 (3) on grounds of limitation — Question whether dismissal was right is question of law — Revising Authority is competent to make reference to High Court under Section 11 against such order — See Sales Tax — U. P. Sales Tax Act (15 of 1948), Section 10 (3) (1)

All 266 (C N 44) (FB)

Saurashtra Terminal Tax and Octroi Ordinance (47 of 1949)
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States Reorganisation Act (37 of 1956)

—S. 115 — Power of integration does not belong exclusively to States — Central Gov-

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ernment has certain controlling, supervisory, concurrent and overriding powers — State Government's powers under Entry 41 of List 2 have to be exercised in subordination to those of Central Government — See Constitution of India, Article 4

Ker 110 B (C N 21) (FB)
—S. 115 — Equation of posts is purely administrative function — Decision thereon by Central Government — Not amenable to writ jurisdiction — See Constitution of India, Art. 226

Madh Pra 82 (C N 20)

Succession Act (39 of 1925)

—Ss. 74, 95 — Will — Construction of — Interest created whether is absolute or limited one — Will has to be considered as a whole

Pat 144 A (C N 24)

—S. 95 — Will — Construction of — Interest created whether is absolute or limited one — Will has to be considered as a whole — See Succession Act (1925), S. 74

Pat 144 A (C N 24)

—S. 124 — Bequest in favour of B — In case a specified uncertain event happens, properties to go to agnates of testator as absolute owner — Legacy in favour of agnates cannot take effect unless that event happens — See Succession Act (1925), S. 131

Pat 144 B (C N 24)

—Ss. 131 and 124 — Contingent bequest — Bequest in favour of B — Condition superadded that if he as well as his male issue would die without leaving behind any legitimate male issue then agnates of testator would get properties as absolute owner — Event of death of B or of his son though specified was uncertain — Provisions of Section 131 attracted and ulterior bequest in favour of agnates is contingent and subject to rules contained in Section 124 — Unless B dies during life time of testator i. e., specified uncertain event happens, legacy in favour of agnates cannot take effect

Pat 144 B (C N 24)

—S. 230 — Executor applying for probate—Executor subsequently applying for withdrawal of probate petition stating that he had renounced executorship — Renunciation complete and could not be retracted — Court had no power to allow retraction from renunciation — Objection by a caveator to the renunciation had no relevance

Mys 139 A (C N 32)

—S. 230 — Executor first applying under Section 230 for withdrawal from probate proceedings — Caveator opposing withdrawal — Executor filing a memo that he did not press the withdrawal application — Court allowing memo — Appeal by caveator — Maintainability — See Succession Act (1925), S. 299

Mys 139 B (C N 32)

—Ss. 299 and 230 — Executor first applying under Section 230 for withdrawal from probate proceedings — Caveator opposing withdrawal — Executor filing a memo that he did not press the withdrawal ap-

Succession Act (contd.)

plication — Caveator again opposing the Memo — Court allowing prayer in the memo — Caveator, an aggrieved party and could therefore appeal under Section 299 — Further, every order made by District Judge under the Act was appealable under Section 299 Mys 139 B (C N 32)

Supreme Court Rules 1966

—O. 11, R. 1 — See Constitution of India, Art. 32

SC 776 (C N 163)

TENANCY LAWS

—Berar Regulation of Agricultural Leases Act (24 of 1951)

—S. 8 (1) (g) — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Section 36 — Order terminating lease under Section 8 (1) (g) of the Act of 1951, on 20-8-1958 — Appeals — Final order of Revenue Tribunal on 31-3-1960 — Application for possession on 5-5-1960 — Not barred by limitation

Bom 167 B (C N 30)

—Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953)

—S. 10 — Expression "entitled to receive maintenance allowance" — For claim under section person need not be receiving cash from income of jagir — Person in possession of certain village in lieu thereof can maintain suit Madh Pra 91 B (C N 22)

—S. 10 and R. 21 framed under Act — Fixation of maintenance by Jagir Commissioner — Matters to be considered — Allegation that certain matters not taken into consideration — Specific plea in written statement necessary

Madh Pra 91 C (C N 22)

—S. 10 — Suit for arrears of maintenance by Guzdar — Article 62, Limitation Act is applicable — See Limitation Act (1908), Article 62 Madh Pra 91 F (C N 22)

—S. 39 (1) and (2) — Bar to jurisdiction of Civil Courts — Bar does not apply to orders which are null

Madh Pra 91 A (C N 22)

—Rules under, R. 21 framed under Act — Fixation of maintenance by Jagir Commissioner — Matters to be considered — See Tenancy Laws — Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953), S. 10

Madh Pra 91 C (C N 22)

—Bihar Land Reforms Act (30 of 1950)

—S. 4 (h) — Order under — Deputy Collector not purporting to pass final order but sending a recommendation to Additional Collector after hearing parties — Additional Collector passing final order without hearing parties — Held order of the Additional Collector was bad — Fact that the Deputy Collector had the powers of the Collector for purposes of Section 4 (h) was irrelevant — Decision of High Court reversed

SC 796 (C N 168)

Tenancy Laws (contd.)

—Bihar Tenancy Act (8 of 1885)

—S. 67 — Section 67, overrides contractual stipulation in respect of rent — See Tenancy Laws — Bihar Tenancy Act (8 of 1885), Section 193

SC 716 D (C N 144)

—S. 106 — Suit to declare the lands as belonged to plaintiffs' ancestors and for correction of survey entry — Proper forum to file suit Pat 136 (C N 22)

—S. 184 — Suit instituted after expiry of period of limitation was liable to be dismissed though limitation was not pleaded in written statement — Absence of plea did not cause plaintiff any prejudice — Appellate Court could allow defendant to raise plea of limitation for first time SC 716 B (C N 144)

—S. 193 — Lease giving lessees right to cut and appropriate trees of certain types and fruits and flowers of certain fruit bearing trees — Held lease deed granted lease in respect of forest right only — Right to open roads and to construct buildings were incidental to the right to enjoy forest produce — Suit being for recovery of rent in respect of forest produce was governed by Art. 2 (b) (i) of Sch. III to the Bihar Act — Special period of limitation applied though claim for arrears of rent was founded on a registered instrument SC 716 C (C N 144)

—Ss. 193 and 67 — Section 67 overrides contractual stipulation in respect of rent

SC 716 D (C N 144)

—Bombay Vidarbha Region Agricultural Tenants (Protection from Eviction and Amendment of Tenancy Laws) Act (9 of 1958)

—S. 5 (1) — Object of — Right to obtain possession accrued before the Act — Application after Act ceasing to be in force — Held not barred by limitation

Bom 167 A (C N 30)

—S. 36 — Order terminating lease under Section 8 (1) (g) of the Act of 1951 on 20-8-1958 — Appeals — Final order of Revenue Tribunal on 31-3-1960 — Application for possession on 5-5-1960 — Not barred by limitation — See Tenancy Laws — Berar Regulation of Agricultural Leases Act (24 of 1951), S. 8 (1) (g)

Bom 167 B (C N 30)

—M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act 1950 (1 of 1951)

—Ss. 3, 4 (a) — Trees agreed to be severed before sale or under the contract of sale are goods — Contract to cut trees of certain measure — Held trees were not ascertained goods and property would pass only on cutting — Trees vested in State under the Act before cutting.

SC 706 A (C N 142)

—S. 4 (a) — Trees agreed to be severed before sale or under the contract are goods

Tenancy Laws — M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (contd.)

— Contract to cut trees of certain measure — Held trees were not ascertained goods and property would pass only on cutting — Trees vested in State under the Act before cutting — See Tenancy Laws — M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act 1950 (1 of 1951), S. 3

SC 706 A (C N 142)

— **Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948)**

— S. 44 — Compensation payable on vesting — Share of compensation money is individual and absolute property of the sharer — See Expenditure Tax Act (1957), S. 4 (i) Andh Pra 197 B (C N 28)

— Ss. 45 (2) (a) and 45 (6) — Compensation payable on vesting — Share of compensation money is individual and absolute property of the sharer — See Expenditure Tax Act (1957), S. 4 (i) Andh Pra 197 B (C N 28)

— S. 49 — Compensation payable on vesting — Share of compensation money is individual and absolute property of the sharer — See Expenditure Tax Act (1957), S. 4 (i) Andh Pra 197 B (C N 28)

— **Madras Impartible Estates Act (2 of 1904)**

— S. 4 — Impartible estate — Zamin-dari and rights of holder and other members of family — Nature of — See Hindu Law Andh Pra 197 A (C N 28)

Pepsu Tenancy and Agricultural Lands Act (13 of 1955)

— S. 32-KK — Date of commencement — Effect of 1962 Amendment Act, Sections 7 and 1 (2) — Section 32-KK (introduced in 1962) came into force on 30-10-1956 and not from date of principal Act (viz., 6-3-1955) — AIR 1964 Punj 30, Overruled — L. P. A. No. 24 of 1963, D/- 30-3-1964 (Punj), Reversed

SC 703 B (C N 141)

Tort

— **Malicious prosecution — Malice — Meaning — Proof — Malice cannot be proved by direct evidence**

Orissa 91 D (C N 36)

— **Malicious prosecution — Suit for damages — Essentials — Onus and presumption — "Acquittal on merits" — Meaning — Civil Court must hear evidence of both parties to decide whether prosecution was without reasonable and probable cause and malicious — Criminal Court judgment is conclusive only as to acquittal of plaintiff**

Orissa 91 C (C N 36)

— **Malicious prosecution — Suit for damages — Limitation — Computation — See Limitation Act (1963), Art. 74**

Orissa 91 B (C N 36)

Tort (contd.)

— **Malicious prosecution — Suit for damages — Prosecutor, who is — Determination — First information report for criminal case lodged by first defendant — Other defendants examined therein as prosecution witnesses — Their evidence however not accepted by criminal Court — Such non-acceptance does not and cannot prove conspiracy between those defendants and the first defendant in initiating the prosecution — Hence those defendants are not prosecutors — Suit against them therefore, is not maintainable — First defendant is the prosecutor**

Orissa 91 A (C N 36)

— **Negligence — Collapse of building — See Penal Code (1860), S. 304-A**

Mad 198 (C N 52)

— **Negligence — Damages — Quantum of — Factors to be considered — See Fatal Accidents Act (1855), S. 1-A**

Madh Pra 86 B (C N 21)

— **Negligence — Motor accident — Negligence — Accident taking place on off side of road — Presumption — Principle of res ipse loquitur — Applicability — See Fatal Accidents Act (1855), S. 1-A**

Madh Pra 86 A (C N 21)

Transfer of Property Act (4 of 1882)

— S. 6 (h) — Minor not disqualified to be a transferee — Contracts in favour of minor imposing personal liability — Lease — Guardian has no authority to do so — See Contract Act (1872), S. 11

Guj 106 (C N 16)

— S. 7 — Contracts imposing personal liability — Premises taken on lease and new business started by de facto guardian on behalf of minor — Guardian has no authority to do so — Section 7 does not apply as minor is not the transferor — See Contract Act (1872), S. 11

Guj 106 (C N 16)

— S. 54 — Market value of land — Determination — Evidence — Acquired land agricultural — Agreement for sale of same land entered into about three months prior to notification under Sec. 4, Land Acquisition Act — Evidentiary value — Purchaser and purpose of purchase bona fide — Such agreement though does not create "interest in property" as required by Section 54 Transfer of Property Act, is still best evidence — See Land Acquisition Act (1894), S. 23 **Guj 91 (C N 14)**

— S. 58 — Mortgage by purdanasin lady — Transaction found to be her spontaneous and well-understood act — Cannot be disregarded even if she had no independent advice from lawyer: **Cal 200 (C N 35)**

— S. 58 (f) — Equitable mortgage by deposit of title deeds — Document evidencing, held, did not require registration — See Registration Act (1908), S. 17

SC 659 (C N 129)

— S. 59 — Equitable mortgage by deposit of title deeds — Document evidencing held did not require registration —

T. P. Act (contd.)

See Registration Act (1908), S. 17

SC 659 (C N 129)

—S. 59 — Evidence Act (1872), S. 70 — Word "admission" in S. 70 — Meaning of — Admission of execution of mortgage bond by mortgagor — Evidence to prove attestation, whether necessary — Mortgagee adducing evidence to prove attestation — Its effect on admission of execution — ILR (1967) Cut 593, Reversed; AIR 1927 Mad 143, Dissented from

Orissa 82 (C N 33)
—S. 91 — Tenants of mortgaged property attorning to mortgagee — No new tenancy is created — On redemption their tenancy with mortgagor revives — See Transfer of Property Act (1882), S. 109

Punj 198 (C N 27) (FB)
—S. 108-B — Lease in favour of minor — Imposes obligations mentioned in Section on minor — Guardian has no authority to do so — See Contract Act (1872), S. 11

Guj 106 (C N 16)
—Ss. 109 and 91 — Tenants of mortgaged property attorning to mortgagee — No new tenancy is created — On redemption their tenancy with mortgagor revives

Punj 198 (C N 27) (FB)
—Ss. 112, 113 — Statutory leases—Acceptance of rent after termination of lease — No waiver — T. P. Act not applicable

Bom 167 C (C N 30)
—S. 113 — Statutory leases — Acceptance of rent after termination of lease — No waiver — T. P. Act not applicable — See Transfer of Property Act (1882), S. 112

Trusts Act (2 of 1882)

—S. 90 — Death of Mahomedan intestate — Heirs take as tenants in common in specific shares — Theory of representation not recognised — Widow and minor children left as heirs — Management of estate assumed by widow's father, and income spent for maintenance and education of heirs — Acquisition of new property in widow's name — No evidence to show that any surplus from income of estate was utilized for acquisition — Newly acquired property held not partible — Section 90, Trusts Act, did not apply — See Mahomedan law — Succession and Administration Mad 200 A (C N 53)

—S. 90 — Advantage gained by mortgagee — Usufructuary mortgagee bound to pay part of rent to landlord — Property brought to sale for default in payment of rent — Mortgagee purchasing it at the sale has to hold it for the benefit of the mortgagor — Fact that the property brought to sale was more than mortgage security, held, immaterial. AIR 1961 Pat 499 held no good law, in view of AIR 1964 SC 1707

Pat 131 (C N 19)
U. P. Municipalities Act (2 of 1916)

See under Municipalities.

U. P. Sales Tax Act (15 of 1948)

See under Sales Tax.

U. P. Temporary Control of Rent and Eviction Act (3 of 1947)

See under Houses and Rents.

Utkal University Regulation

See under Education.

Words and Phrases

—"Acquittal on merits" — See Tort — Malicious Prosecution

Orissa 91 C (C N 36)
—Terms 'dispossession' and 'discontinuation' in Art. 142, Limitation Act — Meaning — See Limitation Act (1908), Art. 142

All 289 C (C N 46) (FB)
—"Fact of State" — Meaning of — See Extra Provincial Jurisdiction Act (1947), S. 6

SC 724 A (C N 147)
—"In the discharge of his duties" — Interpretation — Ingredients of S. 5 (1) (d) — See Prevention of Corruption Act (1947), S. 5

Guj 97 B (C N 15)
—"In the pay of" — "In the pay of" means 'in the employment of' — See Penal Code (1860), S. 21 (12)

Guj 97 C (C N 15)
—"Office" — Meaning — Word "Office" has various meanings depending upon context — See Constitution of India, Art. 191 (1) (a)

SC 694 A (C N 149)
—"Otherwise" — "Officer" — Meaning — "Otherwise" in S. 5 (1) (d), Prevention of Corruption Act means, 'by other like means' and the word does not go with the words 'abusing his position' — "Officer" in S. 21 (9), Penal Code denotes person in service or pay of government or remunerated by fees or commission for performance of any public duty — See Penal Code (1860), S. 161

Guj 97 A (C N 15)
Workmen's Compensation Act (8 of 1923)
—S. 2 (1) (d) — "Dependent" — Widow — Remarriage — Does not disentitle her to claim compensation

Raj 111 C (C N 27)
—S. 2 (1) (e) — Compensation payable by employer — Case not falling under Section 14 — Compensation cannot be awarded against insurance company — See Workmen's Compensation Act (1923), S. 14

Raj 111 B (C N 27)
—S. 3 — "Arising out of employment" — Meaning of — Question as to whether death was caused by added peril — Test

Raj 111 A (C N 27)
—S. 3 (1), Proviso (b) — Applicability of — Accident arising out of and in course of employment — Injury resulting in death — Question of wilful disobedience of any order or rule not material

Raj 111 D (C N 27)
—Ss. 14 and 2 (1) (e) — Compensation payable by employer — Case not falling under S. 14 — Compensation cannot be awarded against insurance company

Raj 111 B (C N 27)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1970 MAY

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in;
REVERS.=Reversed in

Civil Procedure Code (5 of 1908)

- S. 47 — (1896) 78 Pun Re 1896 — Over. AIR 1970 Punj 215 (C N 32) (FB).
- S. 47 — (1902) 94 Pun Re 1902 — Over. AIR 1970 Punj 215 (C N 32) (FB).
- S. 144 — AIR 1920 All 245 (1) — Over. AIR 1970 All 261 A (C N 43) (FB)
- S. 144 — 1962 All LJ 539 — Over. AIR 1970 All 261 A (C N 43) (FB).
- S. 145 (as amended by U.P. Act 24 of 1954) — AIR 1920 All 245 (1) — Over. AIR 1970 All 261 A (C N 43) (FB).
- S. 145 (as amended by U.P. Act 24 of 1954) — 1962 All LJ 539 — Over. AIR 1970 All 261 A (C N 43) (FB).
- S. 146 — (1896) 78 Pun Re 1896 — Over. AIR 1970 Punj 215 (C N 32) (FB)
- S. 146 — (1902) 94 Pun Re 1902 — Over. AIR 1970 Punj 215 (C N 32) (FB).
- O. 9, R. 9 — AIR 1954 All 222 — Over. AIR 1970 All 257 (C N 42) (FB).
- O. 9, R. 13 — AIR 1954 All 222 — Over. AIR 1970 All 257 (C N 42)(FB).
- O. 17, R. 2 — AIR 1954 All 222 — Over. AIR 1970 All 257 (C N 42) (FB).
- O. 17, R. 3 — AIR 1954 All 222 — Over. AIR 1970 All 257 (C N 42) (FB).
- O. 20, R. 14 — (1963) A. F. A. D. No. 30 of 1962, D/- 14-10-1963 (Bom) — Revers. AIR 1970 SC 750 (C N 155)
- O. 20, R. 14 — (1896) 78 Pun Re 1896 — Over. AIR 1970 Punj 215 (C N 32) (FB).
- O. 20, R. 14 — (1902) 94 Pun Re 1902 — Over. AIR 1970 Punj 215 (C N 32) (FB).
- O. 21, R. 16 — (1896) 78 Pun Re 1896 — Over. AIR 1970 Punj 215 (C N 32) (FB).
- O. 21, R. 16 — (1902) 94 Pun Re 1902 — Over. AIR 1970 Punj 215 (C N 32) (FB).
- O. 21, R. 60 — AIR 1920 All 245 (1) — Over. AIR 1970 All 261 A (C N 43) (FB).
- O. 21, R. 60 — 1962 All LJ 539 — Over. AIR 1970 All 261 A (C N 43) (FB).
- O. 23, R. 3 — ILR (1968) 1 Punj 621 — Revers. AIR 1970 SC 669 (C N 131).
- O. 40, R. 1 — AIR 1920 All 149 — Diss. AIR 1970 Mys 141 A (C N 33).
- O. 40, R. 1 — AIR 1958 Assam 171 — Diss. AIR 1970 Mys 141 A (C N 33).
- O. 40, R. 1 — AIR 1915 Bom 41 — Diss. AIR 1970 Mys 141 A (C N 33).
- O. 40, R. 1 — AIR 1938 Nag 540 — Diss. AIR 1970 Mys 141 A (C N 33).
- O. 40, R. 1 — AIR 1932 Cal 194 — Diss. AIR 1970 Mys 141 A (C N 33).
- O. 43, R. 1 (s) — AIR 1920 All 149 — Diss. AIR 1970 Mys 141 A (C N 33).
- O. 43, R. 1 (s) — AIR 1958 Assam 171 — Diss. AIR 1970 Mys 141 A (C N 33).

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- O. 43, R. 1 (s) — AIR 1915 Bom 41 — Diss. AIR 1970 Mys 141 A (C N 33).
- O. 43, R. 1 (s) — AIR 1938 Nag 540 Diss. AIR 1970 Mys 141 A (C N 33).
- O. 43, R. 1 (s) — AIR 1932 Cal 194 — Diss. AIR 1970 Mys 141 A (C N 33).

CIVIL SERVICES

- Fundamental Rules (as amended in 1963)
- R. 56(a) — AIR 1966 All 560 — Over. AIR 1970 All 296 A (C N 47) (FB).
- Railway Servants Conduct and Disciplinary Rules
- R. 1713 — (1965) W. A. No. 205 of 1964, D/- 4-8-1965 (Ker) — Revers. AIR 1970 SC 748 A (C N 154)

Companies Act (1 of 1956)

- S. 237 (b) — AIR 1966 Cal 151 — Revers. AIR 1970 Cal 183 (C N 31).

Constitution of India

- Art. 226 — (1969) 74 ITR 808 (Delhi) — Revers. AIR 1970 SC 778 A (C N 164)
- Art. 309 — (1967) 2 Lab LJ 782 (Cal) — Diss. AIR 1970 Bom 180 (C N 33).
- Art. 310 — (1967) 2 Lab LJ 782 (Cal) — Diss. AIR 1970 Bom 180 (C N 33)
- Art. 311 — (1967) 2 Lab LJ 782 (Cal) — Diss. AIR 1970 Bom 180 (C N 33).

Contempt of Courts Act (32 of 1952)

- S. 3 — (1963) Civ. A. No. 13 of 1963, D/- 14-8-1964 (Bom at Nag) — Revers. AIR 1970 SC 720 (C N 146).

Criminal Procedure Code (5 of 1898)

- S. 2 — Cri. R. No. 1235 of 1967 (Orissa) — Held not good law in view of AIR 1965 SC 1185 as interpreted. AIR 1970 Pat 159 (C N 25).
- S. 107 — (1967) Cri. Revn. Petn. No. 735 of 1965, D/- 17-4-1967 (A P) — Revers. AIR 1970 SC 771 (C N 162).
- S. 145 — AIR 1953 Cal 397 — Diss. AIR 1970 Pat 132 (C N 20).
- S. 145 — AIR 1959 Cal 505 — Diss. AIR 1970 Pat 132 (C N 20).
- S. 173 — Cri. R. No. 1235 of 1967 (Orissa) — Held not good law in view of AIR 1965 SC 1185 as interpreted. AIR 1970 Pat 159 (C N 25).

Criminal P. C. (cont'd.)

- S. 190 — Cri. R. No. 1235 of 1967 (Orissa) — Held not good law in view of AIR 1965 SC 1185 as interpreted. AIR 1970 Pat 159 (C N 25).
 —S. 251-A — Cri. R. No. 1235 of 1967 (Orissa) — Held not good law in view of AIR 1965 SC 1185 as interpreted. AIR 1970 Pat 159 (C N 25).
 —S. 403 — (1967) Cri. Revn. Petn. No. 735 of 1965, D/- 17-4-1967 (A P) — Revers. AIR 1970 SC 771 (C N 162).

Essential Commodities Act (10 of 1955)

- S. 3 — Cri. Misc. No. 224 of 1965, D/- 4-11-1965 (Punjab) — Revers. AIR 1970 SC 713 (C N 143).
 —S. 3 — (1965) Cri. Revn. No. 263 of 1965, D/- 4-11-1965 (Punjab) — Revers. AIR 1970 SC 713 (C N 143).
 —S. 7 — (1965) Cri. Misc. No. 224 of 1965, D/- 4-11-1965 (Punjab) — Revers. AIR 1970 SC 713 (C N 143).
 —S. 7 — (1965) Cri. Revn. No. 263 of 1965, D/- 4-11-1965 (Punjab) — Revers. AIR 1970 SC 713 (C N 143).
 —S. 7-A — (1965) Cri. Misc. No. 224 of 1965, D/- 4-11-1965 (Punjab) — Revers. AIR 1970 SC 713 (C N 143).
 —S. 7-A — (1965) Cri. Revn. No. 263 of 1965, D/- 4-11-1965 (Punjab) — Revers. AIR 1970 SC 713 (C N 143).
 —S. 8 — (1965) Cri. Misc. No. 224 of 1965, D/- 4-11-1965 (Punjab) — Revers. AIR 1970 SC 713 (C N 143).
 —S. 8 — (1965) Cri. Revn. No. 263 of 1965, D/- 4-11-1965 (Punjab) — Revers. AIR 1970 SC 713 (C N 143).

Evidence Act (1 of 1872)

- S. 3 — (1967) Cri. As. Nos. 297 to 300 of 1965, D/- 23-3-1967 (Andh Pra) — Revers. AIR 1970 SC 648 A (C N 124).
 —S. 70 — AIR 1927 Mad 143 — Diss. AIR 1970 Orissa 82 (C N 33).
 —S. 70 — ILR (1967) Cut 593 — Revers. AIR 1970 Orissa 82 (C N 33).

Hindu Law of Inheritance (Amendment) Act (2 of 1929)

- S. 1 — AIR 1935 All 203 — Over. AIR 1970 SC 789 (C N 166).
 —S. 1 — AIR 1934 Mad 138 — Over. AIR 1970 SC 789 (C N 166).

Land Acquisition Act (1 of 1894)

- S. 50 (2) (as amended by Gujarat Act 20 of 1965) — (1909) 13 Cal WN 116 — Diss. AIR 1970 Guj 81 B (C N 13).

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- Art. 120 — AIR 1914 Mad 377 (FB) — Diss. AIR 1970 Madh Pra 91 E (C N 22).
 —Art. 131 — AIR 1914 Mad 377 (FB) — Diss. AIR 1970 Madh Pra 91 E (C N 22).

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- Art. 142 — AIR 1946 All 389 — Over. AIR 1970 All 289 A (C N 46) (FB).
 —Art. 144 — AIR 1946 All 389 — Over. AIR 1970 All 289 A (C N 46) (FB).

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- Succession and administration — (1961) A. S. No. 402 of 1961 (Mad) — Revers. AIR 1970 Mad 200 A (C N 53).

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- S. 59 — AIR 1963 Mys 278 — Diss. AIR 1970 Andh Pra 178 (C N 25).
 —S. 61 — AIR 1963 Mys 278 — Diss. AIR 1970 Andh Pra 178 (C N 25).

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- S. 25 — (1966) W. A. No. 36 of 1966 (Andh Pra) — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).
 —S. 25 — (1966) W. P. No. 274 of 1966 (Andh Pra) — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).
 —S. 25 — 1969 Lab IC 343 (Andh Pra) — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).
 —S. 50 — W. A. No. 36 of 1966 (Andh Pra) — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).
 —S. 50 — W. P. No. 274 of 1966 (Andh Pra) — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).
 —S. 50 — 1969 Lab IC 343 (Andh Pra) — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).

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- S. 4 — AIR 1959 Punj 530 — Diss. AIR 1970 Raj 86 (C N 18).
 —S. 58 — AIR 1967 Andh Pra 99 — Diss. AIR 1970 Raj 99 A (C N 21).
 —S. 59 (2) — AIR 1967 Andh Pra 99 — Diss. AIR 1970 Raj 99 A (C N 21).
 —S. 69 (2) — AIR 1959 Punj 530 — Diss. AIR 1970 Raj 86 (C N 18).
 —S. 69 (2) — AIR 1967 Andh Pra 99 — Diss. AIR 1970 Raj 99 A (C N 21).

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- S. 40 — 1967 Ker LT 223 — Over. AIR 1970 Ker 98 A (C N 20).
 —S. 40 — 1967 Ker LT 689 — Over. AIR 1970 Ker 98 A (C N 20).
 —S. 40 — 1968 Ker LT 929 — Over. AIR 1970 Ker 98 A (C N 20).
 —S. 88 — 1967 Ker LT 223 — Over. AIR 1970 Ker 98 A (C N 20).
 —S. 88 — 1967 Ker LT 689 — Over. AIR 1970 Ker 98 A (C N 20).
 —S. 88 — 1968 Ker LT 929 — Over. AIR 1970 Ker 98 A (C N 20).
 —S. 307 — 1967 Ker LT 223 — Over. AIR 1970 Ker 98 A (C N 20).
 —S. 307 — 1967 Ker LT 689 — Over. AIR 1970 Ker 98 A (C N 20).
 —S. 307 — 1968 Ker LT 929 — Over. AIR 1970 Ker 98 A (C N 20).

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- S. 17 — (1873) 11 Beng LR (OC) 405 — Not approved. AIR 1970 SC 659 (C N 129).
 —S. 49 — (1873) 11 Beng LR (OC) 405 — Not approved. AIR 1970 SC 659 (C N 129).

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- Madhya Pradesh General Sales Tax Act (2 of 1959)
 —S. 2 (d) & (g) — AIR 1968 Madh Pra 163 — (Revers. AIR 1970 SC 732 A (C N 149)).
 —Punjab General Sales Tax Act (46 of 1948)
 —S. 11 — (1965) L. P. A. 262 of 1965, D/- 20-10-1965 (Punj) — Revers. AIR 1970 SC 744 (C N 152).
 —U. P. Sales Tax Act (15 of 1948)
 —S. 10 (3) (1) — (1963) S. T. R. No. 556 of 1961, D/- 18-2-1963 (All) — Over. AIR 1970 All 266 (C N 44) (FB).
 —S. 11 — (1963) S. T. R. No. 556 of 1961, D/- 18-2-1963 (All) — Over. AIR 1970 All 266 (C N 44) (FB).

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 —Pepsu Tenancy and Agricultural Lands Act (13 of 1955)
 —S. 32-KK — AIR 1964 Punj 30 — Over. AIR 1970 SC 703 B (C N 141).
 —S. 32-KK — (1964) LPA No. 24 of 1964, D/- 30-3-1964 (Punj) — Revers. AIR 1970 SC 703 B (C N 141).

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- Malicious Prosecution — AIR 1962 Pat 478 — Diss. AIR 1970 Orissa 91 C (C N 36).
 —Transfer of Property Act (4 of 1882)
 —S. 59 — AIR 1927 Mad 143 — Diss. AIR 1970 Orissa 82 (C N 33).
 —S. 59 — ILR (1967) Cut 593 — Revers. AIR 1970 Orissa 82 (C N 33).
 —Trusts Act (2 of 1882)
 —S. 90 — AIR 1961 Pat 439 — Held no good law in view of AIR 1964 SC 1707 as interpreted. AIR 1970 Pat 131 (C N 19).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC. IN A. I. R. 1970 MAY

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in;
 REVERS.=Reversed in

ALLAHABAD

- AIR 1920 All 149 = ILR 42 All 227, Mohd. Askari v. Nisar Hussain — Diss. AIR 1970 Mys 141 A (C N 33).
 AIR 1920 All 245 (1) = 18 All LJ 357, Kallukhan v. Abdulla Khan — Over. AIR 1970 All 261 A (C N 43) (FB).
 AIR 1935 All 203=4 All WR 1458, Kanhaiya Lal v. Mst. Champa Devi — Over. AIR 1970 SC 789 (C N 166).
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 AIR 1954 All 222 = 1953 All LJ 653, Faiyaz Khan v. Mithan — Over. AIR 1970 All 257 (C N 42) (FB).
 1962 All LJ 539 = 1962 All WR (HC) 438, Gulsher Khan Supardar v. Bedilal — Over. AIR 1970 All 261 A (C N 43) (FB).
 (1963) S. T. R. No. 556 of 1961, D/- 18-2-1963 (All), Sukhanlal Amar Nath v. Commr. of Sales Tax — Over. AIR 1970 All 266 (C N 44) (FB).
 AIR 1966 All 560 = 1966 All LJ 153, Sridhar Prasad Nigam v. State of Uttar Pradesh — Over. AIR 1970 All 296 A (C N 47) (FB).

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- (1966) W. A. No. 36 of 1966 (Andh Pra) — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).
 (1966) W. P. No. 274 of 1966 (Andh Pra) — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).
 AIR 1967 Andh Pra 99 = (1967) 1 Andh WR 192, Jayalakshmi Rice and Oil Mills Contractors Co., Angular v. Commr. of Income-tax, Andh Pra — DISS. AIR 1970 Raj 99 A (C N 21).
 (1967) Criminal Appeals Nos. 297 to 300 of 1965, D/- 23-3-1967 (Andh Pra) — Revers. AIR 1970 SC 648 A (C N 124).
 (1967) Criminal Revn. Petn. No. 735 of 1965, D/- 17-4-1967 (A.P.) — Revers. AIR 1970 SC 771 (C N 162).
 1969 Lab IC 343 = (1966) 2 Andh WR 249, G. Venkatesam v. The Collector Medak — Over. AIR 1970 Andh Pra 180 A (C N 26) (FB).

ASSAM

- AIR 1958 Assam 171, Ramchandra Dey v. Jhumarmal — Diss. AIR 1970 Mys 141 A (C N 33).

BOMBAY

- AIR 1915 Bom 41 = 29 Ind Cas 504, Narbada Shankar Mugatram Vyas v. Kevaldas Raghunath Das — Diss. AIR 1970 Mys 141 A (C N 33).

Bombay (contd.)

- AIR 1938 Nag 540 = ILR (1938) Nag 174, Raje Gopalrao v. Raje Devidas — Diss.
 AIR 1970 Mys 141 A (C N 33).
 (1964) Civil Appeal No. 13 of 1963, D/- 14-8-1964 (Bom at Nag) — Revers.
 AIR 1970 SC 720 (C N 146).

CALCUTTA

- (1873) 11 Beng LR (OC) 405 = 20 Suth WR 150, Kedarnath Dutta v. Shamlal Khetry — Not approved. AIR 1970 SC 659 (C N 129).
 (1909) 13 Cal WN 116 = 4 Ind Cas 332, Municipal Corpn. of Pabna v. Jogendra Narain Raikut — Diss. AIR 1970 Guj 81 B (C N 13).
 AIR 1932 Cal 194 = 35 Cal WN 1141, Kshitish Chandra Achariya Choudhary v. Raja Jankinath Roy — Diss. AIR 1970 Mys 141 A (C N 33).
 AIR 1953 Cal 397 = 1953 Cri LJ 908, Turn Majhi v. State — Diss. AIR 1970 Pat 132 (C N 20).
 AIR 1959 Cal 505 = 1959 Cri LJ 970, Sukhchand Roy v. Sefazuddin Mohamad — Diss. AIR 1970 Pat 132 (C N 20).
 AIR 1966 Cal 151, New Central Jute Mills Co. Ltd. v. Deputy Secretary, Ministry of Finance — Revers. AIR 1970 Cal 183 (C N 31).
 (1967) 2 Lab LJ 782 = 70 Cal WN 925, Makhmalal Dey v. Union of India — Diss. AIR 1970 Bom 180 (C N 33).

DELHI

- (1969) 74 ITR 808 (Delhi), Jain Bros. v. Union of India — Revers. AIR 1970 SC 778 A (C N 164).

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- (1965) Writ Appeal No. 205 of 1964, D/- 4-8-1965 (Ker) — Revers. AIR 1970 SC 748 A (C N 154).
 1967 Ker LT 223 = 1967 Ker LR 219, Moidu v. State of Kerala — Over. AIR 1970 Ker 98 A (C N 20).
 1967 Ker LT 689, Isaac v. State of Kerala Over. AIR 1970 Ker 98 A (C N 20).
 1968 Ker LT 929 = 1LR (1968) 1 Ker 681, Krishnan v. Abdulla — Over. AIR 1970 Ker 98 A (C N 20).

MADHYA PRADESH

- AIR 1955 NUC (Madh Bha) 3774, Nathulal v. Shivnarayan — Diss. AIR 1970 Pat 136 (C N 22).
 AIR 1968 Madh Pra 163, M. P. Electricity Board, Jabalpur v. Commr. of Sales Tax, M. P. — Revers. AIR 1970 SC 732 A (C N 119).

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- AIR 1914 Mad 377 = ILR 38 Mad 916 (FB), Manavikarama Zamorin v. Achutha Menon — Diss. AIR 1970 Madh Pra 91 E (C N 22).
 AIR 1927 Mad 143 = 93 Ind Cas 280, Ramchandra Rao v. Sama Rayar — Diss. AIR 1970 Orissa 82 (C N 33).

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- AIR 1934 Mad 138 = ILR 57 Mad 718, Krishnan Chettlar v. Manikammal — Over. AIR 1970 SC 789 (C N 166).
 (1961) A. S. No. 402 of 1961 (Mad) — Revers. AIR 1970 Mad 200 A (C N 53).

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- AIR 1963 Mys 278 = 1963 Mys LJ (Sup) 180, Meenakshi v. Mysore S. T. A. Tribunal — Diss. AIR 1970 Andh Pra 178 (C N 25).

ORISSA

- (1967) ILR (1967) Cut 593, Sita Dakuani v. Ram Chandra Nahak — Revers. AIR 1970 Orissa 82 (C N 33).
 (1967) Criminal Revision No. 1235 of 1967 (Orissa), Basudeo Prasad v. State of Bihar — Held not good law in view of AIR 1965 SC 1185 as interpreted. AIR 1970 Pat 159 (C N 25).

PATNA

- AIR 1961 Pat 439, Mt. Barti Kuer v. Brahmachari Singh — Held no good law, in view of AIR 1964 SC 1707 as interpreted. AIR 1970 Pat 131 (C N 19).
 AIR 1962 Pat 478 = ILR 41 Pat 369, Ucho Singh v. Nageshwar Prasad Singh — Diss. AIR 1970 Orissa 91 C (C N 36).

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- (1896) 78 Pun Re 1896, Jowala Sahal v. Ram Rakha — Over. AIR 1970 Punj 215 (C N 32) (FB).
 (1902) 94 Pun Re 1902 = 134 Pun LR 1902, Lashkari Mal v. Ishar Singh — Over. AIR 1970 Punj 215 (C N 32) (FB).
 AIR 1959 Punj 530 = 61 Pun LR 434, Durga Das Janak Raj v. Preete Shah Sant Ram — Diss. AIR 1970 Raj 86 (C N 18).
 AIR 1964 Punj 30 = 65 Pun LR 961, Bir Singh v. State of Punjab — Over. AIR 1970 SC 703 B (C N 141).
 (1964) L. P. A. No. 24 of 1963, D/- 30-3-1964 (Punj) — Revers. AIR 1970 SC 703 B (C N 141).
 (1965) Cri. Misc. No. 224 of 1965, D/- 4-11-1965 (Punj) — Revers. AIR 1970 SC 713 (C N 143).
 (1965) L. P. A. No. 262 of 1965, D/- 20-10-1965 (Punj) — Revers. AIR 1970 SC 741 (C N 152).
 (1965) Cri. Revn. No. 263 of 1965, D/- 4-11-1965 (Punj) — Revers. AIR 1970 SC 713 (C N 143).
 (1968) ILR (1968) 1 Punj 621, Devki Nandan Nag Pal v. M/s. Silver Enterprises — Revers. AIR 1970 SC 669 (C N 131).

COMPARATIVE TABLE

(10-4-1970)

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645	(1969) 2 S C W R 1002	765	(1969) 1 S C C 77	170	1969 Maba L J 654	110	ILR (1969) 2
648	(1969) 2 SCWR 807	769	(1969) 1 S C C 185		ILK (1969)	(FB)	Ker 462
652	(1969) 2 SCWR 961		(1969) 1 SCWR 368		Bom 1048		1970 Ker L T 60
654	1970 S C D 193		(1970) 1 S C C 449	177	...	120	1969 Ker L J 95
655	20 Fac L R 89	771	(1969) 1 SCWR 106	180	72 Bom L R 51		ILR (1969) 1
658	1970 S C D 109		(1969) 1 S C C 161		AIR 1970 Calcutta		Ker 340
659	(1970) 1 SCWR 115		1969 S C D 596				(1969) 1 Com
668	...	776	1970 S C Cri R 179		Other Journals		L J 393
669	1970 Ren C J 98	778	(1970) 1 SCWR 261	179	73 Cal W N 670		39 Com Cas 685
670	(1969) 2 SCWR 999	786	...	188	73 Cal W N 557	AIR 1970 Madhya Pradesh	
	36 Cut L T 116	789	...		(1969) 2 Com L J 32	AIR Other Journals	
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675	(1970) 1 S C C 219		AIR 1970 Allahabad	199	73 Cal W N 875		1969 M P L J 540
679	1969 Serv L R 890		AIR Other Journals	200	74 Cal W N 43		1969 M P L J 783
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685	...	(FB)	(HC) 860	206	73 Cal W N 919	91	1969 M P W R 955
688	...		1969 All L J 327	207	73 Cal W N 54		1970 M P L J 16
691	(1970) 1 S C C 140	261	1969 All W R	212	...		1970 Jab L J 256
	(1970) 1 SCWR 171	(FB)	(HC) 633	216	...		
694	...		1969 All L J 875	221	...	AIR 1970 Madras	
703	1969 Cur L J 1	266FB	1969 All L J 914		AIR 1970 Delhi	AIR Other Journals	
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706	...	289	1969 All W R		Other Journals	(SB)	L J 539
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716	1968 Pat L J B	296	1969 Ben C R 909	107	...	184	82 Mad L W 661
	(SC) 1181 (2)	(FB)	1969 All L J 962	110	...	188	82 Mad L W 595
718	(1968) 2 SCWR 777		(HC) 763		AIR 1970 Goa	(SB)	(1969) 2 Mad
	(1969) 1 S C C 61		1969 Ser L K 897				L J 645
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720	(1969) 1 S C C 181		AIR Other Journals	73	...	194	82 Mad L W 297
	1969 Maha L J 522	162	(1969) 2 Andh	80	...		(1969) 2 Mad
	1969 M P L J 454		W R 185		AIR 1970 Gujarat		L J 160
	(1969) 2 SCWR 162	176	(1969) 2 Andh			197	74 I T R 429
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724	...		1969 Mad L J	81	...		(Cri) 158
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741	(1969) 1 S C C 24		AIR 1970 Bombay		1969 Kash L J 390	114	18 Law Rep 5
744	(1970) 1 SCWR 27		AIR Other Journals				(1969) 1 Mys
	(1970) 1 S C C 101	166	1969 Maha L J 433		AIR 1970 Kerala		L J 533
745	(1970) 1 S C C 135		71 Bom L R 536			138	(1969) 2 Mys
748	(1969) 2 SCWR 22		ILR (1969)	98	1969 Ker L T 472		L J 334
	(1969) 2 UMNP 247		Bom 1191		ILR (1969) 2	139	(1969) 2 Mys
750	...		1969 Maha L J 375		Ker 119		L J 261
753	...	167	71 Bom L R 553		1969 Ker L J 532	141	(1968) 2 Mys L J 16
755	...				1969 Mad L J		15 Law Rep 137
759	(1969) 2 SCWR 26				(Cri) 622		
763	1968 All L J 1023						
	1968 All W R						
	(HC) 892						
	1969 S C D 68						

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72	35 Cut L T 1247		1969 Pat L J B 348	203(FB)	...	86	1969 Raj L W 553
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81	25 Cut L T 926	159	...	(FB)	71 Pun L R 1110	91	...
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82	...		AIR 1970 Punjab		ILR (1970) 1	102	1969 Faj L W 469
87	36 Cut L T 33		AIR Other Journals		Punj 251	101	ILR (1969) 19
89	36 Cut L T 208	193	ILR (1969) 1	213	71 Pun L R 927		Baj 393
91	35 Cut L T 835	(FB)	Punj 59	(FB)	ILR (1970) 1		1970 Faj L W 51
	AIR 1970 Patna		1969 Cur L J 652		Punj 326	108	1969 Baj L W 495
AIR	Other Journals	196(FB)	...	219	1969 Cur L J 559	109	1969 Baj L W 497
131	...	200	1969 Cur L J 741	(FB)	71 Pun L R 761		1970 Mer L R 31
132	1969 Pat L J R 153		71 Pun L R 1063		24 S T C 282	110	1969 Faj L W 567
134	...	203	1969 Cur L J 591		ILR (1970) 1	111	...
136	1969 B L J B 618				Punj 246		

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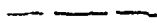
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"ARE STATE MONOPOLY LAWS NOT SUBJECT TO THE TEST OF REASONABLENESS?"

(By ARUN KUMAR, M. COM., LL.M., *Lecturer in Law, Delhi University*)

INTRODUCTION

Does Constitution (First Amendment) Act, 1951 by amending Article 19 (6), really put the State monopoly laws beyond the test of reasonableness as well as in the interest of general public? The Supreme Court, and the authors have answered the question in affirmative. But I hold a different view, which is the subject-matter of this paper.

The reading of *Akadasi Padhan v. State of Orissa*(1) gives an undoubted impression that Court in the instant case moved with a pre-conceived notion that State monopoly is itself a reasonable restriction in the interest of general public, and then started examining the case and interpreting the Constitution (First Amendment) Act, 1951 in such a manner as to arrive at this conclusion.

It may be pointed out in the first instance that the frame of Art. 19 (6) even after the Constitutional Amendment practically remains the same. The only change made was that in latter part of Cl. (6) of Art. 19 which was enlarged by the addition of sub-cl. (ii) to Cl. (6) of Article 19.

Gajendragadkar, J., in *Akadasi* case has given undue importance to the phrase "in particular" appearing in Cl. (6) of Art. 19. He made a heavy reliance on this term to arrive at a desired decision. His Lordship observed :

"It is because the amendment was thus made for purposes of clarification that it begins with the words "in particular" (2)

His Lordship continued :

" and the amendment adds that the State monopolies, or nationalisation schemes which may be introduced by legislation, are an illustration of reasonable restriction imposed in the interest of general public and must be treated as such." (3)

Before we proceed ahead, it may be pointed out that Gajendragadkar, J., "presumed" that State monopoly laws in respect of any trade or business, irrespective

of the manner and form in which it appears,

" . . . must be presumed to be reasonable and in the interest of general public, so far as Art. 19 (1) (g) is concerned." (4)

Here, Gajendragadkar, J. has differed from the observation made by B. P. Mukherjea, J. in *Saghir Ahmed v. State of U. P.*(5) His Lordship observed :

"The result of the amendment is that the State would not have to justify such action as reasonable at all in a Court of law and no objection could be taken to it as an infringement of the right guaranteed under Art. 19 (1) (g) of the Constitution." (6)

In *Akadasi* case, the observations of Mukherjea, J. on the effect of the amendment of Art. 19 (6) were not accepted on the ground, firstly, that in such case the question did not arise and, because the legislative history of the amendment of Art. 19 (6) showed that laws passed by the State creating a State monopoly, as for instance, in road-transport, was struck down as violating Art. 19 (1) (g). The typical case cited by the Court in paragraph II of the judgment is *Motilal v. Government of the State of U. P.*(7)

We start with the phrase "in particular" in Art. 19 (6) which is nothing but a term of emphasis just pointing out that in particular the Legislatures will have the legislative competency to enact laws on the subjects like profession and to specify technical qualifications necessary for carrying on this profession, or other occupation, etc., or on the subject of carrying on the business by the State whether to the exclusion, complete or partial, of citizens of India. The phrase "in particular" did appear even in Cl. (6) of Art. 19 as it originally stood, at the same place and for the same purpose as it appears in the amended article. The repetition of the words followed by the above said term do not in any way (as the similar expression can also be found in opening part of Art. 19 (6)) help the Court to

4. Paragraph 14 of the Judgment in *Akadasi* case.

5. AIR 1954 SC 728.

6. Paragraph 23 of the Judgment of *Saghir Ahmed* case.

7. AIR 1951 All 257 (FB).

1. AIR 1963 SC 1047.

2. Paragraph 15 of *Akadasi* case.

3. Ibid.

interpret Art. 19 (6) in such a manner as to exempt it from the test of reasonableness as well as in the interest of general public. No accepted principles of constitutional interpretation will help the Court to do so. Court brings to its task such considerations as are germane to the interpretation of an organic instrument like constitution, but it will be improper to impose theory like doctrinaire theory to justify the imposition of State monopoly on any trade or business. It is submitted, that cardinal rule of interpretation of the constitution is to give to the words their plain grammatical meaning, and if such meaning is clear and results in no absurdity or grave inconvenience, no further question of interpretation arises. If however the plain meaning of words leads to absurdity or grave inconvenience then resort can be had to the well established principle of taking extrinsic aids to interpretation. Gwyer, C. J., made clear in Central Provinces cases 1939 F C R 18, at pp. 37, 39 : (AIR 1939 F C 1 at pp. 5, 6), that the philosophical, social or economic theories supposed to underlie a particular provision are clearly not one of such extrinsic aids to construction.

The expression "in particular" and the following repetition of words, just give emphasis that 'particularly' and 'especially' the legislatures can validly enact laws on the mentioned subjects in sub-cl. (i) and (ii) of Art. 19 (6), provided the law is reasonable and also in the interest of general public. The State should be called upon to justify that the monopoly law is really in the interest of general public i.e., such laws can in fact be supported on the ground of efficiency and increased output in nationalised industry or on the ground of regulating output or improving quality or reducing undue competition, etc. etc. In short, such laws must be tested on the touchstone of reasonable in substance as well as in procedure.

Further, before the expression "in particular" there is only a 'comma'. According to the well established rules of English grammar 'comma' marks the shortest pause to separate a series of words belonging to the same part of speech. Thus comma in no way suggests a divorce between one part of sentence and the other part of the same sentence. It is difficult to understand which principles of English grammar the Court has followed when His Lordship treated comma, almost as full-stop and divorced Art. 19 (6)

into two parts — the former part of Art. 19 (6) and the latter part of Art. 19 (6), as the Court and authors have generally termed.

In substance, I submit, that Cl. (6) of Art. 19 is a full one-clause and there is no such classification as former part or latter part in it, and the comma before the expression "in particular" just suggests a pause and not a stop, while reading the clause.

Coming now to the purpose of the first amendment. The purpose of the Constitution (First Amendment) Act, 1951 to amend Art. 19 (6) can reasonably be pleaded by any person, to suggest that the above said amendment put beyond doubt that nationalisation laws can be enacted by the Legislatures and such laws are beyond the test of reasonableness as well as in the interest of general public. The genesis of the Constitution First Amendment Act, 1951 traced by Gajendragadkar, J., (to paragraph 11th of Akadasi case) appears to be convincing. His Lordship observed, 'that even before the said Constitution amendment under Entry 21, List III in Seventh Schedule of the Constitution, the Legislatures have had the legislative competency to enact monopoly laws.' Such laws were however challenged as unconstitutional being violative of Arts. 19 (1) (f) and 19 (1) (g) and 31. The typical case given is AIR 1951 All 237 (FB). As a result of the decisions it was realised by the Legislature that legislative competency to create monopolies would not necessarily make monopoly law valid. If they contravene Art. 19. That is why Art. 19 (6) came to be amended.

Purpose of the amendment if read surrounded by such facts will undoubtedly support the contention of the person who pleads against the reading of reasonableness in the so-called latter part of Art. 19(6).

But it is submitted and perhaps it is well recognised principle as well that that constitutional interpretation to a Constitution provision which might lead to anomalous or absurd results with respect to constitutional interpretation should be regarded with considerable suspicion.

Even in Saghir Ahmed case, the Court did not deny the legislative competency to the legislatures to enact State monopolies law. The Court in this case however pointed out that the State had placed no material before their Lordships to prove the reasonableness, as well as the measure taken in the interest of general public. The Court in fact tried to examine the

effect of nationalisation, and quoting with full approval the obligation laid on the State Governments by Art. 39, declared road-transport nationalisation as imposing an unreasonable restriction. Thus the apprehension of the States that they were denied the right to enact monopoly laws of which Gajendragadkar, J., makes a reference in *Akadasi* case, was baseless and unfounded.

There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Art. 19 (1) (g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in cl. (6) of the Article. If the respondents do not place any materials before the court to establish that legislation comes within the permissible limits of cl. (6), it is surely not for the petitioner to prove that the impugned Act creating monopoly is unreasonable as well as is not in the interest of the general public.

Thus it was the States' responsibility, in case of the clear violation of the right to prove to the satisfaction of the Court that the impugned law was saved by Art. 19 (6). But by the Constitution (First Amendment) Act, 1951 the burden thus placed on the respondent was reshifted on the petitioner. Gajendragadkar, J., in *Akadasi v. State of Orissa* (8) observed:

"..... (impugned law) must be presumed to be reasonable and in the interest of general public, so far as Art. 19 (1) (g) is concerned." (9)

This presumption of reasonableness as well as in the interest of general public by the Court, even in case of clear violation of the fundamental right, now calls upon the petitioner to prove to the satisfaction of the Court that the presumption by the Court is incorrect, as the impugned Act is in fact an unreasonable restriction which is also not in the interest of general public.

So to put it in substance, the purpose of the amendment is only to shift the burden once again on the person who challenges the law to prove that the Act is unconstitutional because the State monopoly contemplated by it is neither reasonable nor is in the interest of general public.

In support of the above conclusion I would like to make two more references. First is from the "Objects and Reasons" clause of the Constitution (First Amendment) Act, 1951 and the other is from the expression "Sub-clause" appearing in the former and then latter part of Art. 19 (6).

First coming to the "Objects and Reasons" Clause which reads as :

"During the first fifteen months of the working of the Constitution, certain difficulties had been brought to light by judicial decisions and pronouncements specially in regard to fundamental rights Again although the citizen's right, under Art. 19 (1) (g), to practise any profession or to carry on any occupation, trade or business was subject to "reasonable restriction" which the laws of the State might impose "in the interests of the general public", and although these words were comprehensive enough to cover any scheme of nationalisation which the State might undertake, it was considered desirable to place the matter beyond doubt by a clarificatory addition to Article 19 (6)."

The plain reading of "Objects and Reasons" clause suggests an undoubted conclusion that because of the certain difficulties faced in the working of the Constitution and with the 'object' to remove those difficulties the amendment was made. The reason of the amendment as far as Article 19 (6) was just to 'clarify' that the right guaranteed to citizens under Article 19 (1) (g), which is subject to the reasonable laws of the State enacted in the interest of general public, will also consist of the legislative power to create State monopolies. To read a part of the Objects and Reasons clause once again :

"..... and although these words (reasonable and in the interest of general public) were comprehensive enough to cover any scheme of nationalisation which the State might undertake, it was considered desirable to place the matter beyond doubt by a clarificatory addition to Article 19 (6)."

Even, Gajendragadkar, J., in *Akadasi* case (Paragraph 15th of the judgment) accepted the fact that the amendment was made only with a purpose of clarification. His Lordship observed :

"It is because the amendment was thus made for purposes of clarification....."

Thus, neither the reading of the Objects and Reasons clause to Constitution (First Amendment) Act, 1951 nor the amended and enlarged Clause (6) of Article 19 sug-

8. AIR 1963 SC 1047.

9. Paragraph 14 of the judgment in *Akadasi v. State of Orissa* case.

gests that the State monopolies laws have been exempted from the test of reasonableness. The purpose of the amendment, to put in substance, was to clarify that State too will have the power to nationalise the industry, provided, the nationalising law is reasonable and the nationalisation is in the interest and welfare of the public—the Indian Citizens.

Coming now to the expression "Sub-clause" appearing at two points in Clause (6) of Article 19.

The First expression "Sub-clause" in Cl. (6) of Article 19 is followed by the word "g" in brackets. This letter "g" in brackets undoubtedly refers to Sub-clause (g) of Clause (1) of Article 19. But now an important question arises whether the "Sub-clause" appearing in Clause (6) of Article 19 but this time in the so-called latter part of Art. 19 (6), and followed by the expression "and in particular" means the Sub-cl. (g) of Cl. (1) of Article 19 or it has to be read as 'this Sub-clause'.

If the Court reads the second "Sub-clause" with the addition of the word 'this' read with expression 'sub-clause', reading as 'this sub-clause' only then the Court can justify itself to draw a line in between the clause (6) of Article 19. The Court then can legitimately read that

".....nothing in (this) said sub-clause shall affect the operation of any existing law....." and thus can exempt the nationalisation laws from the test of reasonableness as well as in the interest of general public.

But the first expression "Sub-clause" clearly refers to sub-clause (g) of Cl. (1) of Article 19 and the latter expression sub-clause precedes by the word "said" can only be read as meaning once again to Sub-Clause (g) of Cl. (1) of Article 19. The word "said" means "before mentioned" (Chambers's Twentieth Century Dictionary, 1953-Edition, page 971) i.e. as said earlier, and, this means a reference to the former expression, "sub-clause" appearing in Clause (6) of Article 19.

Further Cl. (6) to Article is a 'Clause' and is not a sub-clause to Article 19. So the expression "sub-clause" in Clause (6) of Article 19 can mean only as referring to Sub-Clause (g) of Clause (1) of Article 19.

Thus having read the latter expression "sub-clause" as once again referring to sub-clause (g) of Cl. (1) of Article 19, then there remains no difficulty to come to the conclusion that even the so-called latter part of Article 19 (6) means only that the

citizen's right under Article 19 (1) (g) cannot create a hindrance to the legislative power of the State to exclude the citizens either fully or partially from the nationalised industry or trade provided nationalisation law stands both the tests.

Another important point may also be drawn home that Court insists that if the law is enacted on the subject mentioned in sub-clause (i) of Clause (6) of Art. 19 then it must stand the test of "reasonableness" as well as of "in the interest of general public." To quote from *Tara-charan Mukherjee v. B. C. Das Gupta* (10) wherein the West Bengal Clinical Establishment Act, and the rules made thereunder were impugned, as imposing unreasonable restrictions are also not in the interest of general public. Physiotherapies being a branch of medical science require, specialised knowledge, technical training and proper equipment, the Court held, so it was open to the government to prescribe the qualifications for running a physical therapy establishment. Coming to the question of reasonableness, *Sinha, J.*, observed :

"Under the Constitution, Article 19 (1) (g), it is quite true that a citizen has been granted the right to practise any profession or to carry on any occupation, but this is not an absolute right. Under Sub-clause (6) of that article, the State is empowered to make any law imposing, in the interest of general public, reasonable restriction on the exercise of a right and is not prevented from making any law relating to "the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business." (11)

His Lordship held :

"On the whole, I am unable to come to the conclusion that the Act and the rules have made it impossible for a citizen under any reasonable circumstances to carry on the occupation of a Physiotherapist. I do not consider the restrictions to be unreasonable simply because they are somewhat exacting and I am convinced that they have been imposed in the interest of general public." (12)

So, when the Courts do not hesitate to read reasonableness in Sub-Clause (1) of Cl. (6) of Article 19 why it hesitates to read the same tests in Sub-Clause (ii)

10. A.I.R. 1954 Cal. 133.

11. A.I.R. 1954 Cal. 133 at p. 139.

12. A.I.R. 1954 Cal. 133 at p. 140.

of Cl. (6) of Article 19? The cause of the discrimination is difficult to follow.

CONCLUDED:

Neither the words and form of Cl. (6) of Art. 19 nor the well established principles of constitutional interpretation help the Court to put beyond the standards prescribed by the constitution, the State monopolies law. The reluctance of the Court to read reasonableness as well as in the interest of general public has left with the government wide and uncontrolled power to take over any industry or business with which they develop fancy irrespective of the fact whether such measures can in fact be designed to result in the welfare of the maximum. The policy of "Justice," that is, socio-economic justice to all which the

'Preamble' of our Constitution also contemplates—will operate against the State being vested with such an unregulated power to nationalise any industry which the State likes.

The views herein expressed do not mean that the State has no power, whatsoever to undertake commercial or industrial enterprises. But the power of the State to do so cannot be unbridled as it has to operate within the constitutional limits set out in Article 19 (1) (g) read with Article 19 (6) of the Constitution.

Such constitutional standards not only keep the exercise of State power under control but are also a reasonable safeguard against the unreasonable violation of the fundamental rights of the citizens.

DELAY IN COURTS AND JUSTICE

(By MADHUSUDAN B. MOR, LL.M. (HARVARD) *Advocate, Nagpur.*)

The topic which I have selected has been discussed many a time but so far, as it appears nothing has moved in concrete terms.

1A. The delays are principally of four types—

(1) Number of cases pending in Courts for decision or disposal.

(2) Late case law reporting, and

(3) Unwillingness of Governments to get their cases decided, and

(4) Unnecessary procedural delays at the High Court and Supreme Court level.

2. The first problem regarding the number of cases has become common and the said question is not easy to solve looking to the numerous multifarious enactments and statutes as also the growing tendency of litigation. One observes that these days prestige litigation has increased and in such a litigation there can be no question of limiting the number of cases. This needs deep pragmatic thinking sociologically.

2A. Moreover, there is always a difference between a decision and a disposal. At the same time the present five hour working of the Court may possibly have to be changed to six, if possible.

Torture of Law

3. As far as the second question is concerned, I am optimistic as the present

law reporting system, although cannot be compared to other reporting system of the western countries, still has improved a lot during the course of the last five years. In fact, this is a very vital issue because by late reporting of decision there is a torture of law. Law reports are the tools of trade to the lawyers and if these are not up to date, naturally there is always a possibility of miscarriage of justice for a fault of the law reporting agency which can be mechanically avoided.

3A. (1) The official government law cases reporting and publishing agency is no good and it should either be closed to stop the wastage of money or the Supreme Court should by its mandate make them work efficient to maintain the dignity of Rule of Law at least from the side of the Government.

Make it an offence

4. The Indian Law Reports Act ought to be amended by inserting the provision of "Reasonable Time" so as to make its breach an offence in the interest of the common man. Out of the non-official reports despite some unhealthy competition in the private sector, the officers of the Court which includes the lawyers do not have on their tables the reports in less than six months from the date of decision.

6. Why this should happen has really become a topic for a thesis and research of a doctorate degree. Why should not the Judiciary distribute their judgments to the reporting agencies free of cost immediately soon after they are ready so as to throw the ball in their ring for justification? Delay in reporting in a growing country like India is a complete denial of opportunity and natural justice. There is undoubtedly a scope for improving the law reporting method as also the delay involved which can be curtailed by investigation and thoughtful approach of the matter. It is just possible that the reporting agencies who are principally in private sector have a commercial outlook which is but natural. If the Reporting Agencies develop a spirit of healthy competition discarding monopoly approach which is still absent unfortunately, I am sure, this problem of late reporting will become easy absolutely in no time.

6. Recently, on this problem of late reporting the learned Chief Justice Shri Hidayatullah delivered Shri B. N. Rao Memorial Lecture Series on judicial methods. While focussing his attention on the problems of law reporting delays, he propounded the desirability of having an efficient system of law reporting. He further advocated several methods and desired a revised law reporting system along with good impartial drafting of laws and Judges of quality. To-day's drafting has been hailed as the lawyer's paradise?

5A. (2) One of the suggestions to minimise the delays to restrict citable cases has been that the Central Government should undertake the task right now of condensing the Reports (Supreme Court and High Courts) uptill 1969 to a handy set of about 100 Volumes. The cost involved can well be compensated by a correspondingly lessening of costs involved in litigation and the Administration of Justice as a whole. The law libraries and the lawyers would be more than ready to buy these volumes but again the question is "Has the Government a desire for Rule of Law"? Does this item find place in their priorities? Well this question must be answered historically to justify the German maxim: "Fools learn by their own experience but we must learn by others".

7. It can only be for Fords or Tatas that history can be bunk or junk but for a commoner, specially in India, it is a great teacher.

8. The next question is the Government's unwillingness in getting pending cases against them decided early. I have been observing throughout India in all Courts that our government advocates are always very eager to have adjournments on one pretext or the other. At numerous times even after half hearing of the case, Government has asked for long adjournments on the usual ground of "Seeking Instructions" either from the Minister or the Department. Compensation cases, acquisition cases and other matters involving employees are kept pending skilfully because *prima facie* the decision seems to be against them. Here there is a clear-cut discrimination and a breach of the "due process and equality" clauses. The famous verdict of our Justice Vivian Bose is that State (Government) and citizen before Judiciary are alike. The rules must be followed by both of them. Government has the greater responsibility to strictly follow the rules because they are the creators of the said rules of procedure and administration. Just because they are Governments, they are not entitled for extras. If they try to find, as they have been doing more so recently, out of way to give a go-by to the rules, then there is the end of the matter. Good is not good where better is expected.

9. The most important, to my mind, is the fourth question i.e. the procedural and technical delays at the High Court and Supreme Court level which has very wild repercussion on the lower Courts. Under Art. 141 of our Constitution, it is said that the law declared by the Supreme Court shall be binding on all the Courts, within the territory of India. The Supreme Court and the High Courts interpret the laws of the country within the meaning of "Judicial review". Now in this background, a decision of the Supreme Court on important questions of law firstly should be delivered as early as possible involving the interpretation of particular section of enactment or otherwise and secondly such a decision should be made known to the public immediately after it is delivered. To give an example, recently there has been a controversy about the Rent Control Order and the right of the landlord to demand the premises under the occupation of the tenants for personal bona fide occupation as also the major controversy is still in existence on the question of Hindu Joint Family partition as to whether it amounts to a transfer within the meaning of Transfer of Property Act or it is just a recognition of an

inherent right of all the co-parceners of the Hindu Joint Family in all ceiling and land tenancy cases, the ideas of partition and transfer are important from the point of view of tenants and land-holders. Then there are cases of jurisdiction of Courts like labour Courts and in absence of a Supreme Court decision the working class is being made to run from pillar to post for no fault on their part. Now such questions are in very many cases pending in Supreme Court and they keep on pending for years together. Such cases involving a question of importance to the general public as such not being decided expeditiously and immediately by the Supreme Court of India result in unnecessary litigation and delay at the lower Courts. Litigants keep on pending their cases and keep on filing fresh ones awaiting the decision of the Supreme Court. Some persons just initiate new litigation in the hope of success and obtain interim reliefs at the hands of the Courts which the Courts are bound to grant in view of the pending cases for decision on such questions. Therefore if the Supreme Court decides such cases taking into consideration their importance and wider effect, the delays will be curtailed automatically as also litigants will be hesitant to initiate proceedings in the Courts, they having come to know the correct position of law one way or the other. This intermediate delay can be easily avoided if the Supreme Court by intervals scans out and scrutinises all the cases and takes out the important ones from the point of view of the common man as also of legal value, it shall help the Nation in all respects. It is not difficult to get this work done by appointing a small Committee but on the contrary it will be too much to expect from the law-

yers and the litigants to bring to the notice of the Courts by their application the importance of the case to seek orders of expediting the hearing. This work can well be done usefully and mutually profitably by the judiciary itself which would in effect minimise the number of cases indirectly and substantially.

10. Similarly, there is a scope for amends which has come into existence because of the famous words of Justice Holmes that Life of Law is not logic or common-sense but it is experience. Our experience has taught us that our Civil and Criminal Procedure Codes need radical amendments. In fact a *de novo* fresh approach has become essential. Ultimately we have got to preserve our tradition for which I am very hopeful but it cannot be done unless and until we confirm the view of Goethe who said long ago that :

“What from our forefathers’ heritage is lent earn it anew to really possess it.”

11. There is no point in saying that ours was a golden country and a welfare State unless we make efforts and start moving and growing within the meaning of Dean Pound’s “the spirit of the Common Law” and be hopeful to the extent and limit of Shelley—“Hope till hope creates from its own wreck, the thing it contemplates.”

12. India is no less a land of contemplation but has lot of faith in the Almighty in contradistinction to western scientific reason because India is the only country in the world which begins where reason ends. I am afraid readers will have to understand the meaning of this not to disappoint and make me pessimistically cynical.

THE DOCTRINE OF PUBLIC POLICY

(By SIDDHESWAR DAS, LL.B, *Barrister-at-Law, Advocate, Calcutta High Court.*)

Although one comes across the doctrine of public policy mostly in relation to contracts or dispositions of property, an investigation into the doctrine must cover a wider field. The doctrine has influenced the formation of law and still influences the growth of it much more than is usually thought.(1) This is true not only in England but also in India although the present legal system of India had not to pass

through stage which English law had to pass when there were no statutes and no case laws and law had to be made somehow or other. But it must not be supposed that the application of the doctrine is always a conscious process. It is an undercurrent flowing through the legal system and influencing the solution of legal problems but not visible to a superficial observer except when it comes up to the surface in the form of specific rules. Professor Winfield has divided the

1. See Friedmann —Legal Theory (1949) p. 291.

use of the doctrine of public policy under two heads: (a) the unconscious or half-conscious use of it and (b) the conscious application of it to the solution of legal problems (2). W. S. M. Knight in an illuminating article in *Law Quarterly Review* has dealt with the historical side of the doctrine and its influence in the formation of English law.(3)

2. At the very outset the first question that confronts one is, "What is Public Policy"? In an attempt to answer this one is reminded of the famous words of St. Augustine about the notion of time, "What is time? if no one asks me, I know; if I wish to explain to the one that asks, I know not."(4) It is this difficulty with any precise definition that has led some jurists to doubt the very existence of public policy outside the ordinary rules of law and legal rights and to assert that when a rule of so-called public policy clearly covers a case it is really a rule of law as much or as little as the rule which it overthrows; the nature of these rules should not be confused by terming them "public policy."(5) Lord Wright in his speech in *Fender v. Mildmay*(6) equated the settled rules of public policy with rules of common law and did not assign to them an especial category. His Lordship said:

"It is true that it has been observed that certain rules of public policy have to be moulded to suit new conditions of a changing world, but that is true of the principles of common law generally."(7).

3. One returns empty-handed from any investigation into the precise meaning of public policy. In *Egerton v. Brownlow*(8) Parke B. said, "Public policy is a vague and unsatisfactory term". Hayward J. in *Richardson v. Mellish*(9) called it "a very unruly horse." Lord Lindlay in *Janson v. Driefontein Mines Ltd.*(10) described it as "a very unstable and dangerous foundation on which to build". Kennedy L. J. in *Wilson v. Carley*,(11) Mc. Cardie J. in *Naylor v. Krainische*(12), and Lord Hal-

dane in *Rodriguez v. Speyer Bros.*(13) thought it to be of variable quality. In India the Supreme Court in *Gherulal Parakh v. Mohadeodas Maiya*(14) called it an illusive concept. After all these one is tempted to quote the following lines of Milton,

"yet from those flames
No light but darkness visible".

4. But in spite of the attempts of some jurists(15) to equate the rules of public policy with the ordinary rules of law, there can be no doubt, as was said by Lord Atkin in *Fender v. Mildmay*(16), that the doctrine exists. If the positive side of the investigation into the nature of the doctrine yields no tangible result, let us investigate the negative side. Let us see what public policy is not. Public policy is no ideal standard to which law ought to conform. Where an established rule of law or the words of a statute are unambiguous, no judge has any jurisdiction to alter them or to give them a strained meaning in order to make them conform to his idiosyncratic notion of what is good for the community. The Courts may not trespass into the province of the legislature. Public policy is also not the policy for the time being of the government. The point was specifically raised in an Indian case, *Srinivas Das v. Ram Chandra*(17). There was a contract for the purchase of sovereigns. At the material time there were two notifications of the Government of India relating to dealings in sovereigns. The contract was not directly hit by those notifications. But it was argued that the contract was opposed to the policy behind those notifications and was thus opposed to public policy. Hayward J. delivering the judgment of the Bench negatived the argument and said that public policy could not be said to comprehend all political policies from time to time, of the Government of India. Finally, public policy is disabling, it is scarcely enabling. It says what one must not do, it seldom says what one may do. Lord Sumner in *Rodriguez v. Speyer Bros.*(15) said:

"Considerations of public policy" are applied to private contracts or dispositions in order to disable, not to enable. I never heard of a legal disability from which a party or a transaction could be

13. (1919) A. C. 59.

14. AIR 1952 S C 781.

15. *Plowden* op. cit. *supra* note (2).

16. *Supra* note (6) at p. 12.

17. 1 L R 44 P 111 C—AIR 1929 B 211.

18. *Supra* note (13) at p. 123.

2. 42 *Harvard Law Review* 76.

3. 39 *Law Quarterly Review* 207.

4. *Confessions* XIV. Quoted by H. L. A. Hart in *The Concept of Law* (1961) p. 13.

5. See Julius Stone—*The Province and Function of Law* (1951) p. 424 et seq.

6. (1923) A. C. 1.

7. *Ibid* p. 78.

8. 41 L. C. 1.

9. 2 B. & C. 329.

10. (1902) A. C. 454.

11. (1902) 1 K. B. 719.

12. (1918) 1 K. B. 351.

relieved, because it would be good policy to do so."

Lord Wright in *Fender v. Mildmay*(19) said,

".....there are considerations of public interest which require the Courts to depart from the primary function of enforcing contracts and exceptionally to refuse to enforce them. Public policy in this sense is disabling."

5. It is in the fields of dispositions of property and contracts that the doctrine of public policy comes mostly into play. The rule against perpetuity and the rule against restraint of trade originated from this doctrine. In India both these rules have been incorporated into statute.(20) As has already been seen, an established rule of law cannot be invalidated on the ground that it is against public policy. The problem that at times confronts the Court is how to give effect to both. The Courts in England sometimes went to fantastic and even to ridiculous length in order to give effect to public policy without violating an established rule of law. Before the passing of the Gaming Acts, wagering contracts were valid and binding in England. Yet the Courts considered such contracts to be against public policy. The Courts very often avoided such contracts not by declaring that wagering contracts were void, which it was too late in the day to do, but indirectly. *Gilbert v. Sykes*(21) is an extreme example. A wagering contract on the duration of the life of Napoleon was held to be void not because it was a wagering contract, but because it gave the plaintiff an interest in keeping the King's enemy alive and also because it gave the defendant an interest in compassing his death by means other than lawful warfare.

6. The question then is when an agreement or a disposition of property is to be held to be against public policy? The Courts from time to time have enunciated certain rules as rules of public policy. Is an agreement or a disposition of property to be held to be void only when it comes under those rules or can the Courts invent new rules to meet new situations? This brings us to the much mooted question, namely, whether the category of public policy is closed? In India S. 23 of the Indian Contract Act

enacts that when the consideration or the object of an agreement is against public policy, the agreement is void. But this does not solve the problem. The Act does not define public policy, as indeed that cannot be done. The better opinion in England and also in India seems to be that although the category of public policy is not strictly closed, the Courts should use extreme reserve in inventing new heads. In *Janson v. Driefontein Consolidated Mines Ltd.*(22) Earl of Halsbury said, ".....I deny that any Court can invent a new head of public policy....." This view was thought by Lord Atkin in *Fender v. Mildmay*(23) to be too rigid. But His Lordship also said:

"On the other hand it fortifies the serious warning.... that the doctrine should be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds."

The law was restated by Asquith L. J. in *Mankland v. Jack Barclay Ltd.*(24) thus: "The Courts have again and again said, that where a contract does not fit into one or other of the pigeon-holes but lies outside the charmed circle, the Courts should use extreme reserve in holding a contract to be void as against public policy and should only do so when the contract is incontestably and on any view inimical to the public interest."

7. In India in some cases it was argued that since the Indian Contract Act by S. 23 makes any agreement void the consideration or the object of which is against public policy, the Courts in India should not follow the English practice and should not restrict themselves only to the recognised heads of public policy. But the Court negatived such arguments. In *Shrinibas Das v. Ram Chandra*(25) Hayward J. said:

"There is no substantial justification that the dicta of English Judges regarding public policy should be disregarded by Judges in India...." The same view was expressed in *Gopi Tihadi v. Gokhej Panda*.(26) In *Bhagwant Genuji v. Gangabisa Ramgopal*.(27) Wassoodew J. said, "The Courts cannot invent a new head of public policy."

22. *Supra* note (10) at p. 491.

23. *Supra* note (6) at p. 11.

24. (1951) 1 All E. R. 714.

25. *Supra* note (17).

26. 1 L R (1953) Cut 558=AIR 1954 Orissa 17.

27. 1 L R (1941) Bom 71=AIR 1940 Bom 369.

19. *Supra* note (6) at p. 38.

20. Section 114 of the Indian Succession Act, S. 14 of the Transfer of Property Act, S. 27 of the Indian Contract Act.

21. (1882) 16 East 50.

The Supreme Court exhaustively dealt with the doctrine in *Gherulal Parakh v. Mahadeodas Maiya*,⁽²⁵⁾ *Subba Rao J.* (as His Lordship then was) delivering the judgment of the Court said:

"... though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days."

8. All these warnings of the English and Indian Courts against the invention of new heads of public policy and their reluctance to do so must not make one forget that the public policy is by its very nature variable. It changes with the changing needs of the community and social values. Flexibility is inherent in the very idea of the doctrine. If the doctrine is to have any meaning at all, it must change with the changing times. Absolute rigidity is incompatible with public policy unless one agrees with *Julus Stone*⁽²⁹⁾ that there are no such things as rules of public policy, they are simply rules of law and consequently they can be added to, modified or repealed only in the same manner as in the case of other rules of law.

9. The Courts have also made conscious application of the doctrine to cases not involving a contract or a disposition of property. A comparatively recent case, *Nagle v. Filden*,⁽³⁰⁾ may be cited as an example. In that case the facts were that the stewards of Jockey club controlled horse-racing on the flat throughout Great Britain. Under their rules no person was allowed to train horses for racing at their meetings unless he held a license. It was the practice of the stewards to refuse license to a woman in any circumstances. The plaintiff, a woman, applied for but was refused a license. The plaintiff brought a suit for a declaration that the practice of the stewards to refuse license to a woman was against public policy and void and an injunction ordering the defendants to grant her a license. The Master ordered the striking out of the statement of claim on the ground that the same did not disclose a cause of action. The matter ultimately came before the Court of Appeal. It was held that the case could not be based on contract, but

that was no reason why the plaintiff should not have a cause of action. The practice of refusing a license to a woman was against public policy being in restraint of trade and on the statement of claim the plaintiff had a cause of action for the reliefs claimed. *Abbott v. Sulliman*⁽³¹⁾ and *Davis v. Carew Pole*⁽³²⁾ were referred to. In those two cases, although there were no contracts the Court granted reliefs on the ground of public policy. It was argued that those cases could be based on contracts. *Dennings M. R.* said that even if those cases were based on contracts, the contracts would be fictitious ones. There was no reason why the Courts should take recourse to a fictitious contract in order to grant relief on the ground of public policy.

10. The doctrine of public policy plays a predominant part in the United States in the interpretation and consideration of validity of statutes. The Fifth Amendment to the Constitution of America which was made applicable to the federal government provided that no person shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment made similar provision for the States. As far back as 1534 the Supreme Court interpreted the phrase, "due process of law", to mean "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions".⁽³³⁾ This interpretation has been adhered to by the Courts in America ever since. Professor Winfield has called this the application of the doctrine of public policy under a disguise.⁽³⁴⁾ In England and in India the scope for the application of the doctrine of public policy in the interpretation of statutes is limited. If the legislature in enacting a statute departs from the principles of public policy, it may in its wisdom do so and no Court in England or India can strike down the statute on that ground. But even apart from the unconscious or half-conscious use of the doctrine in the interpretation of statutes when the language is ambiguous, the doctrine has its conscious use too in this field. It is one of the recognised presumptions in the interpretation of statutes that when the meaning of a statute cannot be ascertained with certainty by looking at

25. *Supra* note (14).

26. *op. cit.* *supra* note (5).

30. (1926) 2 W. L. R. 1037.

31. (1922) 1 K. B. 157.

32. (1930) 2 All E. R. 214.

33. *Hurtado v. California*, (1891) 110 U. S. 516, 275=74 Law Ed. 232.

34. *op. cit.* *supra* note (2) at p. 152.

the language alone and the Court has to look for the so-called legislative intent, it is to be presumed that the legislature had in mind the general principles of public policy and did not intend to depart from them. (35) Public policy in relation to interpretation of statutes is also used in the sense of legislative purpose or the general policy of legislation. But public policy in that sense is not the subject of our discussion.

11. The literature on public policy is scanty in England, it is scantier still in India. This is so perhaps because of the nebulous character of the doctrine. Where the doctrine has crystallised into specific rules one can point to those rules and say that those are the rules of public policy but where it has not so crystallised the doctrine defies all attempts at definition. It has been variously described as "common right and reason", "law of nature", "rules for the good of the community", "a principle of judicial legislation or interpretation founded on the current

needs of the community". But all these are attempts at defining a thing which is essentially indefinable. More often than not it is like the air surrounding us which we feel and breathe but do not see. Judicial decisions are influenced by it, consciously in many cases, unconsciously or half-consciously in many more. Yet, as has been seen, it is not taken as the ideal standard to which law ought to be moulded.

"It is still a useful and important barometer of educated public feeling, but it is not a machine for altering its pressure. The value of the doctrine depends on the men who administer it". (36) In conclusion it can only be said that the doctrine of public policy, though indefinable, plays not an insignificant part in judicial decisions, there are boundaries within which it can exert its influence but the boundaries are not sharply drawn and fixed for all time and although it has taken some specific forms, it is not wholly contained within them.

35. Crawford—Statutory Construction p. 247.

36. Winfield op. cit. supra note (2) at p. 100.

SAFEGUARDS RELATING TO POLICE INVESTIGATION

(By Manindra Nath Das, District & Sessions Judge, *Burdwan, West Bengal.*)

In India ordinarily the police must apply to the Magistrate for issue of a search warrant but S. 165 of the Code of Criminal Procedure empowers a police officer making investigation in a case of cognizable offence to conduct search, without warrant, and effect seizure in course of the search. The law, however, at the same time provides certain safeguards. These are that the search must be necessary for the investigation. The offence must be such as the police officer in question is authorised to investigate, in other words, the offence must be a cognizable offence otherwise, as held in *Bahabal v. Tarak Nath Chowdhry* (1897) 1 L R 24 Cal 691 the police officer would be liable for damages. Again, there must exist reasonable grounds for believing that the article or document or such other thing required for the purpose of investigation would be found in a particular place where the search is sought to be made. There must, again, be circumstances present which would indicate that there would be undue delay in getting that particular thing in any way other than by such a search. The grounds of belief as to the necessity of search without warrant and the article or document or any other thing must be specified in the records of the police

before it proceeds for search. The powers, again, must be exercised only to avoid delay which might frustrate the object of the search. The above conditions have been laid down in S. 165 in order to caution the police officer against indiscriminate search. But omissions to comply with certain procedural portions of S. 165 may be overlooked as was done by the Oudh High Court in the case *Nangu v. Emperor*, reported in A I R 1935 Oudh 270, where it was found that the officer was acting in conscientious discharge of his duties.

2. In a case decided in October, 1969, by the Court of Appeal in England the facts were: In course of investigating a suspected murder, a police officer went to a house and seized a number of passports and detained the same apparently for the purpose of continuing the investigation. To be more precise, one Mastoor Begum came from Pakistan to England on 22-6-67 to join her husband Mohammed Sharif there. They lived together in a house in Oxford with the husband's parents. In November, 1968 the wife disappeared and no one had seen her since. In April, 1969, the husband left England. The husband's sister then came to England and stayed with the parents. The police made enquiries about

the disappearance of the wife which led them to the belief that she had been murdered. In June, 1969, two detective officers from Scotland Yard went to the house in Oxford, interrogated the residents and asked for their passports which were handed over to the officers and thus they took those passports and some letters away from the family on two different dates. Subsequently, in July, 1969, instructed by the father, the latter's solicitors demanded the passports back but the police refused to return them. Thereafter a writ petition was filed. In answer to the writ issued the police pleaded that they retained the passports and the letters because they believed that the enquiries that they were pursuing would lead to the apprehension of those concerned in the murder and that in the event of charges being preferred some of the passports and letters would be of evidential value and others of potential evidential value. Lord Denning, M. R. delivering the judgment of the Court — *Ghani v. Jones* (1969) All E R 1700—held that the police officer was not entitled to retain the passports and letters since it had not been shown that these were material evidence to prove the commission of the murder, nor had it been shown that the police had reasonable grounds for believing that the plaintiffs were in any way implicated in a crime or accessory to it; furthermore, the passports and letters had been kept long enough.

3. In coming to the above decision Lord Denning referred to and disapproved the dictum in *Elias v. Pasmore*, reported in (1934) All E R 384 where the seizure of certain seditious papers was justified by Horridge J. saying :

"the interests of the State must secure the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by any one.....".

Lord Denning held that these words went too far and very correctly observed:

"The common law does not permit police officers, or any one else, to ransack anyone's house, or to search for papers or articles therein, or to search his person, simply to see if he may have committed some crime or other. If the police officers should do so, they would be guilty of a trespass."

Lord Denning also doubted the correctness of the decision in *R. v. Waterfield* and *R. v. Lynn*, reported in (1963) All E R 659, where it was said :

"In the course of argument instances were suggested where difficulty might arise if a police officer were not entitled to prevent removal of an article which had been used in the course of a crime, for example, an axe used by a murderer and thrown away by him. Such a case can be decided it and when it arises . . ." In the *Lynn* and *Waterfield* case the car which was thought to be involved in causing an accident was sought to be seized as the police was anxious to examine it so as to obtain evidence of a collision with brick wall. But *Lynn* drove it away from the clutch of the police at the command of *Waterfield* and so they were charged with assaulting the police officer in the execution of his duty and convicted. Lord Denning observed that the police had reason to believe that *Lynn* and *Waterfield* were implicated in a crime of which the marks on the car might be most material evidence at the trial. If *Lynn* and *Waterfield* were allowed to drive the car away they might very well remove or obliterate all incriminating evidence. The learned Judge's comment on that case is this :

"The law should not allow wrongdoers to destroy evidence against them when it can be prevented. Test it by an instance put in argument. The robbers of a bank "borrow" a private car and use it in their raid, and escape. They abandon it by the roadside. The police find the car, i.e. the instrument of the crime, and went to examine it for finger-prints. The owner of the "borrowed" car comes up and demands the return of it. He says he will drive it away and not allow them to examine it. Cannot the police say to him: "Nay, you cannot have it until we have examined it"? I should have thought that they could. His conduct makes him look like an accessory after the fact, if not before it. At any rate it is quite unreasonable. Even though the raiders have not yet been caught, arrested or charged, nevertheless the police should be able to do whatever is necessary and reasonable to preserve the evidence of the crime."

Referring to yet another instance Lord Denning cites what another Judge on the Bench, *Edmunds Davis, L. J.*, had told him and that was to the effect that

"the great train robbers, when they were in hiding at *Leatherslade Farm*, used a saucer belonging to the farmer and gave the cat its milk. When seeking for the gang, before they were caught, the police officers took the saucer so as to examine it for finger-prints. Could the

farmer have said to them: "No it is mine. You shall not have it"? Clearly not. His conduct might well lead them to think that he was trying to shield the gang. At any rate it would have been quite unreasonable."

4. Concluding Lord Denning said: What is the principle underlying these instances? We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrong-doers and repressing crime. Honest citizens should help the police and not hinder them in their efforts to track down criminals. Balancing these interests, I should have thought that, in order to justify the taking of an article, when no man has been arrested or charged, these requisites must be satisfied;

(a) the police must have reasonable grounds for believing that a serious offence has been committed;

(b) the police must have reasonable grounds for believing that the article in question is either the fruit of the crime, or the instrument by which the crime was committed or is material evidence to prove commission of the crime;

(c) the police must have reasonable grounds to believe that the person in

possession of the article committed the crime or is implicated in it, or is accessory to it; or at any rate his refusal must be quite unreasonable;

(d) the police must keep the article, nor prevent its removal for any longer than is reasonably necessary to complete their investigations or preserve it for evidence; and

(e) the lawfulness of the conduct of the police must be judged at the time, and not by what happened afterwards.

5. Lawyers and Judges and more particularly the Magistracy in India would do well to draw inspiration from the above decision of Lord Denning who has flashed the beacon light for a new thinking on the subject in our country and we should in this connection keep in mind the observation of the Privy Council in *Emperor v. Nazir Ahmed* reported in AIR 1945 PC 18=46 Cri L J 413 where Lord Porter, delivering the judgment of the Board, said :

"The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case."

REVIEWS

LAW OF MEETINGS IN INDIA: By B. A. Masodkar, M. A. LL. B., Advocate, Supreme Court of India. The Lawyers Home, opposite old High Court Buildings, Indore 3. 1969 Edition. Pp. XL and 296, Price Rs. 20-00.

The Indian Constitution ensures individual freedom to everybody and it obviously embraces the right to hold meeting (Art. 19 (1) (b)). The subject of the law governing meetings is fast expanding and a wide-spread knowledge of it is highly desirable in a progressive country like India, especially in the conduct of industrial and corporate activities. The book under review, which is expected to be of help to the practising lawyer and the professor of law, has eight chapters, of which the first two deal with freedom under the Constitution and the meaning and concept of meeting. Public meetings, meetings of legislative bodies, company meetings, co-operative society meetings and meetings of local bodies are dealt with in the next five chapters, while the last one is devoted to the meetings of

other bodies such as societies, clubs, and trade unions. The table of contents gives the chapter headings as well as the details of the sectional sub-heads with their appropriate paragraph numbers.

The book outlines the main requirements of the meetings and dwells on the nature of the body which meets; it examines its legal personality and the legal consequences of its actions. In the three chapters on company meetings, meetings of local bodies and co-operative societies, the nature of a corporation is examined at length. The mention of rules and bye-laws is similarly to be found in these chapters, and particularly in the chapter on co-operative society meetings. Topics like "notice", "Power to adjourn", etc. are respectively considered in each chapter with reference to the various topics discussed.

So far as public meetings are concerned, it is the duty of the police or executive authority to maintain law or order at all public places; their duty enjoins on them to be present and take suitable steps to

preserve the peace. Concisely summarising the position, the author observes :

"The right of public meeting has to be exercised only for lawful purposes and is subject to valid legislation. Everyone who participates in such meetings has a different or definite liability. It is not only the organiser, or chairman, or convener or speaker, but also others gathered in such meetings who must be aware of the law involved and the purpose of such meetings. They are expected to behave in a manner which will tend to promote the prevalence of peace. The freedom of expression at such a meeting has to be used with caution and care, the expressions being circumscribed by the laws of defamation, penal and election laws."

Board meetings have been considered in the chapters dealing with company meetings and co-operative society meetings. As is well known, company meetings occupy a special place and a large body of case law has grown around it. Severe statutory restrictions and limitations have to be observed. Although the basic principles are similar to corporation meetings, there are several special features which have been noted at appropriate places. In England and several Commonwealth Countries the Court may summon a meeting of the company, where it is impracticable to be summoned in accordance with the articles of association.

The chapterwise topic index, with its respective paragraph number and page number, is useful. There is also a table of cases, with their page numbers and references to their sources.

There is a full sheet of errata appended, but it is clear that the printer's devil has been rather too busy. R.S.S.

LEGAL ESSAYS Vol. I: By Prof. M. Krishna Nair, M. A., LL. M. with a Foreword by R. Saekaradasan Thampi, Principal, Law College, Trivandrum, Janatha Book Stall, Near P. M. G.'s Office, Trivandrum. Pp. 120. Price 8-00.

Prof. Krishna Nair has brought together in a single volume fifteen of the articles contributed by him over a decade to different law college magazines, law reports and research journals.

The articles cover a very wide range of subjects and deal, among other things, with the nature and scope of self-defence in international law, the test of foreseeability, mistake of personality in a contract, the presumption of legitimacy, doctrine of mutuality and specific performance of a

contract, presumption relating to birth and death, and the position of mistake in the law of contract. Other articles on governmental liability for torts committed by its servants, administrative law, Act of State, legal aid and reflections on legal education would seem to deserve more than a passing notice.

The question of the liability of Government for torts committed by its servants is becoming important. It is becoming increasingly necessary to redefine the responsibility of a State for torts committed by its servants especially in view of the fact that even the basic concept of the nature and functions of a State has undergone a radical change. Octopus like the State has been interfering more and more in every walk of life and that inevitably leads to some sort of intrusion into the field of one's private rights. In this view Prof. Krishnan Nair has ably tried to explain the liability of Government. Allied in importance to the foregoing is the question of administrative law. Because of the advent of administrative justice even the traditional concept of "rule of law" has changed in Britain. The numerous writ petitions pending in the various High Courts of India is taken to indicate the deficiencies inherent in meting out administrative justice. In France of course there is a separate department for administering *Droit Administratif*. In this country on the other hand, the need is ever more pressing for training up executive officers to administer fair and ready justice to the citizens. Recently a Court in India regretted the fact that "allegations of malpractices and of improper motives on the part of those in power are frequently made and their frequency has increased in recent times." The fact seems to be that, when the Courts try to impose some limits upon the exercise of the administration's discretionary powers, they lay themselves to accusations of interference in the merits of administrative decisions. Prof. Krishnan Nair does well, therefore, to analyse the nature and scope of Administrative law.

The doctrine of "Act of State" has been a general defence to certain claims against the State in India as well as elsewhere. Acts of State are not all of one kind as their nature and consequences might differ in a variety of ways and such difference might affect the position of Courts with regard to them. The Professor attempts in one of his articles to examine the nature and extent of the doctrine with special

reference to post-Constitutional decisions. In this connection the author refers to the case of *Secretary of State in Council for India v. Kamachee Boya Sahaba*. The Rajah of Tanjore, an independent sovereign but under the protection of the East India Company by virtue of treaties, died without leaving a male issue. The East India Co. in exercise of their sovereign power and in trust for the British Government, seized the Tanjore Raj and the whole of the property of the deceased Rajah as an escheat, on the ground that the dignity of the Raj was extinct for want of a male heir and that the property of the late Rajah lapsed to the British Government. It was held by the Privy Council that, as the seizure was made by the British Government acting as a sovereign power through its delegate the East India Co., it was an act of State, and the Municipal Court had no jurisdiction to enquire into its propriety.

The other articles on legal aid and legal education in the volumes are also well worth study. The Preamble to the Constitution of India speaks of justice, social, economic and political, and of equality of status and opportunity. Article 14 provides that the State shall not deny to any person equality before the law or equal protection of the law. But our law makes access to law Courts dependent upon the payment of fees and renders assistance by skilled lawyers indispensable in several cases. If therefore we do not make provisions for legal aid to those who are unable to meet the expenses, the provision for equality must remain a dead letter. Prof. Nair gives a summary of the seven recommendations made by the Law Commission in order to make legal aid available to the poor and indigent. The Law Commission was appointed to revise the statute law of India and suggest ways and means of improving the system of judicial administration. Equally interesting is the article on legal education. It is well known that in recent years the curriculum for legal studies has been subject to far-reaching changes. In Trivandrum the three years LL. B. course has replaced the two-years B. L. course and it is said that several of the suggestions given in the article, "Reflections on Legal Education," published in 1960, now find a place in the newly introduced scheme of studies.

Prof. Nair has dealt with intricate problems of law in a simple and lucid manner and it is hoped that it would stimulate interest in the deeper study of the laws

dealt with among students of law and research workers.
R.S.S.

ANNUAL SURVEY OF COMMONWEALTH LAW 1968. Edited By H. W. R. Wade, Q.C.L.L.D., D. C. L. Butterworth and Co. (Publishers) Ltd., 88 Kingsway, London W. C. 2, 1969. Pp. Lxxxiv and 857. Price £ 8.80 (By Post 4/6 extra).

This is the fourth volume of the Annual Survey of Commonwealth Law, which has aimed, as before, at a high level of commentary on a very wide range of legal decisions, enactments and other legal events throughout the British Commonwealth. It has been prepared under the auspices of the British Institute of International and Comparative Law and the Faculty of Law in the University of Oxford and covers the period from July 1967 to June 1968. In the classification of material from India the Editor has been assisted by Mr. B. K. Chandrasekhar, B.A., B.L. (Mysore) LL.M. (Leeds).

The volume, to which a distinguished array of lawyers and professors have contributed, leads off with an article on Constitutional Law, which opens with an introduction and covers the United Kingdom and the Commonwealth countries: Canada, Australia, New Zealand, India, Pakistan, Ceylon, Malaysia, Singapore and other Commonwealth territories. The Indian section in this article is sub-divided into four sub-sections, viz., the Collapse among the States, Legislation, Judicial Decisions and the available Literature on the subject. Fundamental Rights and Civil Liberties and Administrative Law form the subject of the next two chapters while others follow on Criminal Law and Procedure, Torts, Contract, Real Property, Trusts, Succession, Industrial Property and Commercial Law.

The other branches of law have not been ignored. There are separate chapters on Company Law and Partnership, monopolies and restrictive Practices, Taxation, Labour Law, Civil Procedure, Family Law, Maritime Law and Conflict of Laws. Most of these chapters have each an informing introduction and detailed particulars of the literature available for further reference.

From the wide gamut of matters governed by laws in the countries, dealt with in the book, may be selected, at random, one or two which have been of topical interest in India. The courts in this country have often had to deal with petitions asking the court to appoint an inspector to

investigate the affairs of a company. In an Indian case it was held that strong evidence is required to justify the court in making an appointment and that the court should not act on mere suspicion. As a matter of fact it was held that the court could quash an appointment of inspectors on the ground that there was insufficient evidence of fraud, misfeasance or other misconduct (p. 536).

Another matter referred to in the book is the protection of our civil liberties and fundamental rights. During the continuance of the Indian emergency, which was declared to have expired in January 1968, it was difficult for citizens to shelter behind some of the fundamental right provisions of the Constitution, because of the use made by Government of the power to suspend for that period the right of any person to move the courts for the enforcement of fundamental rights. Yet a Madras decision held that only those fundamental rights directly dealt with by any such suspensory order are covered, so that the court's power to interfere is impeded only to that extent (p. 137).

The courts in India have been vigilant protectors of the civil rights of the citizen. A Madhya Pradesh State Act, passed before the proclamation of emergency, which empowered the Government to order a person to reside where he ordinarily does or to compel him to go and reside elsewhere in the State was held by the Supreme Court to be invalid, as it sought to impose unreasonable restrictions on the freedom of the individual. It is significant that even the administration is beginning to play some part in this matter of protection of liberties. Sheikh Abdullah, Prime Minister of Kashmir, when India became independent in 1947, was released in January 1963 after serving nearly 14 years as a political prisoner without trial (pp. 137-139).

There have been proposals in the air to take away the fundamental right to property guaranteed by the Constitution. This move as well as the move to abolish the privy purses and privileges of the Rulers show which way the wind blows. In this context has come a very encouraging decision of the Full Bench of the Supreme Court. It was directly concerned with the interpretation of the guarantees of fundamental rights by the Constitution. These guarantees are subject to limitations contained in the Constitution itself,

but it provides that the State may not make any law which takes away or abridges the rights so conferred and any law made in contravention would to that extent be void. On two previous occasions the Supreme Court had held that Parliament had the right to amend the fundamental right provision of the constitution and certain amendments, purporting to validate Land Reform Acts which had been declared to be unconstitutional as being inroads on the right to property had been made by Parliament on that basis. In the latest case, however, (*Golak Nath v. State of Punjab*, A I R 1967 S C 1643) the Court decided by a majority that the fundamental rights were outside the amendatory process and that the Parliament had no power to amend any provisions of Part 3 of the Constitution so as to take away or abridge the rights mentioned therein. The Court considered that the two previous decisions which had conceded to Parliament the power to amend these provisions, had been made on a mistaken view of the law, but they adopted a compromise solution to the difficulties that may be caused by their decision viz., by introducing the doctrine of 'prospective overruling' so that the ruling would only have prospective and not retrospective effect upon the amendments. This would seem to ensure that for the future, the power of Parliament to modify and restrict fundamental rights is restricted to temporary suspension (as during emergencies) and to modifying their application (as to the armed forces). Any other abridgment of fundamental rights, says the author, would require the formation of another Constitutional Assembly, convoked by Parliament (pp. 150-151).

The value and utility of the volume under review have been enhanced by a table of cases, a table of statutes, subject index, and territorial index. The wide sweep of the knowledge now presented was available till recently only by searching through a great hulk of unclassified material. There is no denying the fact that this is an outstanding volume on Commonwealth law, providing a comprehensive coverage of useful authorities and comparisons from other Commonwealth countries.

The get-up and printing of the publication is in keeping with the standards which the reader has come to associate with the House of Butterworths.

R.S.S.

the view that the principle specified by the law for determination of compensation is beyond the pale of challenge, if it is relevant to the determination of compensation and is a recognised principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired. On the application of the view expressed in *P. Vajravelu Mudaliar's case*, (1965) 1 SCR 614= (AIR 1965 SC 1017) or in *Shantilal Mangaldas's case*, AIR 1969 SC 634, the Act, in our judgment, is liable to be struck down as it fails to provide to the expropriated banks compensation determined according to relevant principles. Section 4 of the Act transfers the undertaking of every named bank to and vests it in the corresponding new bank. Section 6 (1) provides for payment of compensation for acquisition of the undertaking, and the compensation is to be determined in accordance with the principles specified in the Second Schedule. Section 6 (2) then provides that though separate valuations are made in respect of the several matters specified in Sch. II of the Act, the amount of compensation shall be deemed to be a single compensation. Compensation being the equivalent in terms of money of the property compulsorily acquired, the principle for determination of compensation is intended to award to the expropriated owner the value of the property acquired. The science of valuation of property recognizes several principles or methods for determining the value to be paid as compensation to the owner for loss of his property; there are different methods applicable to different classes of property in the determination of the value to be paid as recompense for loss of his property. A method appropriate to the determination of value of one class of property may be wholly inappropriate in determining the value of another class of property. If an appropriate method or principle for determination of compensation is applied, the fact that by the application of another principle which is also appropriate, a different value is reached, the Court will not be justified in entertaining the contention that out of the two appropriate methods, one more generous to the owner should have been applied by the Legislature.

101. We are unable to hold that a principle specified by the Parliament for determining compensation of the pro-

perty to be acquired is conclusive. If that view be accepted, the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process, the constitutional guarantee of the right to compensation may be severely impaired. The principle specified must be appropriate to the determination of compensation for the particular class of property sought to be acquired. If several principles are appropriate and one is selected for determination of the value of the property to be acquired, selection of that principle to the exclusion of other principles is not open to challenge, for the selection must be left to the wisdom of the Parliament.

102. The broad object underlying the principle of valuation is to award to the owner the equivalent of his property with its existing advantages and its potentialities. Where there is an established market for the property acquired the problem of valuation presents little difficulty. Where there is no established market for the property, the object of the principle of valuation must be to pay to the owner for what he has lost, including the benefit of advantages present as well as future, without taking into account the urgency of acquisition, the disinclination of the owner to part with the property, and the benefit which the acquirer is likely to obtain by the acquisition. Under the Land Acquisition Acts compensation paid is the value to the owner together with all its potentialities and its special adaptability if the land is peculiarly suitable for a particular use, if it gives an enhanced value at the date of acquisition.

103. The important methods of determination of compensation are — (i) market value determined from sales of comparable properties, proximate in time to the date of acquisition, similarly situate, and possessing the same or similar advantages and subject to the same or similar disadvantages. Market value is the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase; (ii) capitalization of the net annual profit out of the property at a rate equal in normal cases to the return from gilt-edged securities. Ordinarily value of the property may be determined by capitalizing the net annual value obtainable in the market at the date of the notice of acquisition, (iii) where the property is a house, expenditure likely to be incurred for constructing a similar house, and re-

duced by the depreciation for the number of years since it was constructed; (iv) principle of reinstatement, where it is satisfactorily established that reinstatement in some other place is bona fide intended, there being no general market for the property for the purpose for which it is devoted (the purpose being a public purpose) and would have continued to be devoted, but for compulsory acquisition. Here compensation will be assessed on the basis of reasonable cost of reinstatement; (v) when the property has outgrown its utility and it is reasonably incapable of economic use, it may be valued as land plus the break-up value of the structure. But the fact that the acquirer does not intend to use the property for which it is used at the time of acquisition and desires to demolish it or use it for other purpose is irrelevant; and (vi) the property to be acquired has ordinarily to be valued as a unit. Normally an aggregate of the value of different components will not be the value of the unit.

104. These are, however, not the only methods. The method of determining the value of property by the application of an appropriate multiplier to the net annual income or profit is a satisfactory method of valuation of lands with buildings, only if the land is fully developed, i.e., it has been put to full use legally permissible and economically justifiable, and the income out of the property is the normal commercial and not a controlled return or a return depreciated on account of special circumstances. If the property is not fully developed, or the return is not commercial the method may yield a misleading result.

105. The expression "property" in Article 31 (2) as in Entry 42 of List III is wide enough to include an undertaking, and an undertaking subject to obligations may be compulsorily acquired under a law made in exercise of power under Entry 42, List III. The language of the amended clause (2) of Article 31 compared with the language of the clause before it was amended by the Constitution (Fourth Amendment) Act leaves no room for doubt. Before it was amended, the guarantee covered the acquisition of "property movable or immovable including, any interest in, or in any company owning any commercial or industrial undertaking". In the amended clause only the word "property" is used, deleting the expressions which did not add to its connotation. But when an undertak-

ing is acquired as a unit the principles for determination of compensation must be relevant and also appropriate to the acquisition of the entire undertaking. In determining the appropriate rate of the net profits the return from gilt-edged securities may, unless it is otherwise found unsuitable, be adopted.

106. Compensation to be determined under the Act is for acquisition of the undertaking, but the Act instead of providing for valuing the entire undertaking as a unit provides for determining the value of some only of the components, which constitute the undertaking, and reduced by the liabilities. It also provides different methods of determining compensation in respect of each such component. This method for determination of compensation is prima facie not a method relevant to the determination of compensation for acquisition of the undertaking. Aggregate of the value of components is not necessarily the value of the entirety of a unit of property acquired, especially when the property is a going concern, with an organized business. On that ground alone, acquisition of the undertaking is liable to be declared invalid, for it impairs the constitutional guarantee for payment of compensation for acquisition of property by law. Even if it be assumed that the aggregate value of the different components will be equal to the value of the undertaking of the named bank as a going concern the principles specified, in our judgment, do not give a true recompense to the banks for the loss of the undertaking. Schedule II by clause (1) provides:

"The compensation $\times \times \times$ in respect of the acquisition of the undertaking thereof shall be an amount equal to the sum total of the value of the assets of the existing bank as on the commencement of this Act, calculated in accordance with the provisions of Part I, less the sum total of the liabilities computed and obligations of the existing bank calculated in accordance with the provisions of Part II."

For the purpose of Part I "assets" mean the total of the heads (a) to (h) and the expression "liabilities" is defined as meaning the total amount of all outside liabilities existing at the commencement of the Act and contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources. Compensation payable to the named banks is accordingly the aggregate of some of the compo-

nents of the undertaking, reduced by the aggregate of liabilities determined in the manner provided in the Schedule. It appears clear that in determining the compensation for undertaking — (i) certain important classes of assets are omitted from the heads (a) to (h); (ii) the method specified for valuation of lands and buildings is not relevant to determination of compensation, and the value determined thereby in certain circumstances is illusory as compensation; and (iii) the principle for determination of the aggregate value of liabilities is also irrelevant.

107. The undertaking of a banking company taken over as a going concern would ordinarily include the goodwill and the value of the unexpired period of long-term leases in the prevailing conditions in urban areas. But goodwill of the banks is not one of the items in the assets in the Schedule, and in Cl. (f) though provision is made for including a part of the premium paid in respect of leasehold properties proportionate to the unexpired period, no value of the leasehold interest for the unexpired period is given.

108. Goodwill of a business is an intangible asset: it is the whole advantage of the reputation and connections formed with the customers together with the circumstances making the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years or in excess of normal amounts because of its reputation, location and other features: *Trego v. Hunt*, 1896 AC 7. Goodwill of an undertaking therefore is the value of the attraction to customers arising from the name, and reputation for skill, integrity, efficient business management, or efficient service.

109. Business of banking thrives on its reputation for probity of its dealings, efficiency of the service it provides, courtesy and promptness of the staff, and above all the confidence it inspires among the customers for the safety of the funds entrusted. The Reserve Bank, it is true, exercises stringent control over the transactions which banks carry on in India. Existence of these powers and exercise thereof may and do ensure to a certain extent the safety of the funds entrusted to the Banks. But the business which a bank attracts still depends upon the confidence which the depositor reposes in the management. A bank is not

like a grocer's shop: a customer does not extend his patronage to a bank merely because it has a branch easily accessible to him. Outside the public sector, there are 50 Indian scheduled banks, 13 foreign banks, besides 16 non-scheduled banks. The deposits in the banks not taken over under the Act range between Rs. 400 crores and a few lakhs of rupees. Deposits attracted by the major private commercial banks are attributable largely to the personal goodwill of the management. The regulatory provisions of the Banking Companies Act and the control which the Reserve Bank exercises over the banks may to a certain extent reduce the chance of the resources of the banks being misused, but a banking company for its business still largely depends upon the reputation of its management. We are unable to agree with the contention raised in the Union's affidavit that a banking establishment has no goodwill, nor are we able to accept the plea raised by the Attorney-General that the value of the goodwill of a bank is insignificant and it may be ignored in valuing the undertaking as a going concern.

110. Under clause (f) of Schedule II provision is made for valuing a proportionate part of the premium paid in respect of all leasehold properties to the unexpired duration of the leases, but there is no provision made for payment of compensation for the unexpired period of the leases. Having regard to the present day conditions it is clear that with rent control on leases operating in various States the unexpired period of leases has also a substantial value.

111. The value determined by excluding important components of the undertaking, such as the goodwill and value of the unexpired period of leases, will not, in our judgment, be compensation for the undertaking.

112. The other defects in the method of valuation, it was claimed by Mr. Palghivala, are the inclusion of certain assets such as cash, choses in action and similar assets, which under the law are not regarded as capable of being acquired as property. This inclusion, it is contended, vitiates the scheme of acquisition. Under clause (a) of Part I—Assets — the amount of cash in hand and with the Reserve Bank and the State Bank of India (including foreign currency notes which shall be converted at the market rate of exchange) are liable to be included. Cash in hand is not an item which is

capable of being compulsorily acquired, not because it is not property, but because taking over the cash and providing for acquisition thereof, compensation payable at some future date amounts to levying a "forced loan" in the guise of acquisition. This Court in *State of Bihar v. Sir Kameshwar Singh of Darbhanga*, 1952 SCR 889 = (AIR 1952 SC 252) held that cash and choses in action are not capable of compulsory acquisition. That view was repeated by this Court in *Bombay Dyeing and Manufacturing Co., Ltd. v. State of Bombay*, 1958 SCR 1122 = (AIR 1958 SC 328) and *Ranojirao Shinde's case*, (1968) 3 SCR 489 = (AIR 1968 SC 1053). We do not propose to express our opinion on the question whether in adopting the method of determination of compensation, by aggregating the value of assets which constitute the undertaking, the rule that cash and choses in action are incapable of compulsory acquisition may be applied.

113. Under Item (e) the value of any land or buildings is one of the assets. The first Explanation provides that for the purpose of this clause (clause (e)) "value" shall be deemed to be the market value of the land or buildings, but where such market value exceeds the "ascertained value" determined in the manner specified in Explanation 2, the value shall be deemed to mean such "ascertained value". The value of the land and buildings is therefore the market value or the "ascertained value" whichever is less. Under Explanation 2, clause (1) "ascertained value" in respect of buildings which are wholly occupied on the date of the commencement of the Act is twelve times the amount of the annual rent or the rent for which the building may reasonably be expected to be let from year to year reduced by certain specific items. This provision, in our judgment, does not lay down a relevant principle of valuation of buildings. In the first place, making a provision for payment of capitalised annual rental at twelve times the amount of rent cannot reasonably be regarded as payment of compensation having regard to the conditions prevailing in the money market. Capitalization of annual rental which is generally based on controlled rent under some State Acts at rates pegged down to the rates prevailing in 1940 and on the footing that investment in buildings yields $8\frac{1}{3}$ per cent. return furnishes a wholly misleading result which cannot be called compensation.

Value of immovable property has spiralled during the last few years and the rental which is mostly controlled does not bear any reasonable relation to the economic return from property. If the building is partly occupied by the Bank itself and partly by a tenant, the ascertained value will be twelve times the annual rental received, and the rent for which the remaining part occupied by the Bank may reasonably be expected to be let out. By the Act the corresponding new banks take over vacant possession of the lands and buildings belonging to the named banks. There is in the present conditions considerable value attached to vacant business premises in urban areas. True compensation for vacant premises can be ascertained by finding out the market value of comparable premises at or about the time of the vesting of the undertaking and not by capitalising the rental — actual or estimated. Vacant premises have a considerably larger value than business premises which are occupied by tenants. The Act instead of taking into account the value of the premises as vacant premises adopted a method which cannot be regarded as relevant. *Prima facie*, this would not give any reliable basis for determining the compensation for the land and buildings.

114. Again in determining the compensation under clause (e), the annual rent is reduced by several outgoings and the balance is capitalized. The first item of deduction is one-sixth of the amount thereof on account of maintenance and repairs. Whether the building is old or new, whether it requires or does not require maintenance or repairs $16\frac{2}{3}$ per cent. of the total amount of rent is liable to be deducted towards maintenance and repairs. The vice of items (v) and (vi) of clause (1) of Explanation 2 is that they provide for deduction of a capital charge out of the annual rental which according to no rational system of valuing property by capitalization of the rental method is admissible. Under item (v) where the building is subject to a mortgage or other capital charge, the amount of interest on such mortgage or charge, and under item (vi) where the building has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital are liable to be deducted from the annual rental for determining the ascertained value. These encumbrances are also liable to be deducted under the head "liabilities". A

simple illustration may suffice to pinpoint the inequity of the method. In respect of a building owned by a bank of the value of Rs. 10 lakhs and mortgaged for say Rs. 7,50,000 interest at the rate of 8 per cent (which may be regarded as the current commercial rate) would amount to Rs. 60,000. The estimated annual rental which would ordinarily not exceed Rs. 60,000 has under clause (e) to be reduced in the first instance by other outgoing. The assets would show a minus figure as value of the building, and on the liabilities side the entire amount of mortgage liability would be debited. The method provided by the Act permits the annual interest on the amount of the encumbrance to be deducted before capitalization, and the capitalized value is again reduced by the amount of the encumbrance. In effect, a single debt is, in determining the compensation debited twice, first in computing the value of assets, and again, in computing the liabilities.

115. We are unable to accept the argument raised by the Attorney-General that under the head "liabilities" in Part II only those mortgages or capital charges in respect of which the amount has fallen due are liable to be included on the liabilities side. Under the head "liabilities" the total amount of all outside liabilities existing at the commencement of the Act, and all contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources on or after the date of commencement of the Act will have to be included. When even contingent liabilities are included in the total amount of all outside liabilities, a mortgage debt or capital charge must be taken into account in determining the liabilities by which the aggregate of the value of the assets is to be reduced, even if the period of the mortgage or capital charge has not expired. The liability under a mortgage or capital charge exists whether the period stipulated under the deed creating the encumbrance has expired or not.

116. Under Cl. (2) of Expln. 2, it is provided that in the case of buildings which are partly occupied, the valuation shall be made on the basis of the "plinth area" occupied and multiplying it by the proportion which that area bears to the total plinth area of the buildings. The use of the expression "plinth area" appears to be unfortunate. What was intended is "floor area". If the expression "plinth

area" is understood to mean "floor area" no fault may be found with the principle underlying Clause (2) of Explanation 2.

117. Under Clause (3) of Explanation 2, where there is open land which has no building erected thereon, or which is not appurtenant to any building, the value is to be determined "with reference to the prices at which sales or purchases of similar or comparable lands have been made during the period of three years immediately preceding the date of the commencement of" the Act. Whereas the value of the open land is to be the market value, the value of the land with buildings to be taken into account is the value determined by the method of capitalization of annual rent or market value whichever is less. The Explanation does not take into account whether the construction on the land fully develops the land, and the rental is economic.

118. We are, therefore, unable to hold that item (e) specifies a relevant principle for determination of compensation for lands and buildings. It is not disputed that the major Banks occupy their own buildings in important towns, and investments in buildings constitute a part of the assets of the Banks which cannot be treated as negligible. By providing a method of valuation of buildings which is not relevant the amount determined cannot be regarded as compensation.

119. We have already referred to item (f) under which a proportionate part of the premium paid is liable to be included in the assets but not the value for the unexpired period of the leases. Item (h) provides for the inclusion of the market or realizable value, as may be appropriate, of other assets appearing on the books of the bank, no value being allowed for capitalized expenses, such as share-selling commission, organizational expenses and brokerage, losses incurred and similar other items.

120. Mr. Palkhivala urged that certain assets which do not appear in the books of account still have substantial value and they are omitted from consideration in computing the aggregate of the value of assets. Counsel said that every bank is permitted to have secret reserve and those secret reserves may not appear in the books of account of the banks. We are unable to accept that contention. A banking company is entitled to withhold from the balance-sheet its secret reserve, but there must be some account in res-

pect of these secret reserves. The expression "books of the Bank" may not be equated with the balance-sheets or the books of account only.

121. The expression "liabilities" existing at the commencement of the Act includes all debts due or to become due. Under the head "liabilities" contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources on or after the date of commencement of the Act are to be debited. The clause is badly drafted. The present value of the contingent liabilities at the date of the acquisition and not the total contingent liabilities may on any rational system of accounting be debited against the aggregate value of the assets. For instance, if a banking company is liable to pay to its employees gratuity, the present value of the liability to pay gratuity at the date of the acquisition made on actuarial calculation may alone be debited, and not the total face value of the liability.

122. The Attorney-General contended that even if the goodwill of a banking company is of substantial value, and inclusion of the goodwill is not provided for, or the value of buildings and lands is not the market value or that there is a departure from recognized principles for determination of compensation, the deficiencies in the Act result merely in inadequate compensation within the meaning of Article 31 (2) of the Constitution and the Act cannot on that account be challenged as invalid. We are unable to agree with that contention. The constitution guarantees a right to compensation—an equivalent in money of the property compulsorily acquired. That is the basic guarantee. The law must therefore provide compensation, and for determining compensation relevant principles must be specified; if the principles are not relevant the ultimate value determined is not compensation.

123. The Attorney-General also contended that if in consequence of the adoption of the method of valuation, an amount determined as compensation is not illusory, the Courts have no jurisdiction to question the validity of the law, unless the law is expropriatory, for, in the ultimate analysis the grievance relates to the adequacy of compensation. He contended that the exclusion of one of the elements in fixing the compensation, or application of a principle which is not

a recognized principle, results in inadequate price, and is not open to challenge, and relied in support upon the observations made in *P. Vajravelu Mudaliar's case*, (1965) 1 SCR 614 = (AIR 1965 SC 1017) (at p. 631 of SCR) = (at p. 1020 of AIR) which we have already quoted in another context in relation to the challenge to the validity of the Land Acquisition (Madras Amendment) Act, 1961, which excluded in determining compensation the potential value of the land. The Court held that exclusion of potential value amounted to giving inadequate compensation and was not a fraud on power. The principle of that case has no application when valuation of an undertaking is sought to be made by breaking it up into several heads of assets and important heads are excluded and others valued by the application of irrelevant principles, or principles of which the only claim for acceptance is their novelty. The Constitution guarantees that the expropriated owner must be given the value of his property, i. e., what may be regarded reasonably as compensation for loss of the property and that such compensation should not be illusory and not reached by the application of irrelevant principles. In our view, determination of compensation to be paid for the acquisition of an undertaking as a unit after awarding compensation for some items which go to make up the undertaking and omitting important items amounts to adopting an irrelevant principle in the determination of the value of the undertaking, and does not furnish compensation to the expropriated owner.

124. The Attorney-General contended that the total value of the undertaking of the named banks even calculated according to the method provided in Schedule II exceeded the total market value of the shares, and on that account there is no ground for holding that the law providing for compensation denies to the shareholders the guarantee of the right to compensation under Article 31 (2). But there is no evidence on this part of the case.

125. Compensation may be provided under a statute, otherwise than in the form of money: it may be given as equivalent of money, e. g., a bond. But in judging whether the law provides for compensation, the money value at the date of expropriation of what is given as compensation, must be considered. If the rate of interest compared with the ruling commercial rate is low, it will

reduce the present value of the bond. The Constitution guarantees a right to compensation—an equivalent of the property expropriated and the right to compensation cannot be converted into a loan on terms which do not fairly compare with the prevailing commercial terms. If the statute in providing for compensation devises a scheme for payment of compensation by giving it in the form of bonds, and the present value of what is determined to be given is thereby substantially reduced, the statute impairs the guarantee of compensation.

126. A scheme for payment of compensation may take many forms. If the present value of what is given reasonably approximates to what is determined as compensation according to the principles provided by the statute, no fault may be found. But if the law seeks to convert the compensation determined into a forced loan, or to give compensation in the form of a bond of which the market value at the date of expropriation does not approximate the amount determined as compensation, the Court must consider whether what is given is in truth compensation which is inadequate, or that it is not compensation at all. Since we are of the view that the scheme in Schedule II of the Act suffers from the vice that it does not award compensation according to any recognized principles, we need not dilate upon this matter further. We need only observe that by giving to the expropriated owner compensation in bonds of the face-value of the amount determined maturing after many years and carrying a certain rate of interest, the constitutional guarantee is not necessarily complied with. If the market value of the bonds is not approximately equal to the face-value, the expropriated owner may raise a grievance that the guarantee under Article 31 (2) is impaired.

127. We are of the view that by the method adopted for valuation of the undertaking, important items of assets have been excluded, and principles some of which are irrelevant and some not recognised are adopted. What is determined by the adoption of the method adopted in Schedule II does not award to the named banks compensation for loss of their undertaking. The ultimate result substantially impairs the guarantee of compensation, and on that account the Act is liable to be struck down.

IV. Infringement of the guarantee of freedom of trade, commerce and intercourse under Article 301:—

128. In the view we have taken the provisions relating to determination and payment of compensation for compulsory acquisition of the undertaking of the named banks impair the guarantee under Article 31 (2) of the Constitution, we do not deem it necessary to decide whether Act 22 of 1969 violates the guarantee of freedom of trade, commerce and intercourse in respect of the (1) agency business; (2) business of guarantee and indemnity carried on by the named banks.

V. Validity of the retrospective operation given to Act 22 of 1969 by S. 1 (2) and Section 27:—

129. The argument raised by Mr. Palkhivala that, even if the Act is within the competence of the Parliament and does not impair the fundamental rights under Articles 14, 19(1)(f) and (g), and 31(2) in their prospective operation, Section 1(2) and S. 27(2), (3) and (4) which give retrospective operation as from July 19, 1969, are invalid, need not also be considered.

130. Nor does the argument about the validity of sub-sections (1) and (2) of Section 11 and Section 26 of the Act survive for consideration.

131. Accordingly we hold that—

(a) the Act is within the legislative competence of the Parliament; but

(b) it makes hostile discrimination against the named banks in that it prohibits the named banks from carrying on banking business, whereas other Banks—Indian and Foreign—are permitted to carry on banking business, and even new Banks may be formed which may engage in banking business;

(c) it in reality restricts the named banks from carrying on business other than banking as defined in Section 5 (b) of the Banking Regulation Act, 1949; and

(d) that the Act violates the guarantee of compensation under Article 31 (2) in that it provides for giving certain amounts determined according to principles which are not relevant in the determination of compensation of the undertaking of the named banks and by the method prescribed the amounts so declared cannot be regarded as compensation.

132. Section 4 of the Act is a kingpin in the mechanism of the Act. Sections 4, 5 and 6 read with Schedule II provide for the statutory transfer and vesting of the undertaking of the named banks in the corresponding new banks and prescribe the method of determining compensation for expropriation of the under-

taking. Those provisions are, in our judgment, void as they impair the fundamental guarantee under Article 31 (2). Sections 4, 5 and 6 and Schedule II are not severable from the rest of the Act. The Act must, in its entirety, be declared void.

133. Petitions Nos. 300 and 293 of 1969 are therefore allowed, and it is declared that the Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969 is invalid and the action taken or deemed to be taken in exercise of the powers under the Act is declared unauthorised. Petition No. 222 of 1969 is dismissed. There will be no order as to costs in these three petitions.

134. RAY, J. (Dissenting judgment) There are 69 commercial banks operating in India. Of these 89 banks 73 are Scheduled and 16 are non-Scheduled banks. The 73 Scheduled banks comprise State Bank with 7 subsidiaries aggregating 8, 15 foreign banks, 14 banks which are the subject matter of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance No. 8 of 1969 (hereinafter referred to for the sake of brevity as the 1969 Ordinance) and the Banking Companies (Acquisition and Transfer of Undertakings) Act No. 22 of 1969 (hereinafter referred to for the sake of brevity as the 1969 Act) and 36 banks which are outside the scope of the 1969 Act. The State Banks have 27 per cent of the aggregate deposit of all commercial banks and 32 per cent of the credit of all commercial banks. The State Bank and its 7 subsidiaries have Rs. 1,239 crores including current account in the total deposit and the total credit of the State Bank and its subsidiaries is Rs. 1,186 crores. The 14 Scheduled Banks each of which has over Rs. 500 crores of deposit which are the subject matter of the 1969 Ordinance and the 1969 Act (hereinafter referred to for the sake of brevity as the 14 banks) and have Rs. 2,632 crores of deposit and the credit amounts to Rs. 1,829 crores. In other words, these 14 banks have 56 per cent of the total deposit and little over 50 per cent of the total credit of the commercial banks. The 36 scheduled banks which are outside the 1969 Ordinance and the 1969 Act have Rs. 296 crores of deposit, viz. 6.3 per cent of the aggregate deposit and the credit is Rs. 197 crores, or in other words, 4.5 per cent of the total credit of the commercial banks. The 15 foreign banks have 10 per cent of the credit and 10 per cent of the deposit.

These foreign banks have Rs. 476 crores of deposit and the credit is Rs. 385 crores. The 16 non-scheduled banks have Rs. 28 crores of deposit and the credit is about Rs. 16 crores. The non-scheduled banks have less than 1 per cent of the total credit and of the deposit. The aggregate deposits of the State Bank of India and its 7 subsidiaries and of the 14 banks is 82.8 per cent (26.5 per cent + 56.3 per cent) of the total deposits of 89 commercial banks and the aggregate credit of the said banks is 83.4 per cent (32.8 per cent + 50.6 per cent) of the total credit of the 89 commercial banks.

135. Of the 89 commercial banks the State Banks have 2,454 branches, namely, 30 per cent of the branch offices. The 15 foreign banks have 138 branch offices including branches. The 36 scheduled banks which are outside the 1969 Ordinance and the 1969 Act have 1,324 offices. The 16 non-scheduled banks have 216 offices. The 14 banks have 4,130 offices which represent about little over 50 per cent of the offices. The aggregate of the number of offices of the State Bank and its 7 subsidiaries and the 14 banks is 6,584 being 79.8 per cent of the total number of branch offices of the 89 commercial banks.

136. On 19 July, 1969 Ordinance No. 8 of 1969 called the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969 was promulgated by the Vice-President acting as President. It was an Ordinance to provide for the acquisition and transfer of the undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with national policy and objectives and for matters connected therewith or incidental thereto. The Ordinance came into force on 19th July, 1969. The Ordinance was repealed on 9th August, 1969 by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 which came into force on 9th August, 1969. The object of the Act was similar to that of the Ordinance. There are some differences between the Ordinance and the Act but it is not necessary for the purpose of the present matter to refer to the same.

137. Broadly stated, as a result of the 1969 Act the undertaking of every existing bank was transferred to and vested in the corresponding new bank on the commencement of the Act. The existing banks mean the 14 banks. The corresponding new banks mean the banks men-

tioned in the First Schedule to the 1969 Act in which is vested the undertakings of the existing banks. Section 5 of the 1969 Act deals with the effect of vesting. First, the undertaking shall be deemed to include all assets, rights, powers, authorities and privileges and all property, movable or immovable, cash balances, reserve funds, investments and all other rights and interests arising out of such property as were immediately before the commencement of the Act in the ownership, possession, power or control of the existing banks in relation to the undertaking, whether within or without India, and all books of accounts, registers, records and all other documents of whatever nature relating thereto. Secondly, the undertaking shall also be deemed to include all borrowings, liabilities (including contingent liabilities) and obligations of whatever kind then subsisting of the existing bank in relation to the undertaking. Thirdly, if according to the laws of any country outside India, the provisions of the 1969 Act by themselves are not effective to transfer or vest any asset or liability situated in that country which forms part of the undertaking of an existing bank to, or in, the corresponding new bank, the affairs of the existing bank in relation to such asset or liability shall on and from the commencement of this Act, stand entrusted to the chief executive officer for the time being of the corresponding new bank who will take all steps as required by the laws of the foreign country for the purpose of affecting such transfer or vesting. Fourthly, all contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature, subsisting or having effect immediately before the commencement of the 1969 Act and to which the existing bank is a party and which are in favour of the existing bank shall be of as full force and effect against or in favour of the corresponding new bank and may be enforced or acted upon as fully and effectually as if in the place of the existing bank the corresponding new bank had been a party thereto or as if they had been issued in favour of the corresponding new bank. Fifthly, there are provisions that suits, appeals or other proceedings pending by or against the existing bank be continued, prosecuted and enforced by or against the corresponding new bank.

138. Section 6 of the 1969 Act provides for payment of compensation and

the second Schedule to the Act sets out the principles of determination of compensation by excluding liabilities from assets. Section 11 of the Act enacts that the corresponding new bank shall be guided by such directions in regard to matters of policy involving public interest as the Central Government may, after consultation with the Governor of the Reserve Bank, give, and if any question arises whether a direction relates to a matter of policy involving public interest, it shall be referred to the Central Government and the decision of the Central Government thereon shall be final. Section 12 provides for appointment of an Advisory Board to advise the custodian of the corresponding new bank. The custodian is the chief executive officer of the corresponding new bank. The Chairman of the existing bank holding office before the commencement of the Act becomes a custodian of the corresponding new bank. The custodian is to hold office during the pleasure of the Central Government. Section 13 of the Act provides for the power of the Central Government to make scheme. Section 15 is an important provision in the Act. Under that section a Chairman, managing or whole-time director of an existing bank shall, on the commencement of the Act, be deemed to have vacated office and every other director of such bank shall until directors are duly elected by such existing bank, be deemed to continue to hold such office. The said Board may transact all or any of the various kinds of business mentioned in Section 15. The other provision in Section 15 is that the existing bank may carry on any business other than banking.

139. The Act of 1969 by reason of Section 1 (2) thereof is deemed to have come into force on 19th July, 1969. Section 27 of the Act contains four sub-sections providing for the repeal of the Ordinance and enacting first, that notwithstanding the repeal of the Ordinance, anything done or any action taken including any order made, notification issued or direction given, under the said Ordinance shall be deemed to have been done, taken made, issued or given, as the case may be, under the corresponding provisions of this Act; secondly that no action or thing done under the said Ordinance shall, if it is inconsistent with the provisions of this Act, be of any force or effect and thirdly notwithstanding anything contained in the Ordinance no right, privilege, obligation or liability shall be deemed to

have been acquired, accrued or incurred thereunder.

140. The petitioner Rustom Cavasjee Cooper is a shareholder of the Central Bank of India Ltd., and of 3 other existing banks and has current and fixed deposit accounts with these banks and is also a director of the Central Bank of India. The petitioner has challenged the validity of the 1969 Ordinance and the 1969 Act and has contended that his fundamental rights under Articles 14, 19 and 31 have been infringed by these measures.

141. Mr. Palkhivala, counsel for the petitioner, contended that the Act of 1969 was effective only from 9th August, 1969 and could not have any effect on or from 19th July, 1969 until 9th August, 1969 because there could not be any retrospective effect given to any piece of legislation which affected the fundamental right to property. It was said that the validation would be effective as from the date when the law was actually passed and any retrospective effect would offend Article 31 (2) of the Constitution. It was said that acquisition under Article 31 (2) could only be by authority of law and authority of law could only mean a law in force at the date of the taking. It was emphasised that the law must be in existence at the material time and there was no difference between a law under Article 20 (1) and law in relation to Article 31 (1) or Article 31 (2) of the Constitution.

142. The Attorney General on the other hand contended that the validity of any law either prospective or retrospective affecting all or any of the fundamental rights under Article 19 has to be judged by the requirement laid down in Article 19 and the validity of a law either prospective or retrospective acquiring property has to be judged by the requirements laid down in Article 31 (2).

143. This Court dealt with retrospective legislations in the cases of *West Ramnad Electric Distribution Co., Ltd. v. State of Madras*, (1963) 2 SCR 747 = (AIR 1962 SC 1753) and *State of Mysore v. Achiah Chetty*, AIR 1969 SC 477. In the case of *M/s. West Ramnad Electric Distribution Co., Ltd.*, (1963) 2 SCR 747 = (AIR 1962 SC 1753) (supra) this Court held that there was difference between the provisions contained in Art. 20 (1) and Article 31 (2) of the Constitution. Article 20 (1) refers to law in force at the time of the commission of the act

charged as an offence whereas Art. 31 (2) does not contain any such words of limitation as to law being in force at the time but speaks only of authority of a law. This vital distinction between Art. 20 (1) and Article 31 (2) is to be kept in the forefront in appreciating the soundness of the proposition that retrospective legislation as to acquisition of property does not violate Article 31 (2).

144. In the case of *West Ramnad Electric Distribution Co.* (1963) 2 SCR 747 = (AIR 1962 SC 1753) (supra) the 1954 Madras Act incorporated the main provisions of the earlier Madras Act of 1949 in validating actions taken under the earlier 1949 Act. The 1949 Act had been challenged in earlier proceedings when this Court held the 1949 Act to be ultra vires. Section 24 of the 1954 Madras Act was intended to validate a notification of acquisition of undertaking issued on 21st September, 1951 under the 1949 Act by providing that orders made, decisions, or directions given, notifications issued if they would have been validly made under the 1949 Act were declared to have been validly made except the extent to which the order was repugnant to the provisions of the later 1954 Act. In the Madras case it was contended that the notification under the 1949 Act in the year 1951 was not supported by any authority or any pre-existing law because there was no valid law. That contention was repelled by *Cajendragadkar, J.* who spoke for the Court "if the Act is retrospective in operation and Section 24 has been enacted for the purpose of retrospectively validating actions taken under the provisions of the earlier Act, it must follow by the very retrospective operation of the relevant provisions that at the time when the impugned notification was issued, these provisions were in existence. That is the plain and obvious effect of the retrospective operation of the statute. Therefore in considering whether Article 31 (1) has been complied with or not, we must assume that before the notification was issued, the relevant provisions of the Act were in existence and so, Article 31 (1) must be held to have been complied with in that sense."

145. Article 20 (1) cannot by its own terms have any retrospective operation whereas Article 31 (2) can and that is a vital distinction between the two Articles. That is why there cannot be a retrospective legislation with regard to creation of an offence. If people at the

time of the commission of an act did not know that it was an offence, retrospective creation of a new offence in regard to such an act would put people to new peril which was not in existence at the time of the commission of the act. Counsel for the petitioner contended that retrospective validation of acquisition fell within the mischief of the decision of Punjab Province v. Daulat Singh, 73 Ind App 59 = (AIR 1946 PC 66) where the Judicial Committee dealing with Section 5 of the Punjab Alienation Act which provided for the avoidance of benami transactions as therein specified which were entered into either before or after the commencement of the Act of 1938 held that the same was ultra vires the Provincial Legislature because it would operate as a prohibition to affect the past transactions. The retrospective element however was severed in that case by the deletion of the words "either before or" in the section and the rest of the provisions were left to operate prospectively and validly. The ratio of the decision is that past transactions which had been closed and title which had been acquired were sought to be reopened or set aside and the same could not be within the legislative competence of Section 298 of the Government of India Act, 1935 which conferred power to prohibit the sale or mortgage of transactions. The words 'prohibit sale or mortgage' in Section 298 of the Government of India Act 1935 were construed to mean prospective or future prohibition as the words used plainly refer to things or transactions in future.

146. The decisions of this Court in West Ramnad Electric Distribution Co. (1963) 2 SCR 747 = (AIR 1962 SC 1753) and AIR 1969 SC 477 are ample authorities for the proposition that there can be retrospective legislation affecting acquisition of property and such retrospective operation and validation of actions with regard to acquisition does not offend Art. 31(2) of the Constitution. In AIR 1969 SC 477 (supra) Hidayatullah, C. J., considered the Bangalore Acquisition of Lands Act, 1962 which consisted of two sections whereof the second was in relation to validation of certain acquisition of lands and orders connected therewith. In short that section provided that all acquisitions, proceedings, notifications or orders were validly made, held or issued with the result that the Act validated all past actions notwithstanding any breach of City of Bangalore Improvement Act, 1945. Hida-

yatullah, C. J. said "What the legislation has done is to make retrospectively a single law for the acquisition of these properties. The legislature could always have repealed retrospectively the Improvement Act rendering all acquisitions to be governed by the Mysore Land Acquisition Act alone. This power of the legislature is not denied. The resulting position after the Validating Act is not different. By the non obstante clause the Improvement Act is put out of the way and by the operative part the proceedings for acquisition are wholly brought under the Mysore Land Acquisition Act to be continued only under that Act. The Validating Act removes altogether from consideration any implication arising from Chapter III or Section 52 of the Improvement Act in much the same way as if that Act had been passed." The correct legal position on the authority of these decisions of this Court is that a legislation which has retrospective effect affecting acquisition or requisition of property is not unconstitutional and is valid. The Act of 1969 which is retrospective in operation does not violate Article 31 (2) because it speaks of authority of a law without any words of limitation or restriction as to law being in force at the time.

147. Counsel for the petitioner next contended that the expression "authority of a law" in Article 31 (2) would have the same meaning as the expression "authority of law" in Article 31 (1) and therefore a law acquiring property would have to satisfy the tests required in Article 19 (1) (f) of the Constitution. Both Articles 31 (2) and 19 (1) (f) relate to property. Both appear in Part III of the Constitution under fundamental rights. The Attorney General contended that Arts. 31 (2) and 31 (2A) constituted a self-contained code relating to acquisition and requisition of property, and once a property had been acquired by a law in compliance with the requirements of Article 31 (2) there would not be any right left under Article 19 (1) (f) and the validity of such a law of acquisition of property for public purpose could not be examined again by the requirements of Article 19 (5) which is a relaxation of Article 19 (1) (f).

148. The two requirements of a law relating to acquisition or requisition of property under Article 31 (2) are: first, that the acquisition or requisition of property can be made only for a public purpose, and secondly, it can only be by

authority of a law which provides for compensation. Article 31 (2A) further enacts that where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned, controlled by the State it shall not be deemed to provide for the compulsory acquisition or requisitioning of property.

149. The question for interpretation of Article 22 of the Constitution in the light of Article 19 came up for consideration in the case of 1950 SCR 88 = (AIR 1950 SC 27). Kania, C. J., Patanjali Sastri, Mahajan, Mukherjea and Das, JJ., expressed the opinion that Article 19 of the Constitution had no application to a law which related directly to preventive detention even though as a result of an order of detention, the rights referred to in sub-clauses (a) to (e) and (g) in general and sub-clause (d) in particular of clause (1) of Article 19 might be restricted or abridged. Fazl Ali, J. however expressed a contrary opinion. The consensus of opinion in Gopalan's case 1950 SCR 88 = (AIR 1950 SC 27) (supra) was that so far as substantive law was concerned, Article 22 of the Constitution gave a clear authority to the legislature to take away fundamental rights relating to arrest and detention which were secured by the first two clauses of that Article. Mukherjea, J. said about preventive detention in relation to right of freedom under Article 19, "Any legislation on the subject would only have to conform to the requirements of clauses (4) to (7) and provided that is done, there is nothing in the language employed nor in the context in which it appears which affords any ground for suggestion that such law must be reasonable in its character and that it would be reviewable by the Court on that ground. Both Articles 19 and 22 occur in the same Part of the Constitution and both of them purport to lay down the fundamental rights which the Constitution guarantees. It is well settled that the Constitution must be interpreted in a broad and liberal manner giving effect to all its parts and the presumption would be that no conflict or repugnance was intended by its framers."

150. I shall now deal with some decisions of this Court as to whether a law acquiring property under Article 31 (2) will have to comply with Article 19 (1) (f) or in other words whether such law of acquisition of property for public purpose must also according to Article 19 (5) be a reasonable restriction on the right to

hold property in the interests of the general public. There are decisions of this Court to the effect that acquisition of property under Art. 31 (2) as it stood prior to amendment in 1955 is an instance of deprivation of property mentioned in Article 31 (1) and the two clauses of Article 31 are to be read together with the result that Article 19 (1) (f) has no application where a law amounts to acquisition or requisition of property for a public purpose under Article 31 (2). When Article 31 (2) was amended by the Constitution Fourth Amendment Act, 1955, the decisions of this Court on that Article held that Article 19 (1) (f) applies only to a deprivation of property under Article 31 (1) but not to a law of acquisition of property for public purpose under Article 31 (2). I shall now refer to these decisions.

151. In the case of 1954 SCR 587 = (AIR 1954 SC 92) the majority view of this Court was that clauses (1) and (2) of Article 31 as these stood before the Constitution Fourth Amendment Act, 1955 are not mutually exclusive in scope and content but are to be read together and understood as dealing with the same subject, namely, the protection of the right to property by means of limitations on the power of the State and the deprivation contemplated in Clause (1) was held to be no other than the acquisition or taking possession of the property referred to in Clause (2).

152. The view in Gopalan's case 1950 SCR 88 = (AIR 1950 SC 27) (supra) was again applied by this Court in 1955-1 SCR 777 = (AIR 1955 SC 41)—also a pre-Amendment case—where it was contended that Article 31 (2) did not exclude the operation of Article 19 (1) (f) in relation to Bombay Land Acquisition Act, 1940. In dealing with the contention as to whether the Bombay Act was hit by Article 19 (1) (f) on the ground of unreasonable restriction having been imposed on the right of the respondent to acquire, hold and dispose of property Bose, J. said at page 780 of the Report (1955-1 SCR) = (at pp. 43-44 of AIR SC): "It is enough to say that Article 19 (1) (f) read with Clause (5) postulates the existence of property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restrictions contemplated by Clause (5) could not be brought into play. If there is no property which can be acquired, held or disposed of, no restriction can be placed on the exercise of the right to acquire,

hold or dispose of it, and as Clause (5) contemplates the placing of reasonable restrictions on the exercise of those rights it must follow that the Article postulates the existence of property over which these rights can be exercised." Bose, J. thereafter said that when every form of enjoyment of and interest in property is taken away leaving the mere husk of title Article 19 (1) (f) is not attracted.

153. The principle laid down in Bhanji Munji's case, 1955-1 SCR 777 = (AIR 1955 SC 41) (supra) was considered in the case 1960-3 SCR 887 = (AIR 1960 SC 1080). In that case a question arose whether the Madras Marumakkathayam (Removal of Doubts) Act, 1955 infringed the provisions of the Constitution. The Act was passed after the Privy Council had declared the properties in possession of the Sthanee to be Sthanam properties in which the members of the tarwad had no interest. The Madras Act, 1955 declared that "notwithstanding any decision of Court, any sthanam under certain conditions mentioned in the section shall be deemed to be and shall be deemed always to have been a Marumakkathayam tarwad and the properties appertaining to such a sthanam shall be deemed to be and shall be deemed always to have been properties belonging to the tarwad". Subba Rao, J. speaking for the majority view on the question as to whether Article 31 (1) had to be read along with Article 19 (1) (f) said "that legislation in a welfare State could be achieved only within the framework of the Constitution and that is why reasonable restrictions in the interest of the general public on the fundamental rights were recognised in Article 19." In that context this Court held that a law made depriving a citizen of his property shall be void, unless the law so made complied with the provisions of Clause (5) of Article 19 of the Constitution. At page 916 of the Report (1960-3 SCR) = (at p. 1094 of AIR SC) Subba Rao, J. said that the observations in Gopalan's case, 1950 SCR 88 = (AIR 1950 SC 27) (supra) would have no bearing on Article 31 (1) of the Constitution after Clause (2) of Article 31 had been amended and Clause (2A) had been inserted in that Article by the Constitution Fourth Amendment Act, 1955. Before the Constitution Fourth Amendment Act this Court held that Clauses (1) and (2) of Article 31 were not mutually exclusive in scope and content but were to be read together, namely, that the words "acquisition or taking possession" referred to in

Clause (2) of Article 31 prior to the Amendment in 1955 were to be read as an instance of deprivation of property within the meaning of Article 31 (1) and therefore the same was not subject to Article 19. This is how the decision in Bhanji Munji's case, 1955-1 SCR 777 = (AIR 1955 SC 41) (supra) was explained by Subba Rao, J. in Kochuni's case, 1960-3 SCR 887 = (AIR 1960 SC 1080) (supra) with the observation that "the decision in Bhanji Munji's case, 1955-1 SCR 777 = (AIR 1955 SC 41) (supra) no longer holds the field after the Constitution Fourth Amendment Act, 1955". It may be stated here that Kochuni's case 1960-3 SCR 887 = (AIR 1960 SC 1080) was decided after the amendment of Article 31 and that was emphasised by Subba Rao, J. to establish that Article 31 (1) which dealt with deprivation of property other than by way of acquisition by the State was to be a valid law or in compliance with limitations imposed in Article 19 (1) (f) and (5).

154. The question whether Article 19 (1) (f) is to be read along with Article 31 (1) again raised its head in the case of (1967) 2 SCR 949. Kochuni's case 1960-3 SCR 887 = (AIR 1960 SC 1080) (supra) was decided on 4 May, 1960 and Smt. Sitabati's case, (1967) 2 SCR 949 (supra) was decided on 1 December, 1961 though it was reported much later in the Supreme Court Reports. In Smt. Sitabati's case, (1967) 2 SCR 949 (supra) the question for consideration was the validity of the West Bengal Land (Requisition and Acquisition) Act, 1948. The Act provided for requisition and also for acquisition of land by the State Government for maintaining supplies and services essential to the life of the community and for other purposes mentioned therein. The Act also provided for payment of compensation in respect of requisition and acquisition. In Smt. Sitabati's case, (1967) 2 SCR 949 (supra) it was contended that the Act offended Article 19 (1) (f) of the Constitution as it put unreasonable restrictions on the right to hold property. The High Court held that the Act providing for acquisition of property by the State could not be attacked for the reason that it offended Article 19 (1) (f) on the authority of the decision in 1955-1 SCR 777 = (AIR 1955 SC 41) (supra). The High Court further held that the decision in Kochuni's case, (1960) 3 SCR 887 = (AIR 1960 SC 1080) (supra) did not hold that Article 31 (2) of the Constitution did not exclude the applicability

of Article 19 (1) (f). Sarkar, J. speaking for the Court said that the High Court was right on both these points. Sarkar, J. pointed out that Kochuni's case, (1960) 3 SCR 887 = (AIR 1960 SC 1080) (supra) dealt with Article 31 (1) and it was not a case of acquisition or requisition of property by the State but was concerned with the law by which deprivation of property was brought about in other ways and there Article 19 of the Constitution had to be complied with. In Smt. Sitabati's case 1967-2 SCR 949 (supra) it was said that the observation in Kochuni's case, (1960) 3 SCR 887 = (AIR 1960 SC 1080) (supra) that Bhanji Munji's case, 1955-1 SCR 777 = (AIR 1955 SC 41) (supra) "no longer holds the field" was to be understood as meaning that it no longer governed the case of deprivation of property by means other than requisition and acquisition by the State. To my mind it appears that the view of this Court in Kochuni's case, (1960) 3 SCR 887 = (AIR 1960 SC 1080) (supra) and Smt. Sitabati's case, 1967-2 SCR 949 (supra) is that Article 31 (2) after the Constitution Fourth Amendment Act, 1955 relates entirely to acquisition or requisition of property by the State and is totally distinct from the scope and content of Article 31 (1) with the result that Article 19 (1) (f) will not enter the area of acquisition or requisition of property by the State.

155. This Court in the recent decision of AIR 1969 SC 634 again considered the applicability of Article 19 (1) (f) in relation to acquisition or requisition of property under the authority of a law mentioned in Article 31 (2). The Bombay Town Planning Act of 1955 was challenged as unreasonable and a violation of Article 19 (1) (f) and (5). Shah, J., speaking for the Court considered Article 31 (2) as it stood after the Constitution Fourth Amendment Act, 1955 and said "clause (1) operates as a protection against deprivation of property save by authority of law which it is beyond question, must be a valid law, i.e., it must be within the legislative competence of the State legislature and must not infringe any other fundamental right. Clause (2) guarantees that property shall not be acquired or requisitioned (except in cases provided by clause (5)) save by authority of law providing for compulsory acquisition or requisition and further providing for compensation for the property so acquired or requisitioned and either fixes the amount of compensation or specifies

the principles on which, and the manner in which the compensation is to be determined or given". Thereafter Shah, J., speaking for the Court said in repelling the contention advanced that the impugned statute was unreasonable. "This Court however held in 1969-2 SCR 949 (supra) that a law made under clause (2) of Article 31 is not liable to be challenged on the ground that it imposes unreasonable restrictions upon the right to hold or dispose of property within the meaning of Article 19 (1) (f) of the Constitution. In Smt. Sitabati Devi's case, 1969-2 SCR 949 (supra) an owner of land whose property was requisitioned under the West Bengal Land (Requisition and Acquisition) Act, 1948 questioned the validity of the Act by a writ petition filed in the High Court of Calcutta on the plea that it offended Art. 19 (1) (f) of the Constitution. This Court unanimously held that the validity of the Act relating to acquisition and requisition cannot be questioned on the ground that it offended Article 19 (1) (f) and cannot be decided by the criterion under Article 19 (5)".

150. In my opinion Article 19 (1) (f) does not have any application to acquisition or requisition of property for a public purpose under authority of a law which provides for compensation as mentioned in Article 31 (2) for these reasons. First, the provisions of the Constitution are to be interpreted in a harmonious manner. No provision of the Constitution is superfluous or redundant. (See Gopalan's case, 1950 SCR 88 = (AIR 1950 SC 27) (supra) at page 252 (of SCR) = (at p. 93 of AIR) per Mukherjee, J.). It cannot be suggested that acquisition of property for public purpose is not of the same content as acquisition for public interest or in the interest of the public. It will be pedantry to say that acquisition for public purpose is not in the interest of the public. Secondly, the contention on behalf of the petitioner that Article 31 (2) will have to be read along with Article 19 (1) (f) for the purpose of deciding the place of legislation on the anvil of reasonableness of restrictions in the interest of the general public will mean that acquisition or requisition for a public purpose under Article 31 (2) is embraced within Article 19 (5). That would be not only depriving the provisions of the Constitution of harmony but also making Article 31 (2) otiose and a dead letter. By harmonising is meant that each provision is rendered free to operate, with full vigour in its own leg-

timate field. If acquisition or requisition of property for a public purpose has to satisfy again the test of reasonable restriction in the interest of the general public then harmony is repelled and Article 31 (2) becomes a mere repetition and meaningless. It could not be said that when Article 31 (2) was specifically enacted to deal with a case of acquisition or requisition of property for a public purpose the framers of the Constitution were not aware that it was a form of public deprivation of property. That is why it is important to notice the distinction between deprivation of property under Article 31 (1) which will relate to all kinds of deprivation of property other than acquisition or requisition by the State and Article 31 (2) which deals only with such acquisition or requisition of property. Thirdly, Articles 31 (2) and 31 (2A) is a self-contained code because (a) it provides for acquisition or requisition with authority of a law, (b) the acquisition or requisition is to be for a public purpose, (c) the law should provide for compensation by fixing the amount of compensation or specifying the principles on which, and the manner in which, the compensation is to be determined and given and (d) finally, it enacts that adequacy of compensation is not to be questioned. In the case of acquisition or requisition of property for public purpose with the authority of a law providing for compensation there is nothing more to guide and govern the law for acquisition or requisition than those crucial words occurring in Clause (2). Finally, the amendment of Article 31 indicates in bold relief the separate and distinctive field of law for acquisition and requisition by the State of property for public purpose.

157. Mahajan, J. in the case of 1952 SCR 889 = (AIR 1952 SC 252) spoke of public purpose in the background of Article 39 which speaks of the Directive Principles. Article 39 enacts that the State shall in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. In the *Darbhanga* case, 1952 SCR 889 = (AIR 1952 SC 252) (supra) land which was in the hands of few individuals was to be made available to the public. The purpose behind the Bihar

Land Reforms Act was to bring general benefit to the community. Mahajan, J. said that "legislature is best judge of what is good for the community, by whose suffrage it comes into existence and it is not possible for this Court to say that there was no purpose behind the acquisition contemplated by the impugned statute. The purpose of the statute is in accordance with the letter of the Constitution of India. It is fallacious to contend that the object of the Act is to ruin 5½ million people in Bihar It is difficult to hold in the present day conditions of the world that the measures adopted for the welfare of the community and sought to be achieved by process of legislation so far as to carry on the policy of nationalization of land can fall on the ground of public purpose. The phrase 'public purpose' has to be construed according to the spirit of times in which particular legislation is enacted and so construed, the acquisition of the estates has to be held to have been made for the public purpose". The meaning of the phrase 'public purpose' is predominantly a purpose for the welfare of the general public. These 14 banks are acquired for the purpose of developing the national economy. It is intended to confer benefit on weaker sections and sectors. It is not that the legislation will have the effect of denuding the depositors in the 14 banks of their deposits. The deposits will all be there. The object of the Act according to the legislation is to use the deposits in wider public interest. What was true of public purpose when the Constitution was ushered in the midcentury is a greater truth after two decades. One cannot be guided either by passion for property on the one hand or prejudice against deprivation on the other. Public purpose steers clear of both passion and prejudice.

158. In regard to property rights the State generally has power to take away property and justify such deprivation on the ground of reasonable restriction in the interest of the general public, but in case of deprivation of property by acquisition or requisition the Constitution has conferred power when the law passed provides compensation for the property acquired by the State. Therefore, the acquisition or requisition for public purpose is a restriction recognised by the Constitution in regard to property rights. In *Kochuni's* case, (1960) 3 SCR 887 = (AIR 1960 SC 1080) (supra) this Court approved the observation of Harries, C. J.

in the case of *Iswari Prosad v. N. R. Sen*, AIR 1952 Cal 273 that the phrase 'in the interest of the general public' means nothing more than 'in the public interest.' A public purpose is a purpose affecting the interest of the general public and therefore the Welfare State is given powers of acquisition or requisition of property for public purpose.

159-160. Counsel for the petitioner contended that the word 'banking' would have the same meaning as the definition of 'banking' occurring in Section 5 (b) of the Banking Regulation Act of 1949 hereinafter referred to for the sake of brevity as the 1949 Act. This contention was amplified to exclude four types of business from the banking business and therefore the Act of 1969 was said to be not within the legislative competence of Banking under Entry 45 in List I. These four types of business are: (1) the receiving of scrips or other valuables on deposit or for safe custody and providing of safe deposit vaults, (2) agency business, (3) business of guarantee, giving of indemnity and underwriting and (4) business of acting as executors and trustees. 'Banking' was defined for the first time in the 1949 Act as meaning the acceptance for the purpose of lending or investments of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft or otherwise. In England there is no statutory definition of banking but the Courts have evolved a meaning and principle as to what the legitimate business of a bank is.

161. In the case of *Tennant v. Union Bank of Canada* 1894 AC 31 a question arose as to whether warehouse receipts taken in security by a bank in the course of business of banking, are matters coming within the class of subjects described in Section 91, sub-section (15) of the British North America Act, namely, 'banking, incorporation of Banks, and the issue of paper money'. Lord Watson said that the word 'banking' comprehends an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker. In *Palmer's Company Precedents*, 17th Ed. Page 317 form No. 93 will be found the usual memorandum of objects of a bank. These objects comprise business of banking in all branches including the receiving of money and valuables on deposit or for safe custody, or otherwise, the collecting and transmitting money and securities and transacting all kinds

of agency business commonly transacted by bankers. The other objects in the form are to undertake and execute any trusts the undertaking whereof may seem desirable, and also to undertake the office of executor, administrator, receiver, treasurer, registrar or auditor. In *Banbury v. Bank of Montreal* 1918 AC 626 the House of Lords considered the authority of the bank to give advice as to investments and Lord Finlay, L. C. said that "the limits of banker's business cannot be laid down as a matter of law. The nature of business is a question of fact, on which the jury are entitled to have regard to their own knowledge of business and it is in this context that the present case must be considered. It cannot be treated as if it was a matter of pure law."

162. In India, the Negotiable Instruments Act, 1881, Stamp Act, 1899 and Bankers' Books Evidence Act, 1891 refer to the expression banking without a definition. In the Indian Companies Act, 1913 for the first time in 1936 provisions were introduced to govern banking companies. Entry 38 in List I of the Government of India Act, 1935 used the words "banking that is to say the conduct of banking business of a Corporation carried on only in that State." It must be observed that Entry 45 in List I of the 7th Schedule to the Constitution is only a 'banking' and it does not contain any qualifying words like the conduct of business occurring in Entry 38 of the Government of India Act, 1935. The Indian Companies Act, 1913 in Section 277-F however defined 'banking company' but not 'banking' by reference to the principal business and other businesses usually undertaken by reputable bankers. Section 277-C of the Indian Companies Act prescribes that the memorandum must be limited to the activities mentioned in Section 277-F. Section 277-M of the Indian Companies Act, 1913 contained provisions similar to Section 19 of the Act of 1949, namely, that a banking company could not form any subsidiary company except a subsidiary company formed for one or more of the following purposes, namely, the undertaking and executing of trusts, the undertaking of the administration of estates as executors, trustee or otherwise, the providing of safe deposit vaults or, with the previous permission in writing of the Reserve Bank carrying on such other purposes as are incidental to the business of banking. It will appear from the Select Committee

Report which was prepared for the introduction of the Indian Companies Amendment Act in 1936 that the list of business mentioned in Section 277-F which included the principal business and other business undertaken by reputable bankers was inserted to escape the danger of hampering a company in the performance of any form of business undertaken by reputable bankers..

163. It is in this background that the 1949 Banking Regulation Act was enacted. 'Banking' is defined in Section 5 (b) of the 1949 Act as meaning the acceptance for the purpose of lending or investment of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft order or otherwise. Section 6 of the 1949 Act contains two sub-sections. In sub-section (1) it is enacted that in addition to the business of banking, a banking company may engage in one or more of the forms of businesses mentioned therein. In sub-section (1) there are clauses marked (a) to (o). In sub-section (2) of Section 6 of the 1949 Act it is enacted that no banking company shall engage in any business other than those referred to in sub-section (1). Clause (a) of Section 6 (1) enumerates the various forms of business, inter alia, the borrowing, raising, or taking up of money, the lending or advancing of money either upon or without security, the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments and securities whether transferable or negotiable or not, the granting and issuing of letters of credit, traveller's cheques and circular notes, the buying, selling and dealing in bullion and specie, the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise, the providing of safe deposit vaults, the collecting and transmitting of money and securities. Clause (b) speaks of acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of the customers, but excluding the business of a company. Clause (h) speaks of undertaking and executing trusts. Clause (i) speaks of undertaking the administration of estates as executor,

trustee or otherwise. It will, therefore, appear that under Section 6 (1) of the 1949 Act the four types of business disputed by counsel for the petitioner not to be within the businesses of a bank are recognised by the statute as legitimate forms of business of a banking company.

164. Keeping valuables for safe custody, the providing of safe deposit vaults occur in clause (a) of Section 6 (1) along with various types of business like borrowing, raising or taking up of money, or lending or advancing of money. It will appear from clause (n) of Section 6 (1) of the 1949 Act that in addition to the forms of business mentioned in clauses (a) to (m) a banking company may engage in "doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company." The words 'other things' appearing in clause (n) after enumeration of the various types of business in clauses (a) to (m) point to one inescapable conclusion that the businesses mentioned in clauses (a) to (m) are all incidental or conducive to the promotion or advancement of the business of the company. Therefore these businesses are not only legitimate businesses of the banks but these also come within the normal business activities of commercial banks of repute. Entry 45 in List I of the 7th Schedule of the Constitution, namely, 'banking' will therefore have the wide meaning to include all legitimate businesses of a banking company referred to in Sec. 5 (b) as well as in Section 6 (1) of the 1949 Act. The contention on behalf of the petitioner that the four disputed businesses are not banking businesses is not supportable either on logic or on principle when businesses mentioned in the sub-clauses of Section 6 (1) of the 1949 Act are recognised to be legitimate business activities of a banking company by statute and practice and usage fully supports that view.

165. Clause (o) of Section 6 (1) of the 1949 Act contemplates that the Central Government might by notification specify any other form of business and therefore the Government could ask a banking company to engage in a form of business which is not a usual type of business done by a banking company. In the first place, it would not be reasonable to think that the Government would ask a bank to do business of that type. Secondly, even if a bank were asked to do so that would not rob the other permissible

and legitimate forms of business mentioned in Section 6 (1) of the Act of their true character. Section 6 (2) of the 1949 Act provides that no banking company shall engage in any form of business other than those referred to in sub-section (1). The restriction contained in sub-section (2) establishes that the various types of business mentioned in sub-s. (1) are normal, recognised legitimate businesses and a banking company is therefore not entitled to participate in any other form of business.

160. In the case of *Commonwealth of Australia v. Bank of New South Wales*, 1950 AC 235 the Judicial Committee in hearing the appeal from the High Court of Australia considered the meaning and content of banking. The question for consideration was the effect of the Australian Banking Act, 1947 and section 46 thereof. At page 303 of the Report the Judicial Committee said "the business of banking, consisting of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities is a part of the trade, commerce and intercourse of a modern society and, in so far as it is carried on by means of inter-State transactions, is within the ambit of Section 92." The business of a bank will therefore consist not only of the hard core of banking business defined in the 1949 Act but also of the divers kinds of lawful business which have grown to be inextricably bound up in the form of chain or string transactions. The words 'banker', 'banking' have different shades of meaning at different periods of history and their meaning may not be uniform today in countries of different habits of life and different degrees of civilisation. See *Bank of Chettinad v. Income Tax Commr. of Colombo*, 1948 AC 378 and *United Dominions Trust Ltd. v. Kirkwood*, 1968-1 QB 783.

167. At this stage reference may be made to various statutes starting from Act 6 of 1839 Bank of Bengal's Third Charter and ending with the State Bank of India Act, 1955 to show the meaning and content of the word 'banking'. The Bank of Bengal's Third Charter of 1839 empowered the Bank of Bengal in Cls. 25 to 33 to do business as mentioned therein which included receiving deposits of goods and safe keeping of the same. Thereafter the Bank of Bengal Charter was repealed by Act 4 of 1862 which by

clause 27 empowered the bank to transact pecuniary business of agency on commission. The Presidency Banks Act, 1876 by Section 38 thereof empowered the Presidency Banks, *inter alia*, to do business of receiving of deposits, agency business, acceptance of valuables, jewels. Section 37 of the Act of 1876 forbade the bank to do any business or loan or advance on mortgage or in other manner upon the security of any immovable property or the documents of title relating thereto. The Imperial Bank of India Act, 1920 in Schedule I as mentioned in Section 8 of the Act authorised the bank to carry on several kinds of business including receiving of deposits, keeping cash accounts, the acceptance of the charge and management of plate, jewels, title deeds or other valuable goods on terms, transacting of pecuniary agency business on commission and the entering into of contracts of indemnity, suretyship or guarantee with specific security or otherwise, the administration of estates for any purpose whether as an executor, trustee or otherwise and the acting as agent on commission in the transaction of various kinds of business mentioned therein.

168. The Indian Companies Act, 1913 did not define banking company or banking business though various sections namely, 4, 133, 136, 138 and 145 and Schedule Form G referred to banking companies. The Indian Companies Amendment Act in 1936 for the first time defined a banking company in S. 277F as a company which carried on the principal business of accepting of deposits on current account or otherwise, notwithstanding that it engaged in any one or more of the businesses as mentioned in clauses (1) to (17) thereof. It may be stated here that Clauses (1) to (17) in section 277F of the Indian Companies Act, 1913 are similar to the various forms of business mentioned in Section 6 (1) of the 1949 Banking Regulation Act. In 1942, the Indian Companies Act, 1913 was amended by Act 21 of 1942 and it will appear from the statement of objects and reasons there that the definition of banking companies in Section 277F of the Indian Companies Act created difficulties in deciding whether a company was a banking company or not. The chief difficulty arose out of the use of the term 'principal business' in Section 277F. With the object of removing these difficulties a proposal was made that any company which used as part of its name the word

'bank', 'banker' or 'banking' shall be deemed to be a banking company irrespective of whether the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or order was its principal business or not. In that context Ordinance No. 4 of 1946 was promulgated under Section 72 of the Government of India Act, 1935 empowering the Reserve Bank to cause inspection of any banking company and to do various other things by way of prohibiting a banking company from receiving deposits. Thereafter came the Banking Companies Restriction of Branches Act, 1946. There a banking company was defined as a banking company defined in Section 277F of the Indian Companies Act, 1913. There was restriction on opening and removal of branches and the Reserve Bank was permitted to cause inspection of banks. It is in this context that Ordinance No. 25 of 1948 was promulgated conferring power on the Reserve Bank to control advances given by the banking companies. In 1948 a confidential note on the banking companies Bill was prepared. The necessity of legislation was felt because there were insufficient paid up capital and reserve and insufficient liquidity of funds, unrestricted loans to directors. In that confidential note it was said that it was difficult to evolve any satisfactory definition of banking and difficulties arose because of the incorporation of the words 'principal business' in relation to banks in Section 277F of the Indian Companies Act, 1913.

168-A. In this background the Banking Regulation Act, 1949 was enacted. I have already referred to the provisions of Sections 5 and 6 of the 1949 Act and the businesses mentioned in Sec. 6 (1) and the definition of banking business in Section 5 (b). A most noticeable feature with regard to all these types of business of a banking company is that a banking company engages not only in the banking business but other businesses mentioned in Section 6 of the 1949 Act with depositors' money. The entire business is one integrated whole. The provisions contained in Section 6 (1) of the 1949 Act are the statutory restatement of the gradual evolution over a century of the various kinds of business of banking companies which are similar to those to be found in the State Bank of India Act, 1955 hereinafter called the State Bank Act. The business with regard to deposit of valuables and safe deposit vaults

is to be found in Section 3 (viii) of the State Bank Act, the agency business is mentioned in Section 33 (xii) of the State Bank Act. The business of guarantee, underwriting and indemnity is found in Section 33 (xi) (xii) (a) of the State Bank Act and the business of trusteeship and executorship is specifically found in the Banking Regulation Act 1949 and in the previous Acts referred to hereinbefore.

169. It was suggested by counsel for the petitioner that by banking business is meant only the hard core of banking, as defined in Section 5 (b) of the 1949 Act. It is unthinkable that the business of banks is only confined to that aspect and not to the various forms of business mentioned in Section 6 (1) of the 1949 Act. Receiving valuables on deposit or for safe custody and providing for safe deposit vaults which are contemplated in Clause (a) of Section 6 (1) of the 1949 Act cannot be dissociated from other forms of unchallenged business of a bank mentioned in that clause because any such severance would be illogical particularly when deposits for safe custody and safe deposit vaults are mentioned in the long catalogue of businesses in Cl. (a). The agency business which is mentioned in Clause (b) of Section 6 (1) is one of the recognised forms of business of commercial banks with regard to mercantile transactions and payment or collection of price. Agency is after all a comprehensive word to describe the relationship of appointment of the bank as the constituent's representative. The forms of agency transactions may be varied. It may be acting as collecting agent or disbursing agent or as depository of parties. The categories of agency can be multiplied in terms of transactions. That is why the business of agency mentioned in Clause (b) is first in the general form of acting as an agent for any Government or local authority, secondly carrying on of agency business of any description including the clearing and forwarding of goods and thirdly acting as attorney on behalf of the customers. The business of guarantee is in the modern commercial world practically indissolubly connected with a bank and forms a part of the business of the bank. It is almost common place for Courts to insist on bank guarantee in regard to furnishing of security. There may be so many instances of guarantee. As to the business of trusteeship and executorship it may be said that this is the wish of the seller who happens to be a constituent of the bank appointing the

bank as executor or trustee because of the utmost faith and confidence that the constituent has in the solvency and stability of the bank and also to preserve the continuity of the trustee or the executor irrespective of any change by reason of death or any other incapacity. It is needless to state that these four disputed forms of business all spring out of the relation between the bank on the one hand and the customer on the other and the bank earns commission on these transactions or charges fees for the services rendered. Although trust accounts may be kept in a separate account all moneys arising out of the trust money go to the general pool of the bank and the bank utilises the money and very often trust moneys may be kept in fixed deposit with the trustee bank and expenses on account of the trust are met out of the general funds of the trustee bank. Payments to beneficiaries are made by crediting the beneficiaries' accounts in the trustee bank and if they are not constituents other modes of payment through other banks are adopted. The position of the banks as executor is similar to that of a trustee. Whatever moneys the bank may spend are recouped by the bank out of the accounts of the trust estate.

170. After the definition of banking company had been introduced for the first time in 1936 in the Indian Companies Act, 1913 it appeared that the banks were not being managed properly and the definition of a banking company gave rise to administrative difficulties in determining whether a company was a banking company or not. A number of banking and loan companies particularly in Bengal claimed that they were not banking companies within the scope of the definition given in Section 277F of the Companies Act and in some cases their contention was upheld by the Court. The failure of the Travancore National and Quilon Bank Ltd., in 1938 and the subsequent banking crisis in South India posed a big question as to the desirability of better legislation. An attempt was made to prescribe certain minimum capital, the amount of capital depending upon the area of the operation of the bank. The banks were also asked to maintain a percentage of their assets in cash or approved securities. Thereafter the Indian Companies (Amendment) Act was passed in 1942 by which a proviso was added to Section 277F to the effect that any company which used as part of its name the word 'bank', 'banker' or 'banking' shall

be deemed to be a banking company notwithstanding the fact that the acceptance of deposits on current account subject to withdrawal by cheque is not the principal business of the company. In the mid-fifties it became desirable that steps should be taken to safeguard the banking structure against possible repercussions in the post-war period and it was considered necessary that comprehensive banking legislation should be introduced.

171. There are various provisions in the 1949 Act to indicate that a banking company cannot carry on business of a managing agent or Secretary and treasurer of a company and that it cannot acquire, construct, maintain, alter any building or works other than those necessary or convenient for the purpose of the company. A banking company cannot acquire or undertake the whole or any portion of any business unless such business is of one of these enumerated in S. 6 (1) of the 1949 Act. A bank cannot deal in buying or selling or bartering of goods except in connection with certain purposes related to some of the businesses enumerated in the aforesaid Section 6 (1). These provisions also establish that businesses mentioned in Section 6 of the 1949 Act are incidental and conducive to banking business. A bank cannot employ any person whose remuneration is in the form of a commission or a share in the profits of the banking company or whose remuneration is in the opinion of the Reserve Bank excessive. One of the most important provisions is Section 35 of the 1949 Act, which states that the Reserve Bank at any time may and on being directed so to do by the Central Government cause an inspection to be made by one or more of its officers of the books of account and to report to the Central Government on any inspection and the Central Government thereafter if it is of opinion after considering the report that the affairs of the banking company are being conducted to the detriment of the interests of its depositors, may prohibit the banking company from receiving fresh deposits or direct the Reserve Bank to apply under Section 38 for the winding up of the banking company. Another important provision in the 1949 Act is found in section 27 which provides for monthly returns in the prescribed form and manner showing assets and liabilities. The power of the Reserve Bank under Sections 27 and 35 of the 1949 Act relates to the affairs of the banking company which comprehend

the various forms of business of the bank mentioned in Section 6 of the 1949 Act. Then again Section 29 of the 1949 Act contemplates accounts relating to accounts of all business transacted by the bank. Section 35-A of the 1949 Act confers power on the Reserve Bank to give directions with regard to the affairs of a bank. These provisions indicate beyond any measure of doubt that all forms of business mentioned in Sec. 6 (1) of the 1949 Act are lawful, legitimate businesses of a bank as these have grown along with increase of trade and commerce. The word 'banking' has never had any static meaning and the only meaning will be the common understanding of men and the established practice in relation to banking. That is why all these disputed forms of business come within the legitimate business of a bank.

172. The next question is the legislative competence in regard to the Act of 1969. Counsel for the petitioner contended that the Act was for nationalisation of banks and there was no legislative entry regarding nationalisation and therefore that was incompetent. There is no merit in that contention. The Act is for acquisition of property; the undertaking of a banking company is acquired. The legislative competence is under Entry 42 in List III of the 7th Schedule and also under Entry 45 in List I of the 7th Schedule. Entry 42 in List III is acquisition and requisitioning of property. Entry 45 in List I is 'banking'. The Act of 1969 is valid under these entries. A question arose whether the Act of 1969 pertains to Entry 43 in List I which deals with incorporation, regulation and winding up of trading corporations including banks. It is not necessary to deal with that entry because of my conclusion as to Entries No. 42 in List III and No. 45 in List I. Counsel for the petitioner contended that the Act of 1969 trench upon Entry 26 in List II, namely, trade and commerce within the State. I am unable to accept that contention for the obvious reason that the legislation is for acquisition of undertakings of banking companies. The pith and substance of the legislation is to be found out and meaning is to be given to the entries 'banking' and acquisition of property. In the case of *United Provinces v. Mst. Atiga Begum*, 1940 FCR 110 = (AIR 1941 FC 16) Gwyer C. J. said that it would be practically impossible to define each item in the provincial legislation as to make it exclusive of every other item in that list and Parlia-

ment seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. The doctrine of pith and substance used in *Union Colliery Co. of British Columbia v. Bryden*, 1899 AC 580 is nothing but an illustration of the principle that when the legislation is referable to one or more entries the Courts try to find out what the pith and substance of the legislation is. In the present case the Act is beyond any doubt one for acquisition of property and is also in relation to banking. The legislation is valid with reference to the entries, namely Entry 42 (Requisition) in List III, Entry 45 (Banking) in List I.

173. Counsel for the petitioner contended that undertaking of banking companies could not be the subject matter of acquisition and acquisition of all properties in the undertaking must satisfy public purpose as contemplated in Article 31 (2). This contention was amplified to mean that undertaking was not property capable of being acquired and some assets like cash money could not be the subject matter of acquisition. The Attorney General on the other hand contended first that undertaking is property within the meaning of Article 31 (2), secondly, undertaking in its normal meaning refers to a going concern and thirdly it is a complete unit as distinct from the ingredients composing it and therefore it could not be said that acquisition of the undertaking was an infraction of any constitutional provision. The term 'undertaking' is explained in Halsbury's Laws of England, 3rd Ed. Vol. 6 paragraph 75 at page 43 to mean not the various ingredients which go to make up an undertaking but the completed work from which the earnings arise. As an illustration reference is made to mortgage of the undertaking of a company.

174. In *Gardner v. London Chatham and Dover Rly. Co.*, (1867) 2 Ch A 201 the undertaking of a railway company which was pledged was held to be a railway which was to be made and maintained, by which tolls and profits were to be earned, which was to be worked and managed by a company, according to certain rules of management, and under a certain responsibility. In an undertaking there will be money for the working of the undertaking and money will be earned thereby. Again in *Re: Panama, New Zealand and Australian Royal Mail Co.*, (1870) 5 Ch A 318 the

undertaking of a steamship company was explained to have reference not only to all the property of the company which existed at the date of the debenture but which might become the property of the company and further that the word 'undertaking' referred to the application of funds which came into the hands of the company in the usual course of business. Undertaking will therefore relate to the entire business although there may be separate ingredients or items of work or assets in the undertaking. The undertaking is a going concern and it cannot be broken up into pieces to create a security over the undertaking (See *Re: Portsmouth (Kingston, Fratton and Southsea) Tramway Co.*, (1892) 2 Ch 362 and *H. H. Vivian and Co. Ltd.*, (1900) 2 Ch 654).

175. The word 'undertaking' is used in various statutes of our country, viz., the Indian Electricity Act, 1910 (Sections 6, 7, 7A), Indian Companies Act (Sections 125 (4) (f), 293 and 394), Banking Regulation Act, 1949 (Section 14A), Cotton Textiles Companies (Management of Undertaking, Liquidation and Reconstruction) Act, 1967 (Sections 4 (1), 5 (1) (2)). By the word undertaking is meant the entire organisation. These provisions indicate that the company whether it has a plant or whether it has an organisation is considered as one whole unit and the entire business of the going concern is embraced within the word 'undertaking'. In the case of sale of an undertaking as happened in *Doughty v. Lomagunda Reefs, Ltd.*, (1962) 2 Ch 837 the purchaser was required to pay all debts due by and to perform outstanding contracts comprised in the entire undertaking. The word 'undertaking' is used in the Indian Electricity Act, the Air Corporation Act, 1953, the Imperial Bank of India Act, 1920 (Sections 3, 4, 6 and 7), the State Bank of India Act, 1955 (Section 6 (1) (g)), the State Bank Subsidiaries Banks Act, 1959 (Section 10 (1)), the Banking Regulation Act, 1949 (Section 30AE (1)) and there have been legislative provisions for acquisition of some of these undertakings.

176. Under Section 5 of the Act of 1969 the undertaking of each existing bank shall be deemed to include all assets, rights, powers, authorities and privileges and all property, movable and immovable, cash balances, reserve funds, investments and all other rights and interests arising out of such property as were immediately before the commencement of this Act in the ownership, possession,

power or control of the existing bank in relation to the undertaking. This Court accepted the meaning of property given by Rich, J. in the *Minister for State for the Army v. Dalziel*, 68 CLR 261 to be a bundle of rights which the owner has over or in respect of a thing, tangible or intangible or the word 'property' may mean the thing itself over or in respect of which the owner may exercise those rights. In the case of *Commr. Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005 = (AIR 1954 SC 282) this Court again gave wide meaning to the word 'property' and Mukherjea, J. said that there is no reason why the word 'property' as used in Article 19 (1) (f) of the Constitution should not be given a liberal and wide connotation and would not be extended to those well-recognised types of interest which have the insignia or characteristics of proprietary right. In the case of *J. K. Trust, Bombay v. Commr. of Income-tax, Excess Profits Tax, Bombay*, 1958 SCR 63 = (AIR 1957 SC 846) this Court held the managing agency business to be a property. The undertaking of a bank will therefore be the entire integrated organisation consisting of all property, movable or immovable and the totality of undertaking is one concept which is not divisible into components or ingredients. That is why in relation to a company the word 'undertaking' is used in various statutes in order to reach every corner of property, right, title and interest therein. The decision in (1968) 3 SCR 489 = (AIR 1968 SC 1053) is an authority for the proposition that money cannot be acquired under Article 81 (2). The impugned Act in *Ranojirao Shinde's case*, (1968) 3 SCR 489 = (AIR 1968 SC 1053) (supra) abolished cash grants which the respondents were entitled to receive from the Government of Madhya Pradesh, but provided for the payment of certain compensation to the grantees. *Ranojirao Shinde's case*, (1968) 3 SCR 489 = (AIR 1968 SC 1053) (supra) did not deal with the case of an undertaking and has therefore no application to the present case. The undertaking is an amalgam of all ingredients of property and is not capable of being dismembered. That would destroy the essence and innate character of the undertaking. In reality the undertaking is a complete and complex web and the various types of business and assets are threads which cannot be taken

apart from the west. I am, therefore, of opinion that undertaking of a banking company is property which can be validly acquired under Article 31 (2) of the Constitution.

177. The next question for consideration is whether Article 19 (6) of the Constitution is attracted. Counsel for the petitioner contended that as a result of the Constitution First Amendment Act, 1951 Article 19 (6) was clarified to the effect that the word 'restrictions' would include prohibition or exclusion which was dealt with in the second limb of Article 19 (6). It may be stated here that prior to the amendment of Art. 19 (6) the second limb spoke only of law prescribing qualifications for practising any profession or carrying on any occupation, trade or business. As a result of the amendment of the second limb of Article 19 (6) consisted of two sub-articles the first sub-article relating to qualifications for practising profession or carrying on any occupation, trade or business and the second sub-article relating to carrying on by the State of trade, business industry to the exclusion complete or partial of citizens or otherwise. The second sub-article was really an enlargement of Clause (6) of Article 19 as a result of the amendment. The main contention of counsel for the petitioner was that the second limb of Article 19 (6) after the expression 'in particular' must also satisfy the test of reasonable restriction contained in the first limb of Article 19 (6) and emphasis was placed on the word 'in particular' to show that it indicated that the second limb was only an instance of the first limb of the Article. The Constitution First Amendment Act of 1951 was enacted really to enable the State to carry on business to the exclusion, complete or partial of citizens or otherwise as will appear from the amendment of Article 19 (6).

178. In the case of (1963) Supp 2 SCR 691 = (AIR 1963 SC 1047) this Court considered the Orissa Tendu Leaves (Control of Trade) Act, 1961 by which the State acquired monopoly in the trade of Kendu leaves and put restrictions on the fundamental rights of the petitioner. In that case, Gajendragadkar, J. speaking for the Court referred to the decision of the Allahabad High Court in *Motilal v. Government of the State of Uttar Pradesh*, ILR (1951) 1 All 269 = (AIR 1951 All 257) where a monopoly of transport sought to be created by the U. P. Government in favour of the State operated

Bus Service known as the 'Government Roadways' was struck down as unconstitutional because such a monopoly totally deprived the citizens of their rights and that is why Article 19 (6) came to be amended. The necessity of the amendment of Article 19 (6) was explained in the case of *Akadasi Padhan*, (1963) Supp 2 SCR 691 = (AIR 1963 SC 1047) (supra). The view expressed by this Court in that case is that the two sub-articles of the second limb deal with two different forms of legislation. The first sub-article deals with restrictions on the exercise of the right to practise any profession or to carry on any trade, occupation or business. The second sub-article deals with carrying on by the State of any trade, business or industry to the exclusion, complete or partial of citizens or otherwise. The effect of the amendment was stated by Gajendragadkar, J. to be that a State Monopoly in respect of any trade or business must be presumed to be reasonable and in the interest of the general public so far Article 19 (1) (g) is concerned. The words 'in particular' in that case in Article 19 (6) were held to indicate that restrictions imposed on the fundamental rights guaranteed by Article 19 (1) (g) which are reasonable and which are in the interest of the general public are saved by Article 19 (6) as it originally stood and the validity of the laws covered by the amendment would no longer be left to be tried in Courts.

179. Counsel for the petitioner relied on the decision of the House of Lords in the case of 1952 AC 362 in support of the proposition that the words 'in particular' in Article 19 (6) were used to place the accent on reasonable restrictions in that clause as the saving feature of a law affecting Article 19 (1) (g). Section 43 (1) of the Town and Country Planning Act, 1947 which was considered was as follows:

"(1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development."

It was held that the sub-section conferred a single power on the Central Land

Board and not two powers, viz., that the boards have power to acquire land for the purpose connected with the performance of their functions and the words in the second limb of the section were no more than a particular instance of that which the legislature regarded as part of the Board's functions. The purpose referred to in the second part of the sub-section there introduced by the words 'in particular' was held to be a purpose connected with the performance of the function within the meaning of the first part of the sub-section. The language of the sub-section in the case before the House of Lords is entirely different from the language in Article 19 (6). Article 19 (6) in the two limbs and in the two sub-articles of the second limb deals with separate matters and in any event State monopoly in respect of trade or business is not open to be reviewed in Courts on the ground of reasonableness. This Court in the case of *Writ Petn. No. 295 of 1965, D/- 30-1-1969* = (reported in AIR 1969 SC 1100) held that so far as monopoly business by the State was concerned under Article 19 (6) it was not open to challenge.

180. The four businesses which were disputed by counsel for the petitioner to be within the business of banking were contended to be not only acquisition of property in violation of Article 19 (1) (f) but also not to be reasonable restriction in the interest of the general public under Article 19 (5) or under Article 19 (6). Emphasis was placed on Section 15 (2) of the Act of 1969 to contend that after the acquisition of the undertaking of the bank the provision permitting the banks to carry on business other than banking would be empty and really amount to prohibition of carrying on of the business because the assets pertaining to the four disputed businesses with which the business could be carried on had been taken away. I have already expressed my opinion that the four disputed businesses are the legitimate businesses of a banking company as mentioned in Section 6 (1) of the 1949 Act and are comprised in the undertaking of the bank and Article 19 (1) (f) is not attracted in case of acquisition or requisition of property dealt with by Article 31 (2). I have also held that Article 19 (6) confers power on the State to have a valid monopoly business. Section 15 (2) of the 1969 Act allows the existing banks to carry on business other than banking. If as a result of acquisition, the bank will complain of

lack of immediate resources to carry on these businesses the Act provides compensation and the existing bank will devise ways and means for carrying on the businesses. Constitutionality of the Act cannot be impeached on the ground of lack of immediate resources to carry on business. In the present case, the acquisition is not unconstitutional and the bank is free to carry on all business other than banking. It cannot be suggested that after compensation has been provided for the State will have to provide moneys to enable the existing bank to carry on these businesses. That would be asking for something beyond the limits of the Constitution. If the entire undertaking of a banking company is taken by way of acquisition the assets cannot be separated to distinguish those belonging to banking business from other belonging to "non banking business" because assets are not in fact divided on any such basis. Furthermore that would be striking at the root of acquisition of the entire undertaking. It would be strange to hold in the teeth of express provisions in the Act of 1969 permitting the banks to carry on business other than banking that the same will amount to a prohibition on the bank to carry on those businesses. I find it difficult to comprehend the contention of the petitioner that a permissive provision allowing the banks to carry on these businesses other than banking becomes unreasonable. If that provision was not there the businesses could be carried on and the argument would not be available at all. The express making of the provision obviously for greater safety cannot change the position. The petitioner's contention on Article 19 (6) therefore fails.

181. Counsel for the petitioner contended that Section 11 of the 1969 Act suffered from the vice of excessive delegation and there were no guidelines for reaching the objectives set out in the Preamble of the Act and the decision of Government regarding policy involving public interest was made final and therefore it was unconstitutional. Section 11 of the Act of 1969 is in two sub-sections. The first sub-section enacts that corresponding new bank shall, in the discharge of its functions, be guided by such directions in regard to matters of policy involving public interest as the Central Government may after consultation with the Governor of the Reserve Bank, give. The second sub-section enacts that if any question arises whether a direction rela-

tes to a matter of policy involving public interest, it shall be referred to the Central Government and the decision of the Central Government thereon shall be final. Section 25 (1) (c) of the Act of 1969 provides that the words 'corresponding new bank' constituted under Sec. 3 of the 1969 Act "on any other banking institution notified by the Central Government" shall be substituted for the words "or any other banking institution notified by the Central Government in this behalf", in Section 51 of the 1949 Act. Sections 7, 17 (15A) of the Reserve Bank Act of 1934 contain similar powers on the part of the Central Government to give directions to the Reserve Bank in regard to management and exercise of powers and functions in performance of duties entrusted to the bank under the Reserve Bank Act. A statute of this nature whereby the controlling interest of the business of banks is acquired renders it not only necessary but also desirable that policy involving public interest should be left to the Government.

182. The Act of 1969 contains enough guidance. First the Government may give directions only in regard to policy involving public interest; secondly directions can only be given by the Central Government and no one else; thirdly, these directions can only be given by the Central Government after consultation with the Governor of the Reserve Bank; fourthly, directions given by the Government are in regard to matters involving public interest which means that this is objective and subject to judicial scrutiny and both the Central Government and the Governor of Reserve Bank are high authorities.

183. As a result of Section 25 (1) (c) of the Act of 1969, 14 banks will be subject to the provisions of the 1949 Act enumerated in Sections 15, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 31, 34, 35, 35A, 36 and 48. These sections principally deal with restrictions as to payment of dividend, prohibition of floating charge on assets, creation of reserve fund, restrictions on subsidiary company, restrictions on loans and advances, power of the Reserve Bank to control advances by banking companies, restrictions on the opening of new places of business, maintenance of percentage of assets, return of unclaimed deposits, furnishing of returns to the Reserve Bank, publication of information by the Reserve Bank, submission of accounts and balance sheet

to the Reserve Bank, inspection by the Reserve Bank, power of the Reserve Bank to give directions with regard to management, and imposition of penalties for contravention of the provisions of the Act.

184. There are other statutes which provide powers of the Central Government to give directions. I have already referred to the Reserve Bank of India Act, 1934. There are similar statutes conferring powers on the Government to give directions, namely, State Bank of India Act, 1955, State Financial Corporation Act, 1951, University Grants Commission Act, 1956, Life Insurance Act, 1956, Deposit Insurance Act, 1961, National Co-operative Development Corporation Act, 1962, Agricultural Refinance Corporation Act, 1963 and State Agricultural Credit Corporations Act, 1968. There are English statutes which contain similar provisions of exercise of power on directions by the Government in regard to the affairs of the undertakings covered by the statutes. These are the Bank of England Act, 1946, Cotton (Centralised Buying) Act, 1947, Coal Industry Nationalisation Act, 1946, Civil Aviation Act, 1946, Electricity Act 1947, Gas Act, 1948, Iron and Steel Act, 1949 and Air Corporations Act, 1949. It is explicable that where the Government acquires undertakings of industries, the matters of policy involving public interest or national interest should be left to be decided by the Government. There is nothing unconstitutional in such provisions.

185. The Preamble to the Act of 1969 states that the object of the Act is "to serve better the needs of the development of the economy in conformity with national policy and objectives". National policy and objectives are in accordance with the Directive Principles in Part IV of the Constitution. It is stated by the respondents in their affidavits that there are needs of the development of the economy in conformity with the Directive Principle and these are to be achieved by a mobilisation of the savings of the community and employing the large resources of the 14 banks to develop national economy in several spheres of activity by a more equitable distribution of economic resources, particularly, where there are large credit gaps. In the case of *Harishankar Bagla v. State of Madhya Pradesh*, 1955-1 SCR 380 = (AIR 1954 SC 465) Mahajan, C. J. at pages 388-89 of the report said "The Preamble and the body of the sections sufficiently formulate the legislative policy and the ambit and character of the Act

is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the frame-work of that policy'. It is manifest that in working the Act of 1969 directions from the Central Government are necessary to deal with policy and other matters to serve the needs of national economy.

186. Counsel on behalf of the petitioner next contended that acquisition of the 14 banks and the prohibition of banking business by the existing banks violated Article 301 and was not saved by Article 302 because it is not required in the public interest. As to the four disputed businesses which the existing banks can under the Act carry on, it was said that the same was an infraction of Article 301. Article 305 to my mind directly applies to a law relating to banking and all businesses necessarily incidental to it carried on by the State to the complete or partial exclusion of 14 banks. Article 302 can have no application in such a case. An individual cannot complain of violation of Article 301.

187. Article 305 applies in the present case and therefore neither Article 301 nor Article 302 will apply. Article 302 is an enabling provision and it has to be read in relation to Article 301. Acquisition of property by itself cannot violate Article 301 which relates to free trade, commerce throughout India. The object of acquisition is that the State shall carry on business to the exclusion, complete or partial, of the 14 banks.

188. Counsel for the petitioner contended that the 1969 Act violated the provisions of Article 14 on these grounds: First, the Act discriminated against 14 banks as against other Indian scheduled banks, secondly, the selection of 14 banks has no reasonable connection to the objects of the Act; thirdly, banks which may be described to be inefficient and which are liable to be acquired under Section 36AE of the 1949 Act are not acquired whereas 14 banks who have carried on their affairs with efficiency are acquired; fourthly under Section 15 (2) (d) (e) of the 1969 Act the 14 banks cannot do any banking business whereas other Indian scheduled banks or any other new banking company can do banking business.

189. In order to appreciate these contentions it is necessary to remember the background of growth of Indian banks. At the beginning I referred to the position

that State Bank of India and its several subsidiaries and the 14 banks occupy today in contrast with foreign banks and other scheduled or non-scheduled Indian banks. These 14 banks are not in the same class as other scheduled banks. The classification is on the basis of the 14 banks having deposit of Rs. 50 crores and over. The object of the Act is to control the deposit resources for developing national economy and as such the selection of 14 banks having regard to their larger resources, their greater coverage, their managerial and personnel resources and the administrative and organisational factors involved in expansion is both intelligible and related to the object of the Act. There is no evidence to show that the 14 banks are more efficient than the others as counsel for the petitioner contended. Section 15 (2) (d) (e) of the 1969 Act states that these 14 banks after acquisition are not to carry on any banking business for the obvious reason that these 14 banks are not in the same class as the other Indian banks. Besides, it is also reasonable that the 14 banks should not be permitted to carry on banking business as the corresponding new banks. Therefore the classification of the 14 banks is also a rational and intelligible classification for the purposes of the Act. The object of the 1969 Act was to meet credit gaps and to have a wider distribution of economic resources among the weaker sections of the economy, namely, agriculture, small scale industry and retail trade.

190. The Act of 1969 is for development of national economy with the aid of banks. There are needs of various sectors. The legislature is the best judge of what should subserve public interest. The relative need is a matter of legislative judgment. The legislature found 14 banks to have special features namely, large resources and credit structure and good administration. The categorisation of Rs. 50 crores and over vis-a-vis other banks with less than Rs. 50 crores is not only intelligible but is also a sound classification. From the point of view of resources these 14 banks are better suited than others and therefore speed and efficiency which are necessary for implementing the objectives of the Act can be ensured by such classification.

191. In the case of 1959 SCR 279 = (AIR 1958 SC 538) it was said that the Court would take into consideration the history of the times and could also assume the state of facts existing at the time of legislation. A presumption also

arises in regard to constitutionality of a piece of legislation. In the case of P. V. Sivarajan v. Union of India, (1959) Supp (1) SCR 779 = (AIR 1959 SC 556) the Coir Industry Act was considered in relation to registration of dealers for export. The Act provided minimum quantity of export preceding 12 months the commencement of the Act as one of the qualifying terms for registration. This quantitative test was held good. The legislative policy as to the necessity is a matter of legislative judgment and the Court will not examine the propriety of it. The legislation need not be all embracing and it is for the legislature to determine what categories will be embraced. In Dalmia's case (1959) SCR 279 = (AIR 1958 SC 538) (supra) it was said that the two tests of classification were first that there should be an intelligible differentia which distinguished persons or things grouped from others left out and secondly the differentia must have a rational relation to the object sought to be achieved by the statute. There has to be a line of demarcation somewhere and it is reasonable that these 14 banks which are in a class by themselves because of their special features in regard to deposit, credit, administration, organisation should be prohibited from carrying on banking business. These special circumstances are the reasons for classification. This distinction between the 14 banks and others reasonably justified different treatment. An absolute symmetry or an accurate classification is not possible to be achieved in the task of acquisition of undertakings of banking companies. It cannot, therefore, be said that companies whose deposits were in the range of Rs. 45 to Rs. 50 crores should have been taken.

192. In Kathi Rani Rawat v. State of Saurashtra, (1952) 3 SCR 435 = (AIR 1952 SC 123) this Court said that the necessity for judicial enquiries would arise when there was an abuse of power and the differences would have no relation to the object. In the case of Board of Trustees, Ayurvedic and Unani Tibbia College, Delhi v. State of Delhi, (1962) Supp (1) SCR 156 = (AIR 1962 SC 458) the Court supported legislation on a reasonable ground that the case of Tibbia College, 1962 Supp (1) SCR 156 = (AIR 1962 SC 458) (supra) had exceptional features which were not found in others. In Dalmia's case, 1959 SCR 279 = (AIR 1958 SC 538) (supra) the legislature was said to be free to recognise the degrees of

harm and to confine its restriction to those cases where the need was deemed to be the greatest. It is in this sense that usefulness to society was found to form a basis of classification in the case of Mohd. Hanif Quareshi v. State of Bihar, 1959 SCR 629 = (AIR 1958 SC 731). In the case of Harnam Singh v. Regional Transport Authority, Calcutta, 1954 SCR 371 = (AIR 1954 SC 190) Mahajan, J. said that in considering Article 14 the Court should not adopt an attitude which might well choke all beneficial legislation and legislation which was based on a rational classification was permissible. It will not be sound to suggest that there are other banks which can be acquired and these 14 banks should be spared. There is always possibility of discerning some kind of inequality and therefore grouping has to be made. Where the legislature finds that public need is great and these 14 banks will be able to supply that need for the development of national economy classification is reasonable and not arbitrary and is based on practical grounds and consideration supported by the large resources of over Rs. 50 crores of each of these 14 banks and their administration and management. I am, therefore, of opinion that the acquisition of the undertakings does not offend Art. 14 because of intelligible differentia and their rational relation to the object to be achieved by the Act of 1969 and it follows that these banks cannot therefore be allowed to carry on banking business to nullify the very object of the Act.

193. Counsel for the petitioner contended that the Act of 1969 infringed Article 31 (2) because there was no just compensation. It was said that compensation in Article 31 (2) meant just compensation and if the 1969 Act did not aim at just compensation, it would be unconstitutional. It was contended that cash could not be taken and further that the four disputed businesses could not be acquired. I have already expressed my view that the Act acquired the entire undertaking of the banks, and, therefore, there is no question of taking of cash. I have also expressed my view that the four disputed businesses are all within the business of bank, and, therefore, the Act is valid.

194. It was said by counsel for the petitioner that the word 'compensation' in Article 31 (2) was given the meaning of just equivalent in earlier decisions of this Court and since the word 'compensation'

sation' was retained in Article 31 (2) after the Constitution Fourth Amendment Act, 1953 there was no change in the meaning of the expression 'compensation' and it would have the same meaning of just equivalent. In view of the fact that after the Constitution Fourth Amendment Act the question of adequacy of compensation is not justiciable it was said by counsel for the petitioner that the only question for Courts is whether the law aimed at just equivalent. Counsel for the petitioner relied on the decision of this Court in (1965) 1 SCR 614 = (AIR 1965 SC 1017) and submitted that the decision in AIR 1969 SC 634 was a wrong interpretation of Article 31 (2).

195. The Attorney General on the other hand contended first that after the Constitution Fourth Amendment Act Article 31 (2) enacted that no law shall be called in question on the ground that the compensation provided by that law is not adequate and therefore compensation in that Article could not mean just equivalent. It was also said that Article 31 (2) refers to a law which provides for compensation and not to a law which aims at just equivalent. Secondly, it was said that the whole of Article 31 (2) had to be read and the meaning of the word 'compensation' in the first limb was to be understood by reference to the second limb and if the petitioner's arguments were accepted the Constitution would read that unless law provided for a just equivalent it shall be called in question. It was, therefore, said by the Attorney General that if just equivalent was to be aimed at the second limb of Article 31 (2), namely, that inadequacy would not be questioned would become redundant and meaningless. If the law enjoined that there was to be compensation and either principle for determination of compensation or amount of compensation was fixed the Court could not go into the question of adequacy or reasonableness of compensation and the Court could not also go into the question of result of application, propriety of principle or reasonableness of compensation.

196. In Vajravelu Mudaliar's case, (1965) 1 SCR 614 = (AIR 1965 SC 1017) (supra) this Court referred to the decision of Bela Banerjee's case, 1954 SCR 558 = (AIR 1954 SC 170) where it was held that compensation in Article 31 (2) meant just equivalent or full indemnification. In Vajravelu Mudaliar's case, (1965) 1 SCR 614 = (AIR 1965 SC 1017) (supra) it was

contended that the Land Acquisition Madras Amendment Act, 1961 had provided for acquisition of land for housing schemes and laid down principles for compensation different from those prescribed in the Land Acquisition Act 1894 and thereby Art. 31 (2) was infringed because the Act did not provide for payment of compensation within the meaning of Art. 31 (2). Suhba Rao, J. speaking for the Court said that if the term 'compensation' had received judicial interpretation it must be assumed that the term was used in the sense in which it had been judicially interpreted unless a contrary intention appeared. That is how reference was made to the decision of this Court in Bela Banerjee's case, 1954 SCR 558 = (AIR 1954 SC 170) to emphasise that a law for requisition or acquisition should provide for a just equivalent of what the owner has been deprived of. Subha Rao, J. then dealt with the clause excluding the jurisdiction of the Court where the word 'compensation' was used and said at page 627 of the Report 1965-1 SCR = (at page 1024 of AIR). The argument that the word 'compensation' means 'just equivalent' for the property acquired, and, therefore the Court can ascertain whether it is just equivalent or not makes the amendment of the Constitution nugatory. It will be arguing in a circle. Therefore, a more reasonable interpretation is that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' can be questioned by the Court on the ground of inadequacy of compensation fixed or arrived at by the working of the principles".

197. This Court then said that when value of a house at the time of acquisition had to be fixed there could be several methods of valuation, namely, estimate by engineer or value reflected by comparable sales or capitalisation of rent and similar others with the result that the adoption of one principle might give a higher value but they would nevertheless be principles of the manner in which the compensation has to be determined and the Court could not say that the Act should have adopted one principle and not the other because it would relate to the question of adequacy. In that case it was said that if a law lays down principles for determining compensation which are not relevant to the property acquired or to the value of the property at or about the time it is acquired it might be said that these are not princi-

ples contemplated by Article 31 (2). This was illustrated by saying that if a law says that though a house is acquired it would be valued as an agricultural land or though it is acquired in 1950 its value in 1930 should be given and though 100 acres are acquired only 50 acres will be paid for, these would not enter the question of area or adequacy of compensation. Another rule which was laid down in *Vajravelu Mudaliar's case*, 1965-1 SCR 614= (AIR 1965 SC 1017) (supra) is that the law may prescribe compensation which is illusory. To illustrate a property worth a lakh of rupees might be paid for at the sum of Rs. 100 and the question in that context would not relate to the adequacy of compensation because there was no compensation at all.

198. Two broad propositions which were laid down in *Vajravelu Mudaliar's case*, 1965-1 SCR 614= (AIR 1965 SC 1017) (supra) are these. First if principles are not relevant to the property acquired or not relevant to the value of the property at or about the time it is acquired, these are not relevant principles. The second proposition is that if a law prescribes a compensation which is illusory the Court could question it on the ground that it is not compensation at all.

199. In the case of *Shantilal Mangaldas*, AIR 1969 SC 634 (supra) the Bombay Town Planning Act of 1950 which was repealed by the Bombay Town Planning Act of 1955 came up for consideration. There was a challenge to the Bombay Act of 1955 on the ground of infringement of Article 31 (2) of the Constitution. Section 53 of the Bombay Act contemplated transfer of ownership by law from private owners to the local authority. It was argued that under Section 53 of the Bombay Act when a plot was reconstituted and out of that plot a smaller area was given to the owner and the remaining area was utilised for public purpose the area so utilised vested in the local authority for a public purpose, but the Act did not provide for giving compensation which was a just equivalent of the land expropriated at the date of extinction of interest and therefore Article 31 (2) was infringed. It was also argued that when the final scheme was framed in lieu of the ownership of the original plot and compensation in money was determined in respect of the land appropriated to public purpose such a scheme for compensation violated Article 31 (2) because compensation for the

entire land was not provided and secondly payment of compensation in money was not provided in respect of the land appropriated to public use.

200. *Shah, J.*, speaking for the Court in the case of *Shantilal Mangaldas*, AIR 1969 SC 634 (supra) said that the decision of this Court in the cases of *Bela Banerjee*, 1954 SCR 558= (AIR 1954 SC 170) and *Subodh Gopal Bose*, 1954 SCR 587= (AIR 1954 SC 92) (supra) "raised more problems than they solved", because the Court did not indicate the meaning of just equivalent and "it was easier to state what was not just equivalent than to define what a just equivalent was". In this state of law Article 31 was amended by Constitution Fourth Amendment Act, 1955. *Shah, J.*, said first that adequacy of compensation fixed by the legislature or awarded according to principles specified by the legislature is not justifiable and secondly if the amount of compensation is fixed it cannot be challenged apart from a plea of abuse of legislative power because otherwise it would be a challenge to the adequacy of compensation. In *Shantilal Mangaldas's case*, AIR 1969 SC 634 (supra) *Shah, J.*, also said that the compensation fixed or determined on principles specified by the legislature cannot be challenged on the indefinite plea that it is not a just or fair equivalent. *Shah, J.*, further said that principles of compensation could not be challenged on the plea that what was awarded as a result of the application of those principles was not just or fair compensation.

201. If the quantum of compensation fixed by the legislature is not liable to be challenged before the Court on the ground that it is not a just equivalent the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of these principles is not a just equivalent. The right declared by the Constitution guarantees compensation before a person is compulsorily expropriated of the property for public purpose. Principles may be challenged on the ground that they are not relevant to the property acquired or the time of acquisition of the property but not on the plea that the principles are not relevant to the determination of a fair or just equivalent of the property acquired. A challenge to the statute that a principle specified by it does not provide or award a just equivalent will be a clear violation of the constitutional dec-

laration that inadequacy of compensation provided for is not justifiable.

202. Shah, J., referred to the decision of this Court in (1967) 1 SCR 255= (AIR 1967 SC 637) and expressed disagreement with the following view expressed in the Metal Corporation case, 1967-1 SCR 255= (AIR 1967 SC 637) "the law to justify itself has to provide a payment of just equivalent to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary the adequacy of the resultant product cannot be questioned in the Court of law. The validity of the principles judged by the above tests falls within judicial scrutiny and if they stand the test the adequacy of the product falls outside justification". In Metal Corporation case, 1967-1 SCR 255= (AIR 1967 SC 637) (supra), compensation was to be equated to the cost price in the case of unused machinery in good condition and written down value as understood in income-tax law was to be the value of the used machinery and both were said to be irrelevant to the fixation of the value of machinery as on the date of acquisition. Shah, J., speaking for the Court expressed inability to agree with that part of the judgment and then said "the Parliament has specified the principles for determining compensation of undertaking of the company. The principles expressly related to the determination of compensation payable in respect of unused machinery in good condition and used machinery. The principles were not irrelevant to the determination of compensation and the compensation was not illusory". If what is specified is a principle for determination of compensation the challenge to that principle on the ground that a just equivalent is not reached is barred by the plain words of Article 31 (2) of the Constitution.

203. These two decisions have one feature in common, namely, that if compensation is illusory the Court will be able to go into it. By the word 'illusory' is meant something which is obvious, patent and shocking. If for a property worth Rs. 1 lakh compensation is fixed at Rs. 100 that would be illusory. One need not be astute to find out as to what would be at sight illusory. Furthermore, illusoriness must be in respect of the whole property and there cannot be illusoriness as to part in regard to the amount fixed or the result of application of principles laid down.

204. When principles are laid down in a statute for determination of compensation all that the Court will see is whether those principles are relevant for determination of compensation. The relevancy is to compensation and not to adequacy. I am unable to bold that when the relevant principle set out is ascertained value the petitioner could yet contend that market value should be the principle. It would really be going into adequacy of compensation by preferring the merits of the principle to those of the other for the oblique purpose of arriving at what is suggested to be just equivalent. To my mind it is unthinkable that the legislature after the Constitution Fourth Amendment Act intended that the word 'compensation' would mean just equivalent when the legislature put a bar on challenge to the adequacy of compensation. Just compensation cannot be inadequate and anything which is impeached as unjust or unfair is impinging on adequacy. Therefore, just equivalent cannot be the criterion in finding out whether the principles are relevant to compensation or whether compensation is illusory. In Vajravelu Mudaliar's case, 1965-1 SCR 614= (AIR 1965 SC 1017) (supra) the Court noticed continuous rise in land price but accepted an average price of 5 years as a principle. An average price over 5 years in the teeth of a continued rise in price would not aim at just equivalent according to the petitioner's contention there. Again potential value of land which was excluded in the Act in Vajravelu Mudaliar's case, (1965) 1 SCR 614= (AIR 1965 SC 1017) (supra) was said there to pertain to the method of ascertaining compensation and its exclusion resulting in inadequacy of compensation. I am, therefore, of opinion that if the amount fixed is not obviously and shockingly illusory or the principles are relevant to determination of compensation, namely, they are principles in relation to property acquired or are principles relevant to the time of acquisition of property there is no infraction of Article 31 (2) and the owner cannot impeach it on the ground of 'just equivalent' of the property acquired.

205. Counsel on behalf of the petitioner contended that Section 6 of the 1969 Act was an infraction of Article 31 (2) on these grounds. First, no time limit was mentioned with regard to payment of compensation in Section 6 (1); secondly, Section 6 (6) was an unreasonable restriction; thirdly, the four disputed businesses

are not subject-matter of acquisition for public purpose; fourthly, debentures cannot be subject-matter of acquisition; fifthly, currency notes, cash, coins cannot be subject matter of acquisition. It was said that securities and cash which are maintained under Section 42 of the Reserve Bank Act, 1934 and Section 24 of the 1949 Act can be taken but reserves and investments and shareholders' accumulated past profits cannot be subject-matter of acquisition and finally undertaking is not property and each asset is to be paid for.

206. Section 6 (1) of the Act provides for payment of compensation if it can be fixed by agreement and if agreement cannot be reached there shall be reference to a tribunal. There is no question of time within which agreement is to be reached or determination is to be made by a tribunal.

207. Section 6 (6) relates to interim payment of "one half of the amount of paid-up share capital" and any existing bank may apply to the Central Government for such payment before the expiry of 3 months or within such further time not exceeding 3 months as the Central Government may by notification specify. If the bank will apply the Government will pay the money only if the bank agrees to pay to shareholders. Section 6 (6) is a provision for the benefit of the bank and the shareholders. There is no unreasonableness in it.

208. I have already held that the four disputed businesses come within the legitimate business of banks and therefore they are valid subject-matter of acquisition. No acquisition or requisition of the undertaking of the banking company is complete or comprehensive without all businesses which are incidental and conducive to the entire business of the bank.

209. The entire undertaking is the subject-matter of acquisition and compensation is to be paid for the undertaking and not for each of the assets of the undertaking. There is no uniform established principle for valuing an undertaking as a going concern but the usual principle is assets minus liabilities. If it be suggested that no compensation has been provided for any particular asset that will be questioning adequacy of compensation because compensation has been provided for the entire undertaking. The compensation provided for the undertaking cannot be called illusory because in the present case principles have been laid down. The Second Schedule of the Act of 1969 deals with the principles of com-

pensation for the undertaking. The second Schedule is in two parts. Part I relates to assets and Part II relates to liabilities. The compensation to be paid shall be equal to the sum total of the value of assets calculated in accordance with the provisions of Part I less the sum total of liabilities computed and obligations of existing banks calculated in accordance with the provisions of Part II. In Part I assets are enumerated.

210. Counsel for the petitioner contended that with regard to assets either there was no principle or the principle was irrelevant or the compensation was illusory or it was not just equivalent. As to securities, shares, debentures Part I (c) explanation (iv) was criticised on the ground that there was no principle because period was not fixed and was left to be determined by some other authority. Explanations (iv) and (v) to Part I (c) will be operative only when market value of shares, debentures is not considered reasonable by reason of its having been affected by abnormal factors or when market value of shares, debentures is not ascertainable. In the former case the basis of average market value over any reasonable period and in the latter case the dividend paid during 5 years and other relevant factors will be considered. In both cases principles have been laid down, namely, how valuation will be made taking into account various factors and these principles are relevant to determination of compensation for the property.

211. Part I (c) Explanation I was criticised by counsel for the petitioner to be an instance of value being brought down from 'just equivalent'. Part I (c) Explanation I states that value shall be deemed to be market value of land or buildings, but where such market value exceeds the ascertained values determined in the manner specified in Explanation 2, it shall be deemed to mean such ascertained value. This criticism suggests that compensation should be just equivalent meaning thereby that what is given is not just and therefore, indirectly it is challenging the adequacy. In *Vajravelu Mudaliar's case*, 1965-1 SCR 614= (AIR 1965 SC 1017) (supra) there was a provision for compensation on the basis of the market value on the date of the notification or on the basis of average market value during past 5 years whichever was less. That principle was not held to be bad. The owner of the property is not entitled to

just equivalent. Explanation I lays down the principle. Market value is not the only principle. That is why the Constitution has left the laying down of the principles to the legislature. Ascertained value is a relevant and sound principle based on capitalisation method which is accepted for valuation of land and properties.

212. It was next said by counsel for the petitioner that Explanation 2 (1) in Part I was an irrelevant principle because it was a concept borrowed from Income-tax Act for calculating income and not capital value. It was said that 12 times the annual rent was not a relevant principle and was not an absolute rule and compensation might be illusory. It was also said that Explanation 2 (1) would be irrelevant where 2 plots were side by side, one with building and the other vacant land because the latter would get more than the former and in the former standard rent was applied and the value of land was ignored and therefore it was an irrelevant principle. That will not be illusoriness. Standard rent necessarily takes into account value of land on which the building is situated because no rent can be thought of without a building situated on a plot of land. Article 31 (2) does not enjoin the payment of full or just equivalent or the payment of market value of land and buildings. There should be a relevant principle for determining compensation for the property acquired. Capitalisation method is not available for land because land is not generally let out. If rental method be applied to land the value may be little. In any event, it is a principle relevant to determination of compensation. Furthermore, there was no case in the petition that there was land with building side by side with vacant land.

213. Another criticism with regard to Explanation 2 (1) (i) was that amount required for repairs which was to be deducted in finding out ascertained value should not be deducted against capital value. I am unable to accept the contention because this deduction on account of maintenance and repairs is essential in the capitalisation method. It was next said by counsel for the petitioner that Explanation 2 (1) (ii) which speaks of deduction of insurance premium would reduce the value. Insurance would also be an essential deduction in the capitalisation method and it could not be assumed that the bank would insure for a value higher than what was necessary. Annual

rent would also vary in different buildings. Amounts mentioned in Explanations 2 (1) (iii) and (iv) were said on behalf of the petitioner not to be deductible against capital value because annual charge or ground rent would be paid from income. These relate to Municipal tax and ground rent which are also taken into consideration in capitalisation method. Payment of tax or ground rent may be out of income but these have to be provided for in ascertaining value of the building under the capitalisation method.

214. Explanation 2 (1) (vi) which speaks of deduction of interest on borrowed capital with which any building was constructed was said to be included twice, namely under Explanation 2 (1) (vi) and also under liabilities in Part II. Explanation 2 in Part I which relates to finding out ascertained value of building enacts that where building is wholly occupied 12 times the annual rent or the rent at which the building may be expected to let out less deductions mentioned therein would be the ascertained value. These deductions are made to arrive at the value of the building under the capitalisation method to find out how much will be paid in the shape of interest on mortgage or borrowed capital. Interest on mortgage or borrowed capital will be one of the deductions in calculating outgoing under capitalisation method. In Part II, the liabilities are those existing at the commencement of the Act and contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources on or after the commencement of the Act. Interest payable on mortgage or borrowed capital at or after the commencement of the Act will not be taken into account as outgoings deducted under capitalisation method.

215. Explanation 2 (2) was criticised by counsel for the petitioner on the ground that plinth area related to the floor area and if a floor was not occupied the plinth area thereof was not taken into account. Explanation 2 (1) relates to determination of compensation by finding out ascertained value in the case of building which is wholly occupied. Explanation 2 (2) relates to the case of a building which is partially occupied. Explanation 2 (3) refers to land on which no building is erected or which is not appurtenant to any building. In the case of partial occupation Explanation 2 (2) sets out the principle of compensation of partially occu-

pied building. Again in Explanation 2 (3) the criticism on behalf of the petitioner that if there is a garage or one storeyed structure the principle will not apply is explained on the ground that the expression 'appurtenant' means land belonging to the premises. If there is a small garage or a one storeyed building the land will not be appurtenant to the garage or building.

216. Counsel for the petitioner contended that Part 1 (h) which spoke of market or realisable value of other assets did not include goodwill, benefit of contract, agencies, claims in litigation, and, therefore, there was no compensation for these. Part 1 (h) is a residuary provision. Whatever appears in books would be included. Goodwill does not appear in the books. Goodwill may arise when an undertaking is sold as a going concern. The contention as to exclusion of goodwill goes to the question of adequacy and will not vitiate the principle of valuation which has been laid down. Reference may be made to Schedule VI of the Companies Act which refers to goodwill under Fixed Assets but the Banking Regulation Act 1949 does not contain goodwill under property and assets.

217. Goodwill in the words of Lord Elden in *Cruttwell v. Lye*, (1810) 17 Ves 335 means "the probability that the old customers will resort to the old place". The term 'goodwill' is generally used to denote the benefit arising from connection and reputation. Whether or not the goodwill has a saleable value the question of fact is to be determined in each case. Upon sale of a business there may be restriction as to user of the name of the business sold. That is another aspect of sale of goodwill of a business. The 14 banks carried on business under licence by reason of Section 22 of the Act of 1949. The concept of sale in such a situation is unreal. Furthermore, the possibility of nationalisation of undertakings like banks cannot be ruled out. Possibility of nationalisation will affect the value of goodwill. In the case of compulsory acquisition it is of grave doubt whether goodwill passes to the acquiring authority. No facts have been pleaded in the petition to show as to what goodwill the bank has. Goodwill is not shown in assets. In the present case the names of the 14 banks and the corresponding new banks are not the same and it cannot therefore be said that any goodwill has been transferred. The 14 banks will be

able to carry on business other than banking in their names. Again under the Act compensation is being paid for the assets and secret reserves which are provided for by depreciating the value of assets will also be taken into account. Any challenge as to compensation for goodwill falls within the area of adequacy.

218. As to Part II of the Schedule counsel for the petitioner said that liabilities not appearing in the books would be deducted but in the case of assets only those appearing in the books will be taken into account. Nothing has been shown in the petition that there are assets apart from those appearing in the books. It would not be appropriate to speak of liabilities like current income-tax liability, gratuity, bonus claims as liabilities appearing in the books.

219. It was said on behalf of the petitioner that interest from the date of acquisition was not provided for. That would again appertain to the adequacy of compensation. Furthermore, interest has been provided for under Section 6 (3) (a) (b) of the 1969 Act. It was also said that if there was a large scale sale of promissory notes or stock certificates the value would depreciate. Possibility of depreciation does not vitiate the principle or constitutionality of a measure.

220. The principles which have been set out in 1969 Act are relevant to the determination of compensation. When it is said that principles will have to be relevant to the compensation, the relevancy will not be as to adequacy of compensation but to the property acquired and the time of acquisition. It may be that adoption of one principle may confer lesser sum of money than another but that will not be a ground for saying that the principle is not relevant. The criticism on behalf of the petitioner that compensation was illusory is utterly unmeritorious.

221. The Attorney-General contended that even if Article 19 (1) (f) or 19 (1) (g) applied the 1969 Act would be upheld as a reasonable restriction in the interest of the general public. It is said that social control scheme is a constitutional way of fulfilling the Directive Principles of State Policy. The 14 banks paid a total of 4.35 crores of rupees as dividend in 1968. This amount is said in the affidavit of the respondent not to be of great significance and that the bank should expand and attract more deposits. The comparative position of India along with

other countries is focussed in the study group Report referred to in the affidavit in opposition. Commercial bank deposits and credit as proportion of national income form hardly 14 per cent and 10 per cent respectively in India as against 84 per cent and 19 per cent in Japan, 56 per cent and 38 per cent in U. S. A., 49 per cent and 29 per cent in Canada whereas the average population served in India by banks is as high as 73000 as against 4000 in U. S. A. and Canada and 15,000 in Japan. Then it is said that more than 4/5th of the credit goes to industry and commerce, retail has about 2 per cent and agriculture less than 1 per cent. Small borrowers it is said have no facilities. It is said that institutional credit is virtually non-existent in relation to small borrowers. The suggestion is that there is flow of resources from smaller to larger population and from rural to urban centres. There are many places which have no banks. In different States there is uneven spread of banking offices. There is greater expansion in urban banking. 5 major cities are said to have 46 per cent deposit but 65 per cent credit. Banks are more developed in States which are economically and socially advanced but even in such developed States banks are sparsely located.

222. India is a predominantly agricultural country and one half of national income, viz., 53.2 per cent is from agriculture. Out of 5,64,000 villages only 5,000 are served by banks. Not even 1 per cent have bank facilities. Credit requirements for agriculture are of great importance. Agriculturists have 34 per cent credit from Co-operatives, 5 per cent from banks and the rest from money lenders. The requirements are said to be Rs. 2,000 crores for agriculturists. The small scale industries are said to employ one-third of the total industrial population and 40 per cent of the industrial workers are in small scale industries. Banks will have to meet their needs. Small artisans and retail trade have all need for credit. It is said that barely 1.8 per cent of the total bank advances goes to small scale industries. It is said in the affidavit that the policy of the Government is to take up direct management of credit resources for massive expansion of branches, vigorous principles for mobilisation of deposits and wide range programme to fill the credit gaps of agriculture, small scale industries, small artisans, retail trade and consumer credit. This policy can be achieved only by direct management by State and not

merely by social control. Almost all the banks are in favour of large scale industry. This direct control and expansion of bank credit is intended to make available deposit resources and expand the same to serve the country in the light of Directive Principles. These are the various reasons which are rightly said by the Attorney-General to be reasonable restrictions in the interest of the general public. I wish to make it clear that in my opinion Articles 19 (1) (f) and (g) do not at all enter the domain of Article 31 (2) because a legislation for acquisition and requisition of property for public purpose is not required to be tested again on the touchstone of reasonableness of restriction. Such reasonable restriction is inherent and implicit in public purpose. That is why public purpose is dealt with separately in Article 31 (2).

223. The validity of the Ordinance of 1969 was challenged by contending that the satisfaction of the President under Article 123 was open to challenge in a court of law. It was said that the satisfaction of the President was objective and not subjective. The power of the President under Article 123 of the Constitution to promulgate Ordinances is when both the Houses of Parliament are not in session and this power is co-extensive with that of the legislature and the President exercises this power when he is satisfied that circumstances exist which render it necessary for him to take immediate action. The power of promulgating Ordinance is of historical antiquity and it has undergone change from time to time. In the East India Company Act, 1773 under Section 36 the Governor-General could promulgate Ordinance. The Indian Councils Act, 1861 by Section 23 thereof provided that the Governor-General in case of emergency may promulgate an Ordinance for the peace and good government of the territories. The Government of India Act, 1915 provided in Section 72 that the Governor-General could promulgate Ordinances for the peace and good government. The Government of India Act 1935 by Sections 42, 43 and 45 conferred power on the Governor-General to promulgate Ordinances and Sections 88 and 89 conferred a similar power on the Governor. Article 123 of the Constitution is really based on Section 42 of the Government of India Act, 1935 and Article 213 which relates to the power of the Governor in the States is based on Section 88 of the Government of India Act, 1935.

224. It has been held in several decisions like Bhagat Singh's case, 58 Ind App 169= (AIR 1931 PC 111) and Sibnath Banerjee's case, 72 Ind App 241= (AIR 1945 PC 156) that the Governor-General is the sole judge as to whether an emergency exists or not. The Federal Court in Lakhi Narain Singh's case, 1949 FCR 693 = (AIR 1949 FC 59) took a similar view that the Governor-General was the sole judge of the state of emergency for promulgating Ordinances.

225. The sole question is whether the power of the President in Article 123 is open to judicial scrutiny. It was said by counsel for the petitioner that the Court would go into the question as to whether the President was satisfied that circumstances existed which rendered it necessary for the President to promulgate an Ordinance. *Liversidge's case*, 1942 AC 206 was relied upon by counsel for the petitioner. That case interpreted the words "reasonable cause to believe". It is obvious that when the words used are "reasonable cause to believe" it is to be found out whether the cause itself has reason to support it and the Court goes into the question of ascertaining reasons. In *Liversidge's case* 1942 AC 206 it was said that the words "has reasons to believe" meant an objective belief whereas the words "if it appears" or "if satisfied" would be a subjective satisfaction.

226. The words 'if it appears' came up for consideration in two English cases of *Ayr Collieries*, 1948-2 All ER 546 and the *Carltona* 1943-2 All ER 560 and the decision was that it was not within the province of the Court to enquire into the reasonableness of the policy.

227. The interpretation of Article 123 is to be made first on the language of the Article and secondly the context in which that power is reposed in the President. When power is conferred on the President to promulgate Ordinances the satisfaction of the President is subjective for these reasons. The power in Article 123 is vested in the President who is the executive head and the circumstances contemplated in Article 123 are a guide to the President for exercise of such power. Parliament is not in session throughout the year and during the gaps between sessions the legislative power of promulgating Ordinance is reposed in the President in cases of urgency and emer-

gency. The President is the sole judge whether he will make the Ordinance. The President under Article 74 (1) of the Constitution acts on the advice of Ministers. Under Article 74 (2) the advice of the Ministers is not to be enquired into by any Court. The Ministers under Article 75 (3) are responsible to Parliament. Under Article 123 the Ordinances are limited in life and the Ordinance must be laid before Parliament and the life of the Ordinance may be further shortened. The President under Article 361 (1) is not answerable to any Court for acts done in the performance of his duties. The Ministers are under oath of secrecy under Article 75 (4). Under Article 75 (3) the Ministers are collectively responsible to the House of the People. Under Article 78 it shall be the duty of the Prime Minister to furnish information to the President. The power under Article 123 relates to policy and to an emergency when immediate action is considered necessary and if an objective test is applied the satisfaction of the President contemplated in Article 123 will be shorn of the power of the President himself and as the President will be acting on the advice of Ministers it may lead to disclosure of facts which under Article 75 (4) are not to be disclosed. For these reasons it must be held that the satisfaction of the President is subjective.

228. Counsel for the petitioner relied on the decisions of this Court in the cases of *Barium Chemicals*, (1966) Supp SCR 311= (AIR 1967 SC 295) and *Rohtas Industries*, AIR 1969 SC 707. In both the cases the words used in the Companies Act, 1956 Section 237 (b) which came up for consideration before this Court are to the effect that the Central Government may, if in the opinion of the Central Government there are circumstances suggesting, that the business of the company is not properly conducted, appoint competent persons to investigate the affairs of the company. The opinion which is to be formed by the Central Government under the Companies Act in that section is in relation to various facts and circumstances about the business of a company and that is why this Court came to the conclusion that the existence of circumstances but not the opinion was open to judicial scrutiny. This was the view of this Court in the cases of *Barium Chemicals*, (1966) Supp SCR 311= (AIR 1967 SC 295) and *Rohtas Industries*, AIR 1969 SC 707 (supra).

229. The decisions in *Barium Chemicals*, (1966) Supp SCR 311= (AIR 1967 SC 295) and *Rohas Industries*, AIR 1969 SC 707 (supra) turned on the interpretation of Section 237 of the Companies Act and executive acts thereunder. The language used in that section is 'in the opinion of'. The Judicial Committee in the *Hubli Electricity* case, 76 Ind App 57 = (AIR 1949 PC 136) interpreted the words "the Provincial Government may, if in its opinion the public interest so requires, revoke a licence in any of the following cases" to mean that the relevant matter was the opinion and not the ground on which the opinion was based. This Court in the *Barium Chemicals* case, (1966) Supp SCR 311= (AIR 1967 SC 295) (supra) however found that there were no materials upon which the authority could form the requisite opinion. That is the ratio of the decision in *Barium Chemicals* case, (1966) Supp SCR 311= (AIR 1967 SC 295) (supra).

230. In order to entitle the Central Government to take action under Section 237 of the Companies Act, 1956 there is to be the requisite opinion of the Central Government and the circumstances should exist to suggest that the company's business was being conducted as laid down in sub-clause (1) or that the persons mentioned in sub-clause (2) were guilty of fraud, misfeasance or misconduct. The opinion of the Central Government was subjective but it was said that the condition precedent to the formation of such opinion was that there should be circumstances in existence and the recitals of the existence of those circumstances did not preclude the Court from going behind those recitals and determining whether in fact the circumstances existed and whether the Central Government in making the order had taken into consideration any extraneous consideration.

231. In the case of *Rohas Industries* AIR 1969 SC 707 (supra) reference was made to English Canadian and New Zealand decisions. The Canadian decision related to power of the Liquor Commission to cancel the liquor licence and it was held to be an exercise of discretion. The New Zealand decision related to the power of the Governor General under the Education Act to make Regulations as "he thinks necessary to secure the due administration." It was held that the opinion of the Governor General as to the necessity for such regulation

was not reasonably tenable. These decisions do not deal with questions as to whether the satisfaction is subjective or objective. Of the two English decisions one related to the power of the Commissioner to make regulations providing for any matter for which provisions appear to them to be necessary for the purpose of giving effect to the provisions of the Act. The nature of legislation was taxation of subjects. It was held that the authority was not the sole judge of what its powers were, nor of the way in which that power was exercised. The words "reasonable cause to believe", "reasonable grounds to believe" occurring in the case of *Liversidge* 1942 AC 206 (supra) were relied on to illustrate the power of the Court to find out as to whether the regulation was *intra vires* in the English case.

232. The decision of the House of Lords in *Padfield v. Minister of Agriculture Fisheries and Food*, 1968-1 All ER 694 on which counsel for the petitioner relied turned on interpretation of Section 19 (3) of the Agricultural Marketing Act which contemplated a committee of investigation, if the Minister so directed, to consider and report to the Minister on any report made by the consumer committee and any complaint made to the Minister as to the operation of any scheme which in the opinion of the Minister could not be considered by a consumer's committee under one of the subsections in that section. The House of Lords held that the Minister had full or unfettered discretion but he was bound to exercise it lawfully that is to say not to misdirect himself in law, nor to take into account irrelevant matters nor to omit relevant matters from consideration. That was an instance of a writ of mandamus directing exercising of discretion to act on the ground that it was a power coupled with duty.

233. The only way in which the exercise of power by the President can be challenged is by establishing bad faith or mala fide and corrupt motive. Bad faith will destroy any action. Such bad faith will be a matter to be established by a party propounding bad faith. He should affirm the state of facts. He is not only to allege the same but also to prove it. In the present case there is no allegation of mala fide.

234. It was said on behalf of the petitioner that the fact that Parliament would be in session on 21st July 1969

and that the Ordinance was promulgated on Saturday, 19th July, 1969 was indicative of the fact that the Ordinance was not promulgated legitimately but in a hasty manner and the President should have waited. If the President has power when the House is not in session he can exercise that power when he is satisfied that there is an emergency to take immediate action. That emergency may take place even a short time before Parliament goes into session. It will depend upon the circumstances which were before the President. The fact that the Ordinance was passed shortly before the Parliament session began does not show any mala fide. It was said that circumstances were not set out in the affidavit and therefore the Court was deprived of examining the same. The Attorney General rightly contended that it was not for the Union to furnish facts and information which were before President because first such information might be a State secret, secondly, it was for the party who alleged non-existence of circumstances to prove the same and thirdly the respondent was not called upon to meet any case of mala fide.

235. It was said that no reason was shown as to what mischief could have happened if the Ordinance would not have been promulgated on the date in question but no reason was required to be shown. The Statement of Objects and Reasons shows that there was considerable speculation in the country regarding Government's intention with regard to 'nationalisation' of banks during few days immediately before the Ordinance. In the case of Barium Chemicals, (1966) Supp SCR 311= (AIR 1967 SC 295) (supra) it was said by this Court that if circumstances lead to tentative conclusion, that the Court would not have drawn a similar inference would be irrelevant. The reason is obvious that in matters of policy just as Parliament is the master of its province similarly the President is the supreme and sole judge of his satisfaction on such policy matters on the advice of the Government.

236. The locus standi of the petitioners was challenged by the Attorney-General. The petitions were heard on merits. I have dealt with all the arguments advanced. It is, therefore, not at all necessary to deal with this objection.

237. For the reasons mentioned above, the petitions fail and are dismissed. There will be no order as to costs.

ORDER

238. In accordance with the opinion of the majority Petitions Nos. 300 and 298 are allowed, and it is declared that the Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969 is invalid and the action taken or deemed to be taken in exercise of the powers under the Act is declared unauthorised. Petition No. 222 is dismissed. There will be no order as to costs in these three petitions.

Petitions allowed.

AIR 1970 SUPREME COURT 645 (V 57 C 123)

J. C. SHAH AND K. S. HEGDE, JJ.

Champalal Binani, Appellant v. The Commissioner of Income-tax, West Bengal and others, Respondents.

Civil Appeal No. 2379 of 1966, D/- 4-12-1969.

(A) Constitution of India, Article 226 — Certiorari — When to be issued.

A writ of certiorari is discretionary; it is not issued merely because it is lawful to do so. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises question of jurisdiction or infringement of fundamental rights of the petitioner. (Para 5)

(B) Constitution of India, Article 226 — Other remedy open — Petitioner without availing himself of the adequate remedy of appeal under Section 33B (3), Income-tax Act, filing writ petition — High Court will require a strong case to be made out for entertaining petition — Held on facts no adequate ground was made out for entertaining petition — Income-tax Act (1922), Section 33-B (3).

The Income-tax provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach the High Court directly against the action. Where the party feeling aggrieved by an order of an Authority under the Income-tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and he does not avail himself of that remedy the High

Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority which is *ex facie* with jurisdiction.

(Para 5)

A notice issued under Section 33-B, Income-tax Act (1922), requiring the assessee to show cause why the orders of assessment he not revised was served by affixing the copies of the notice at the different addresses given by him as places of his business in his returns. On the date of bearing the assessee was not present and the Commissioner of Income-tax set aside the order and directed the Income-tax Officer to make fresh assessments according to law after making proper enquiries and investigation. The assessee without preferring an appeal under Section 33-B (3) moved a petition for a writ alleging that he was not given sufficient opportunity to represent his case. The assessee never attempted to get into touch with the Commissioner and did not ask him to give him an opportunity for filing his objection to the proposed revision. His conduct indicated that he was anxious to ensure that the period of two years within which the Commissioner was competent to make an order under Section 33-B should expire.

Held on facts that the order under Section 33-B was properly passed and that no adequate ground was made out for entertaining the petition. If the assessee had any grievance about the sufficiency of the opportunity given to him to make his representation, his obvious remedy was to appeal against the order to the Income-tax Appellate Tribunal and that the Tribunal would have considered the appeal on merits and given him an opportunity of tendering evidence.

(Paras 4, 5)

The following Judgment of the Court was delivered by

SHAH, J.—The appellant Champalal Binani was assessed by the Income-tax Officer, B Ward, District 24-Parganas, to pay tax for the assessment years 1953-54 to 1960-61. The Commissioner of Income-tax West Bengal issued a notice on October 23, 1963 under Section 33-B of the Income-tax Act, 1922 requiring the assessee to show cause why the orders of assessment be not revised. Three copies of the notice were sent to the assessee — one was addressed at Basantlal Shah Road, Tollygunje, Calcutta (which was

the address disclosed by the assessee in his return for the assessment years 1953-54 to 1960-61); another was addressed at No. 18/C Mathur Sen Carden Lane, Calcutta—6 (which was the address given by the assessee in his return for the assessment year 1962-63); and the third was addressed at No. 216, Mahatma Gandhi Road, Calcutta, "care of" Janki Lal Bajaj — brother-in-law of the assessee. By the notice, October 31, 1963 was fixed as the date for hearing. On October 31, 1963, the date fixed for hearing, the assessee was not present and the Commissioner set aside the order and directed the Income-tax Officer to make fresh assessments according to law after making proper enquiries and investigation. Against this order an appeal lay to the Income-tax Appellate Tribunal within 60 days from the date on which the order was communicated to the assessee: Section 33-B (3). But the assessee did not prefer an appeal: instead he moved a petition in the High Court of Calcutta for a writ quashing the order of the Commissioner and for directing him to forbear from acting upon the order in any manner whatever. His principal contention was that in passing the order the Commissioner had "violated the principles of natural justice" and the "express provision of the law." Holding that the notice under Section 33-B was not served on the assessee a Single Judge of the High Court set aside the order of the Commissioner. In appeal against that order by the Commissioner under the Letters Patent the High Court of Calcutta held that the notice addressed to the appellant at No. 18/C Mathur Sen Carden Lane, Calcutta—6, was properly served by affixing it at his place of business and that the assessee had opportunity of being heard as required by Section 33-B of the Income-tax Act.

2. In this appeal with special leave, Counsel for the assessee contended that the Commissioner violated the rules of natural justice because he did not give adequate opportunity to the assessee to appear and contest the notice. Section 33-B of the Income-tax Act, 1922, insofar as it is relevant, provides:

"(1) The Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after

making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, xx xx xx xx

(2) No order shall be made under sub-section (1)—

(a) x x x x x

(b) After the expiry of two years from the date of the order sought to be revised.

xx xx xx xx xx

3. The period of two years prescribed by sub-section (2) (b) of Section 33-B within which power had to be exercised by the Commissioner was expiring on November 15, 1963. The Commissioner had, therefore, to take early steps to serve the notice upon the assessee. With that end in view he sent three copies of the notice at three different places. It is not suggested that the assessee was not carrying on his business at the two places addresses of which had been furnished by him in the returns filed. A notice to an assessee may be served as if it were a summons issued by the Court under the Code of Civil Procedure, 1908; Section 63 (1) of the Income-tax Act, 1922. The notice was affixed at the two places of which addresses were furnished by the assessee, and therefore, there was proper service of the notice.

4. Counsel for the assessee, however, contended that he had not sufficient opportunity of representing his case for the hearing was fixed on October 31, 1963 and the assessee was unable to appear before the Commissioner on that day. The grievance is not that notice was not served, but that he should have been given more time to make his representation. But the assessee never attempted to get into touch with the Commissioner and did not ask him to give him an opportunity for filing his objection to the proposed revision. The conduct of the assessee leaves little room for doubt that he was anxious to ensure that the period of two years within which the Commissioner was competent to make an order under Section 33-B should expire. If the assessee had any grievance about the sufficiency of the opportunity given to him to make his representation, his obvious remedy was to appeal against the order to the Income-tax Appellate Tribunal and that the Tribunal would have considered the appeal on merits and given him an opportunity of tendering evidence. But such a course would not have served the object of the assessee that is why he avoided approaching the Tribunal. In

our view the High Court was right in holding that the order under Section 33B of the Income-tax Act was properly passed.

5. Before parting with the case we deem it necessary once more to emphasize that the Income-tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach the High Court directly against the action. The assessee had an adequate remedy under the Income-tax Act which he could have availed of. He however, did not move the Income-tax Appellate Tribunal which was competent to decide all questions of fact and law which the assessee could have raised in the appeal including the grievance that he had not adequate opportunity of making his representation and invoked the extraordinary jurisdiction of the High Court. In our judgment no adequate ground was made out for entertaining the petition. A writ of certiorari is discretionary; it is not issued merely because it is lawful to do so. Where the party feeling aggrieved by an order of an Authority under the Income-tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and he does not avail himself of that remedy the High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority which is *ex facie* with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises question of jurisdiction or of infringement of fundamental rights of the petitioner. The present case was one in which the jurisdiction of the High Court could not be invoked.

6. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 648

(V 57 C 124)

(From: Andhra Pradesh)*

V. RAMASWAMI AND I. D. DUA, JJ.

The State of Andhra Pradesh, Appellant
v. I. B. S. Prasada Rao and others, Respondents.

Criminal Appeal No. 220 (N) of 1967,
D/- 27-10-1969.

(A) Evidence Act (1872), Section 3 — Criminal P. C. (1893), Section 367 — Penal Code (1860), Sections 120B, 419 and 420 — Appreciation of evidence — Circumstantial evidence, sufficiency of — If combined effect of all the proved facts taken together is conclusive in establishing guilt of accused, conviction would be justified even though anyone or more of those facts by itself is not decisive — Held on facts and circumstances that charges under Sections 120B and 420, I. P. C. have been established against all the four accused and under Section 419, I. P. C. against accused No. 3 — Criminal Appeals Nos. 297 to 300 of 1965, D/- 23-3-1967 (Andh. Pra.), Reversed.

Before conviction based solely on circumstantial evidence can be sustained, it must be such as to be conclusive of the guilt of the accused and must be incapable of explanation on any hypothesis consistent with the innocence of the accused. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet any and every hypothesis suggested by the accused, however extravagant and fanciful it might be. Before an accused can contend that a particular hypothesis pointing to his innocence has remained unexcluded by the facts proved against him, the Court must be satisfied that the suggested hypothesis is reasonable and not far-fetched. Further, it is not necessary that every one of the proved facts must in itself be decisive of the complicity of the accused or point conclusively to his guilt. It may be that a particular fact relied upon by the prosecution may not be decisive in itself, and yet if that fact, along with other facts which have been proved, tends to strengthen the conclusion of his guilt, it is relevant and has to be considered. In other words when deciding the question of sufficiency, what the Court has to

consider is the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt, and if the combined effect of all those facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that any one or more of those facts by itself is not decisive. (Para 7)

Held on facts and circumstances of the case that the guilt of the accused persons has been established beyond all reasonable doubt and the facts proved against them were of such a nature that the only conclusion which any court would legitimately reach was that the offences under Sections 120B and 420, I. P. C. had been committed by each one of the four accused persons and under Section 419, I. P. C. by accused No. 3, Criminal Appeals Nos. 297 to 300 of 1965, D/- 23-3-1967 (Andh Pra.), Reversed. (Paras 8, 10)

(B) Constitution of India, Article 136 — Extraordinary jurisdiction of Supreme Court — When can be exercised.

The extraordinary jurisdiction of the Supreme Court under Article 136 will be exercised by it only when it finds (a) a substantial and grave injustice has been done and (b) exceptional and special circumstances exist in the case.

(Para 10)

Ram Reddy, for Appellant.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: This appeal is brought by special leave from the judgment of the Andhra Pradesh High Court dated 23-3-1967 in Criminal Appeals Nos. 297, 298, 299 and 300 of 1965 preferred by respondents 1 to 4 whereby the High Court allowed the said appeals, set aside the judgment of the Sessions Court and acquitted the respondents.

2. In the Co-operative Central Bank, Srikakulam, accused No. 1 Satya Rao and accused No. 2 Prasada Rao were working as clerks while accused No. 4 Mohan Rao was a peon. The Co-operative Central Bank has four branches one of which is at Sompeta. The Branch Office has a manager, a clerk, a shroff and one peon and a night watcher. Till September 30, 1964 Sri V. S. Venkateswarlu was the Branch Manager of the Bank at Sompeta. He went on leave with effect from October 1, 1964. In his place accused No. 1 was posted to act as Branch Manager, Sompeta. Accused No. 1 took charge as

*(Crim. Appeals Nos. 297 to 300 of 1965,
D/- 23-3-1967 — Andh Pra.)

Branch Manager with effect from October 1, 1964 from Venkateswarlu. The case of the prosecution is that while accused No. 1 was at the headquarters he came to know that the accused No. 4 was in the habit of practising signatures of the Secretary of the Bank. A conspiracy for cheating the bank was entered into between all the accused. In pursuance of the conspiracy accused No. 2 had typewritten credit advice card and also a letter of authority both stating to the effect that they should be treated as Demand Draft advice and Demand Draft respectively. To both these documents accused No. 4 forged the signature of the Secretary. On October 8, 1964 accused No. 4 took the credit advice card to the despatch clerk and said that the Manager wanted that the advice card should be despatched immediately and got it despatched the same day to the branch office. The credit advice card was received on October 10, 1964 by accused No. 1 himself who handed the credit advice card to the clerk and asked him to keep the same with him in spite of the fact that the clerk protested that such advice cards should be kept with the Manager himself. On October 13, 1964 accused No. 1 pretended that he was having motions and was unable to sit up in the office and asked the clerk to carry on the business of the branch for him. But accused No. 1 was all the time sitting by the side of the clerk giving him guidance. On October 14, 1964 accused No. 1 was still pretending that he was unwell and asked the clerk to carry on the transactions on his behalf. At 12.30 P. M. on October 14, 1964 accused No. 2 went to the Sompeta Branch office. Accused Nos. 1 and 2 went out for about 15 minutes and came back at about 1.45 P. M. Accused No. 3 went to the Bank & presented to accused No. 1 the letter of authority typewritten on the letter-head with a copy to the Central Bank purporting to authorise payment of Rs. 15,000 to V. Chandrasu of Mandasa treating the letter as Demand Draft. The letter purported to bear the signature of the Secretary and also specimen signatures of the payee Chandrasu. Accused No. 1 gave the letter to the clerk for necessary action. When the clerk protested that no amount will be paid on the letter of authority in the absence of Demand Draft accused No. 1 said that the amount should be paid in any case as the bank's prestige was at stake. The clerk in obedience to

the advice of accused No. 1 took out the credit advice card and tallied the signature of the Secretary and after satisfying himself that the signatures were correct, prepared the debit slip and after taking endorsement of accused No. 3 made the payment order. The clerk passed on the documents to the shroff who again protested that the payment could not be made unless the payee was identified by a person known to the Bank. Again accused No. 1 interfered and told the shroff that to demand identifying witnesses would amount to harassment of customers and the prestige of the Bank would be lowered. When the shroff found accused No. 3 was talking familiarly with accused No. 1 he took it that accused No. 1 must be knowing accused No. 3. But as there was no sufficient money in the counter accused No. 1 and the shroff went to the chest and drew Rs. 15,000. When the money was paid to accused No. 3 he took it and went away without even counting the amount. On October 27, 1964 the Secretary verified the accounts of the Bank and of the Head Office and found that there was no credit of Rs. 15,000 in favour of Chandrasu. Suspecting foul play the Secretary and the Auditor proceeded to Sompeta and made enquiries. After return to Headquarters the Secretary made a complaint to the Sub-Inspector of Police, Srikakulam. On the same day the Sub-Inspector arrested accused No. 1 and upon his statement recovered a sum of Rs. 7,000 (Rs. 3,000 in 100 rupee currency notes and the rest in 10 rupee currency notes). Then accused No. 1 took the police party to the house of accused No. 3 who after interrogation produced a sum of Rs. 3,000 (300 ten rupee currency notes). Accused No. 1 took the police party to the house of accused No. 2 who after his arrest produced Rs. 1,930 (193 ten rupee notes). Besides, he produced a transistor radio with a licence and one gold necklace stating that he purchased the transistor radio from D. V. Ramanaiah for Rs. 498.50 and had redeemed the gold necklace from A. Gopala Rao of Vijayanagaram by paying Rs. 200. He further stated that he paid Rs. 250 to Patnala Satyanarayana, dealer in watches at Srikakulam to get him a "Fortis" wrist watch. Accused No. 1 took the police party to the house of accused No. 4 in Relli Street at Srikakulam. Accused No. 4 produced Rs. 1,686 (168 ten rupee currency notes and six one rupee currency notes). He also

produced one gold necklace, a gold chain, a wrist watch and other articles. Accused No. 3 was identified by the clerk and the shroff of Sompeta in test identification parade held by the Judicial Second Class Magistrate on November 11, 1964 in Srikakulam Sub-Jail.

3. The Additional Sessions Judge, Srikakulam, convicted all the four accused of the charge under Section 120-B, I. P. C. and sentenced them to undergo rigorous imprisonment for three years each. Accused Nos. 2 and 4 were also convicted under Section 467, I. P. C. and each of them was sentenced to undergo rigorous imprisonment for three years. Accused Nos. 1, 2 and 3 were convicted under Sections 467 and 471, I. P. C. and each was sentenced to undergo rigorous imprisonment for three years. Accused Nos. 1 to 4 were further convicted under S. 429, I. P. C. and each of them was sentenced to undergo rigorous imprisonment for four years. Accused No. 3 alone was convicted under Section 419, I. P. C. and was sentenced to undergo rigorous imprisonment for two years. Accused No. 1 was found guilty under Section 203, I. P. C. All the accused presented appeals to the Andhra Pradesh High Court which allowed the appeals and acquitted them of all the charges.

4. On behalf of the appellant it was contended by Mr. Ram Reddy that in reversing the judgment of the Additional Sessions Judge the High Court has failed to take into account all the important circumstances pointing to the guilt of each of the respondents and as a result the findings of the High Court suffered from grave infirmities and there has been a failure of justice in this case.

5. On a consideration of the entire evidence the Additional Sessions Judge found that the following circumstances are established:

(1) Accused No. 4 was in the habit of practising the signatures of the Secretary and the Manager and other officials of the Bank as spoken to by P. Ws. 7 to 9;

(2) Accused Nos. 1, 2 and 4 were in close contact with one another;

(3) On October 7, 1964 accused No. 2 took a bundle of Advice Cards from P. W. 2 and was later seen typing an Advice Card and a letter of Authority;

(4) Accused No. 4 took the Advice Cards and the letter of authority to P. W. 7 and told him that the Advice Card ad-

ressed to the Sompeta Branch was to be despatched immediately;

(5) Accused No. 1 received the Advice Card on October 10, 1964 and asked the clerk to keep it in his custody;

(6) Accused No. 1, though he was present in the office on October 13 and 14, 1964 pretended to be ill and made the clerk P. W. 1 to attend to the business of the Branch;

(7) Accused No. 2 met Accused No. 1 at Sompeta on October 14, 1964;

(8) Accused No. 3 appeared at the Branch office on October 14, 1964 with a letter of authority and despite the irregularities pointed out by the clerk and shroff accused No. 1 made them pay the amount of Rs. 15,000 to accused No. 3;

(9) Soon after accused No. 3 left accused No. 1 also left the office throwing the keys on the shroff's table;

(10) On October 27, 1964 P. W. 11 found the documents relating to the payment of Rs. 15,000 missing;

(11) Various accused produced various amounts and articles when interrogated by the police;

(12) Accused No. 3 was identified by P. Ws. 1 and 2 at an identification parade held by the Magistrate, P. W. 15.

(13) P. W. 14, the Handwriting Expert gave his opinion that Ex. P-4, the debit slip was in the handwriting of accused No. 3.

6. In our opinion the Additional Sessions Judge was justified in holding that on the basis of all these circumstances the charge of conspiracy under S. 120B and a charge of cheating under S. 420, I. P. C. was established against all the four respondents and the charge under Section 419, I. P. C. against respondent No. 3.

7. In regard to the question of the effect and sufficiency of circumstantial evidence for the purpose of conviction, it is now settled law that before conviction based solely on such evidence can be sustained, it must be such as to be conclusive of the guilt of the accused and must be incapable of explanation on any hypothesis consistent with the innocence of the accused. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet any and every hypothesis suggested by the accused, however extravagant and fanciful it might be. Before an accused can contend that a particular hypothesis pointing to his innocence has remained unexcluded by

the facts proved against him, the Court must be satisfied that the suggested hypothesis is reasonable and not far-fetched. Further, it is not necessary that every one of the proved facts must in itself be decisive of the complicity of the accused or point conclusively to his guilt. It may be that a particular fact relied upon by the prosecution may not be decisive in itself, and yet if that fact, along with other facts which have been proved, tends to strengthen the conclusion of his guilt, it is relevant and has to be considered. In other words, when deciding the question of sufficiency, what the Court has to consider is the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt, and if the combined effect of all those facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that any one or more of those facts by itself is not decisive.

8. Applying the principle to the present case we are satisfied that the charges under Sections 120-B and 420, I. P. C. have been established against all the four respondents and under Sec. 419, I. P. C. against respondent No. 3.

9. The case of respondent No. 1 was that he was not in the Branch office and did not attend to the business of the Branch on October 13 and 14, 1964. D. Ws. 1 to 4 were examined on his behalf to show that he was not in the Branch Office either on the 13th or 14th, October. All the witnesses said that they were in the Branch Office for 5 to 10 minutes. It is possible that they might not have noticed respondent No. 1 or at that particular time respondent No. 1 might have gone out. The evidence of these witnesses was also discarded by the trial court on the ground that it was inconclusive. On behalf of respondent No. 3 three witnesses D. Ws. 9, 10 and 11 were examined to prove the plea of alibi. The case of respondent No. 3 was that he was present at the Panchayat Court at Kotabommali on October 14, 1964 and gave evidence in S. C. Nos. 2 and 3 of 1964. The evidence of D. W. 9 does not in any way establish the alibi pleaded by respondent No. 3. But D. Ws. 10 and 11 stated that respondent No. 1 was present in the Panchayat Court at Kotabommali on October 14, 1964 for giving evidence. The evidence of these two witnesses cannot be relied upon because

it is admitted that the father-in-law of respondent No. 3 was the purohit of Kotabommali and was, therefore, in a position to influence D. Ws. 10 and 11. No reliance can be placed on the evidence of D. Ws. 10 and 11 for the important reason that in the court of the Committing Magistrate respondent No. 3 did not set up the plea of alibi. If the respondent No. 3 was actually present in the Panchayat Court on October 14, 1964 it is most unlikely that he would not have put forward this plea of alibi in the court of the Committing Magistrate. We are, therefore, of opinion that the Additional Sessions Judge rightly rejected the defence evidence adduced on behalf of the respondents.

10. It is well settled that the extraordinary jurisdiction of this Court under Article 136 will be exercised by it only when it finds (a) substantial and grave injustice has been done and (b) exceptional and special circumstances exist in the case. In our opinion the judgment of the High Court in the present case is perverse and as we have already shown the guilt of the respondents has been established beyond all reasonable doubt and the facts proved against them are of such a nature that the only conclusion which any Court would legitimately reach on those facts is that the offences charged have been committed by each one of the respondents.

11. For these reasons we allow these appeals, set aside the judgment of the High Court and convict all the four respondents under Section 120-B and sentence them to rigorous imprisonment for three years each. We also convict all the respondents under Section 420, I. P. C. and sentence them to rigorous imprisonment for four years each and respondent No. 3 under Section 419, I. P. C. and sentence him to rigorous imprisonment for four years. The sentence of imprisonment will run concurrently; if the respondents are at large action should be taken for the arrest and the surrender of the respondents.

Appeals allowed.

AIR 1970 SUPREME COURT 652

(V 57 C 125)

(From: Delhi)

J. C. SHAH, J. M. SHELAT,
C. A. VAIDIALINGAM, K. S. HEGDE
AND A. N. RAY, JJ.

A. K. K. Nambiar, Appellant v. Union
of India and another, Respondents.

Civil Appeal No. 1406 of 1969, D/- 23-
10-1969.

(A) Civil Services — All India Service (Appeal and Discipline) Rules (1955), R. 7 — Investigation relating to a criminal charge against Government Servant — Suspension of Government Servant pending sanction for trial — Order of suspension indicating that Government applied its mind to allegations, enquiries and circumstances of case — No reference to Rule 7 (1) in the Order — Held, Order was made under Rule 7 (3) and did not infringe Rule 7 — Judgment of High Court at Delhi, Affirmed. (Paras 8, 10)

(B) Civil P. C. (1908), Order 19, Rule 1 — Affidavits — Verification of — Necessity — Affidavits not properly verified cannot be admitted in evidence.

The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In absence of proper verification, affidavits cannot be admitted in evidence. (Para 11)

The following Judgment of the Court was delivered by

RAY, J.: This appeal by certificate from the judgment of the High Court at Delhi challenges the order dated 5th July, 1963 placing the appellant under suspension.

2. The appellant canvassed two grounds: first, that the order of suspension was passed on a report which was made mala fide, and, therefore, the order of suspension was bad; secondly, the order of suspension was made under sub-

rule (1) of Rule 7 of the All India Service (Appeal and Discipline) Rules, 1955, and is, therefore, liable to be quashed.

3. The appellant was appointed to the Indian Police Service in the year 1935. He was posted as Inspector General of Police of the State of Andhra Pradesh, on 1st November, 1956. He was confirmed as Inspector General of Police, Andhra Pradesh in the year 1957. On 14th May, 1968, he reached the age of 55 years. He, however, continued to work as Inspector General of Police, Andhra Pradesh up to 1st August, 1967. He was then posted as Special Inspector General of Police for the revision of Police Standing Orders.

4. Some time in the year 1967 the Chief Minister of Andhra Pradesh ordered that the Chief Secretary should make an enquiry with regard to certain allegations against the appellant. The Chief Secretary recommended that the Vigilance Commissioner in the State of Andhra Pradesh might be requested to look into the matter. The Vigilance Commissioner advised that the enquiry should be conducted by an independent agency like the Central Bureau of Investigation. The Central Bureau of Investigation thereafter made an enquiry. The appellant was given allegations to answer. The appellant submitted explanation and was examined. The Central Bureau of Investigation made a report on the enquiry.

5. On 11th July, 1968 the Government of India, Ministry of Home Affairs made an order placing the appellant under suspension. The appellant alleged as follows. The Chief Minister of the State of Andhra Pradesh was inimical and hostile to the appellant since the time of the General Elections in the year 1967. The investigation by the Central Bureau of Investigation was conducted by persons who were hostile to the appellant. The Ministry of Home Affairs, Government of India, should not have relied on the report because the initiation and the conduct of the enquiry were motivated mala fide on the part of the Chief Minister of the State and other persons.

6. The other contention of the appellant was that under sub-rule (1) of R. 7 of the All India Service (Appeal and Discipline) Rules, 1955 the order of suspension could be made only if disciplinary proceeding was initiated and the Government was satisfied that there should be an order and in the present case the order did not satisfy the provisions of the rule, and, therefore, the order is bad.

7. The pre-eminent question in this appeal is whether the order of suspension is in infraction of Rule 7. Rule 7 is as follows:—

“(1) having regard to the nature of the charges and the circumstances in any case the Government which initiates any disciplinary proceeding is satisfied that it is necessary or desirable to place under suspension the member of the Service against whom such proceedings are started that Government may—

(a) if the member of the Service is serving under it pass an order placing him under suspension, or

(b) if the member of the Service is serving another Government, request that Government to place him under suspension, pending the conclusion of the inquiry and the passing of the final order in the case:

Provided that in cases where there is a difference of opinion between two State Governments the matter shall be referred to the Central Government whose decision thereon shall be final.

(2) x x x

(3) A member of the Service in respect of, or against whom, an investigation, inquiry or trial relating to a criminal charge is pending may, at the discretion of the Government under which he is serving, be placed under suspension until the termination of all proceedings relating to that charge, if the charge is connected with his position as a Government servant or is likely to embarrass him in the discharge of his duties or involves moral turpitude”.

8. Rule 7 sub-rule (1) contemplates suspension when disciplinary proceeding is initiated and the Government is satisfied that it is necessary to place a member of the Service under suspension. It was contended by the appellant that the order of suspension was made under sub-rule (1) in the present case without any disciplinary proceedings. The order does not have any reference to sub-rule (1) of Rule 7. The order recites first that there are serious allegations of corruption and malpractices against the appellant, secondly that the enquiry made by the Central Government revealed that there is a prima facie case and thirdly that the Government of India after considering the available material and having regard to the nature of the allegations against the appellant and the circumstances of the case is satisfied that it is necessary and desirable to place the appellant under suspension.

9. At the hearing of the appeal Mr. Solicitor General produced the correct copy of the First Information Report dated 17th August, 1967 under Section 154 of the Code of Criminal Procedure. It will appear from the report that the appellant was charged with offences under the Prevention of Corruption Act, 1947 and the time of occurrence was the period 1960 to 1967.

10. Sub-rule (3) of Rule 7 states that a member of the Service in respect of, or against whom, an investigation, inquiry or trial relating to a criminal charge is pending may, at the discretion of the Government under which he is serving, be placed under suspension until the termination of all proceedings relating to that charge. The appellant contended that the appellant was not suspended under sub-rule (3) of Rule 7. That is a contention. The facts are that there was an investigation and the trial is awaiting relating to a criminal charge against the appellant. The order of suspension has to be read in the context of the entire case and combination of circumstances. This order indicates that the Government applied its mind to the allegations, the enquiries and the circumstances of the case. The appellant has failed to establish that the Government acted mala fide. There is no allegation against any particular officer of the Government of India about acting mala fide. The order of suspension was made under sub-rule (3) and does not suffer from any vice of infringement of Rule 7.

11. The appellant made allegations against the Chief Minister of Andhra Pradesh and other persons some of whose names were disclosed and some of whose names were not disclosed. Neither the Chief Minister nor any other person was made a party. The appellant filed an affidavit in support of the petition. Neither the petition nor the affidavit was verified. The affidavits which were filed in answer to the appellant's petition were also not verified. The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable

the Court to find out as to whether it will be safe to act on such affidavit evidence. In the present case, the affidavits of all the parties suffer from the mischief of lack of proper verification with the result that the affidavits should not be admissible in evidence.

12. The affidavit evidence assumes importance in the present case because of allegations of mala fide acts on the part of the respondents. The appellant alleged that the Union of India made the order of suspension because of the pressure of the Chief Minister of the State of Andhra Pradesh. The appellant, however, did not name any person of the Union of India who acted in that manner and did not implead the Chief minister as a party. In order to succeed on the proof or mala fides in relation to the order of suspension, the appellant has to prove either that the order of suspension was made mala fide or that the order was made for collateral purposes. In the present case, the appellant neither alleged nor established either of these features.

13. The appellant contended that the report of the Central Bureau of Investigation was made mala fide. The appellant appeared before the investigation authorities. We are not concerned with the correctness and the propriety of the report. We have only to examine whether the order of suspension was warranted by the rule and also whether it was in honest exercise of powers. The order of suspension satisfied both the tests in the present case.

14. In view of the fact that the criminal case is pending, it is desirable not to express any opinion on the merits and demerits of the charges as also the rival contentions of the parties because such an opinion may cause prejudice.

15. The appellant raised a contention as to the vires of the Delhi Special Police Establishment Act, 1946 and the validity of the investigation. In view of the fact that sanction for the trial is pending pursuant to the investigation under the First Information Report dated 17th August, 1967 the appellant did not want a decision on this point in this appeal because the appellant would raise that contention in the criminal case. We have therefore left open the contention as to the Delhi Special Police Establishment Act, 1946 to enable the appellant to agitate that contention, if so advised, in the criminal trial.

16. The appeal, therefore, fails and is dismissed. In view of the fact that there

was no order as to costs in the High Court, we are of opinion that each party should bear its costs in this Court.

Appeal dismissed.

AIR 1970 SUPREME COURT 654

(V 57 C 126)

(From: Punjab)

M. HIDAYATULLAH, C. J.,

A. N. GROVER, A. N. RAY

AND I. D. DUA, JJ.

Om Prakash, Appellant v. The State of Haryana and another, Respondents.

Criminal Appeal No. 54 of 1967, D/- 24-11-1969.

(A) Gur (Movement Control) Order (1963), Cl. 3 (1) — Prosecution for exporting gur without permit — Repeal of Order — Prosecution relating to period prior to repeal — Prosecution proceedings can continue even after repeal of Order, 1947 A. C. 362 & (1841) 8 M & W 234, Ref. to. Judgment of High Court of Punjab and Haryana, Affirmed.

(Para 2)

(B) Constitution of India, Art. 134 — Criminal Proceedings — Appeal to Supreme Court — Question of fact — No interference.

(Para 3)

Cases Referred: Chronological Paras

(1947) 1947 AC 362 = (1947) 1 All

ER 205, Wicks v. Director of

Public Prosecutions 2

(1841) 8 M & W 234 = 151 ER

1024, Steavenson v. Oliver 2

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:— The appellant Om Prakash who appeals by special leave, has been convicted under sub-rule (9) of Rule 125 of the Defence of India Rules, 1962 read with Section 3 (1) of the Gur (Movement Control) Order, 1963 and sentenced to six months' rigorous imprisonment. The case against the appellant is that on January 14, 1964 at or about 10 A. M. he was attempting to export from Punjab State to Rajasthan State gur in truck No. PNR 6020. This truck was stopped near the border between Punjab and Rajasthan States at a village called Khandewara. The truck was found loaded with 59 quintals of gur and 22 quintals of desi khand which under the Gur (Movement Control) Order could not be exported from the State of Punjab. Under the definition of "export"

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in the said Order, it is stated inter alia that "export" means to take or cause to be taken from the State of Punjab. Clause (3) of the Order states that no person shall export or attempt to export or abet the export of gur except under and in accordance with a permit issued in this behalf by the Chief Director or by the Government of the State or, as the case may be, by the Administrator or the Union territory, from which the gur is to be exported, or any officer authorised in this behalf by that Government or Administrator. No such permit was produced in the case. It would appear, therefore, that an offence under sub-rule (9) of Rule 125 of the Defence of India Rules, 1962 was being committed in attempting to export gur from the territory of Punjab. Om Prakash was not the actual driver of the truck. The driver of the truck was one Sunder Lal who was also convicted but who has not been granted special leave by this Court. Om Prakash was only seated by the side of the driver Sunder Lal. He denied all connection with the export.

2. Three defences were raised in the case. The first was that the Gur (Movement Control) Order which came into force on October 30, 1963 was repealed on July 27, 1964 and the prosecution therefore could not continue beyond July 27, 1964 on which date the order was repealed. This argument is not acceptable, because the repealed (sic repealing²) order itself provides for saving of prosecutions commenced by the State in respect of offences committed while the Order was in force. It states that the repeal shall not affect anything done or omitted to be done under the Order. The prosecution could therefore continue. Authority for this proposition was cited in the High Court from the House of Lords' case *Wicks v. Director of Public Prosecutions*, 1947 AC 362. Indeed this was also laid down in an earlier case which is considered as the leading authority on the subject *Stevenson v. Oliver*, (1841) 8 M & W 234.

3. The second defence was that the truck was not intended to cross the border into Rajasthan but was going to village Bawal within the State of Punjab. The case of the defence was that the truck was stopped at a place three miles from the border where the road bifurcates, one limb going to Rajasthan and the other going to Bawal. This part of the case was not believed by the Tribunal

itself and that being a question of fact, we cannot interfere.

4. The third defence is that there was nothing to show that the appellant was in any way connected with or privy to the export of gur in violation of the Gur (Movement Control) Order. His case is that he was merely sitting by the side of the driver, suggesting thereby that he was not taking the gur, but was only taking a lift in the truck. It seems difficult to believe that he was an innocent passenger in the truck. The truck was loaded with large quantity of gur and desi khand and was making its way towards the border. Evidence shows that it was about to cross the border when it was stopped. In these circumstances, we are not prepared to hold, in disagreement with the High Court and the Tribunal below, that Om Prakash had joined as an innocent party. The fact, however, remains that no connection between him and the gur had been established and therefore it is difficult to think that he was more than an abettor in the case. It may be that he was accompanying the truck merely to see that the driver did not take the truck to another place or deploy the truck. However, we think a more lenient view can be taken in his case, because of lack of proof of direct connection with the gur. We accordingly dismiss this appeal, but think that in the circumstances of the case the ends of justice will be met by reducing the sentence to the imprisonment already undergone by the appellant.

Appeal dismissed.

AIR 1970 SUPREME COURT 655

(V 57 C 127)

(From: Punjab)

M. HIDAYATULLAH, C. J.,
A. N. GROVER, A. N. RAY
AND I. D. DUA, JJ.

State of Punjab, Appellant v. Satpal and another, Respondents.

Criminal Appeals Nos. 59 to 61 of 1967,
D/- 24-11-1969.

Employees' Provident Funds Act (1952), S. 16 (1) (b) — Period of infancy must be calculated from the first establishment of factory and not from the moment of time when figure of 20 or more is first reached. Decision of Punjab High Court Reversed.

BN/BN/A80/70/LGC/M

The period of infancy mentioned in Section 16 (1) (b) of the Employees' Provident Funds Act (1952), should be calculated from the first day of the establishment of the factory and not from the moment of time when the figure of employment of 20 or more workmen is first reached. The word "is" in the sub-section clearly indicates a newly started business and the words "has been" a business which has been in existence before. AIR 1968 SC 1367, Rel. on; Decision of Punjab High Court, Reversed.

(Paras. 8, 9)

The law takes into account only the existence of establishments and the employment of a certain number of persons in factories over a given period. Change of location or change of composition of partners or even a change in the manufacturing process is not vital in the application of this law. (1966) 1 Lab LJ 741 (SC), Foll.

Cases Referred: Chronological Paras (1968) AIR 1968 SC 1367 (V 55)= (1968) 2 SCR 819, R. Ramakrishna Rao v. State of Kerala 8 (1965) Civil Appeals Nos. 572 and 573 of 1964, D/- 6-10-1965= (1966) 1 Lab LJ 741 (SC), Lakshmi Rattan Engineering Works v. Regional Provident Fund Commr. Punjab 7

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: The State has appealed in these three appeals (which will be governed by this judgment), against the acquittal of the respondent Satpal who was prosecuted along with a firm M/s. Jai Bharat Metal Industries under Section 14 of the Employees' Provident Funds Act, 1952 read with Para 76 of the scheme framed under that Act for breach of Section 16 (1) (b) of the Act. The prosecution ended in acquittal. Against the acquittal, appeals were filed in the High Court which were dismissed summarily on August 16, 1966. The present appeals have been filed by special leave against the judgments and orders of the High Court dismissing the appeals against the acquittals.

2. The facts disclosed in the case are as follows:

One Tirath Ram (who was examined as P. W. 4) started a factory by the name of Net Ram Tirath Ram on November 9, 1957. The factory was manufacturing in the years 1958-59 tavas, chaff-cutter blades. Later, the name of this manufacturing concern was changed to Jai

Bharat Metal Industries. Tirath Ram was then the sole proprietor of the concern. In September 1962, Satpal the present accused and three others joined Tirath Ram as Partners. The firm, however, continued under the same name till February 13, 1963. On that date, the old partnership was dissolved. Tirath Ram went out of the business and the remaining partners continued running the factory jointly. This went on till April 30, 1963. The factory was run in the same premises with the same labour and under the same name. In April 1963, the factory was removed to other premises, a new electrical connection was obtained but the old machinery of the factory save the electric motor was installed, and the factory continued, although not for the original business, but for the business of manufacturing iron nails for shoes for the bullocks.

3. The firm did not at that time maintain a register of provident funds. It appears that it had been employing less than 20 workmen till November 13, 1962 when it began to employ 20 or more workmen. The factory reached the figure of 20 in the employment of workmen while the factory was still in the old premises. In other words, when the factory first employed 20 workmen, a period of 5 years had already elapsed from the initial establishment of the factory by Tirath Ram.

4. Several pleas were taken in defence by the respondents. Only one of them prevailed in the Court of trial and that was that the prosecution had not led any evidence to show that the factory ever employed 20 persons prior to November 13, 1962. It was, therefore, held that the period of 5 years' grace allowed by Section 16 (1) (b) of the Employees' Provident Funds Act would have elapsed on November 13, 1967 and no prosecution for the breach of the section in respect of 1964 and 1965 could have been started in these three cases. On the other points the findings of the trial court were against the respondents. However, in view of this point, acquittal was ordered. In appeal to the High Court, the State of Punjab took the ground that the infancy period of 5 years during which the factory was exempt from the operation of Section 16 (1) (b) was to be reckoned from the date on which the establishment was or had been set up, and not from the date on which factory establishment first began to employ 20 or more workmen. This

ground was not accepted by the High Court. Hence these appeals.

5. The Employees' Provident Funds Act, 1952 was passed to provide for institution of provident funds for employees in factories and other establishments. It provided for the establishment of a fund in the hands of a Board of Trustees and establishments liable to make contributions of provident fund had to recover the contributions of the workmen, add to them their own contribution plus an administrative charge of 3% and hand over the amount periodically to the Central Provident Funds Commissioner appointed for this purpose. Para 76 of the scheme which was framed under the Act provided for punishment for failure to pay contributions and to furnish returns etc. It is stated in that para that if any person fails to pay any contribution which he is liable to pay under the scheme, deducts or attempts to deduct from the wages or other remuneration of a member the whole or any part of the employer's contribution, or fails or refuses to submit any return etc., or obstructs any inspector or other official appointed under the Act or the scheme in the discharge of his duties or fails to produce any record for inspection by such Inspector or other official, or is guilty of contravention of or non-compliance with any other requirement of the scheme, he shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees, or with both. The Act, however, gives breathing time to new establishments by providing in Section 16 that the Act is not applicable to them for some specified periods. We are concerned in these appeals with the exemptions granted to infant establishments under S. 16 (1) (b) which reads as follows:

"16. Act not to apply to establishments belonging to Government or local authority and also to infant establishments —

(1) This Act shall not apply—

(a) ** ** *

(b) to any other establishment employing fifty or more persons or twenty or more, but less than fifty, persons until the expiry of three years in the case of the former and five years in the case of the latter, from the date on which the establishment is, or has been, set up.

Explanation: For the removal of doubts, it is hereby declared that an establishment shall not be deemed to be

newly set up merely by reason of a change in its location."

6. The contention of the respondents is that the business which they were running in 1964-65 was an entirely different business and was not the same business which Tirath Ram had started. They referred in particular to the kind of articles that Tirath Ram was manufacturing and submit that the manufacturers had been changed when action was taken under the Employees' Provident Funds Act. In other words, they draw attention to the difference between the manufacture of Tawas and Knives on the one hand and nails for bullock shoes on the other. We do not think that this makes any difference. In fact, the business had already changed in the hands of the partnership long before the establishment changed its premises. The business of the partnership was running an iron-smithy for the manufacture of iron articles and the factory continued even though the manufacturing process changed from one article to another. We must, therefore, hold that the same factory continued in spite of the change from Tawas to iron nails in the manufacturing process.

7. The next submission on behalf of the respondents is that the partnership changed and therefore a new business came into existence. Here again, we are not concerned with the law of partnership but with the Employees' Provident Funds Act. The law takes into account only the existence of establishments and the employment of a certain number of persons in factories over a given period. It is for this purpose that change of location or change of composition of partners or even a change in the manufacturing process is not considered vital in the application of this law. This was laid down by this Court in very explicit terms in Civil Appeals Nos. 572 and 573 of 1964, D/- 6-10-1965 (SC) (Lakshmi Rattan Engineering Works v. Regional Provident Fund Commissioner Punjab).

8. The most important question which arises for consideration in this case is whether the period of infancy is to be calculated from 9-11-1957 when the establishment was first begun or from 13-11-1962 when the employment of 20 or more workmen first commenced. This point is also covered in the case we have cited above. A further ruling on the subject exists in R. Ramakrishna Rao v. State of Kerala, (1968) 2 SCR 819 = (AIR 1968 SC 1367). In that case also employment

of 20 or more persons began later than the commencement of the establishment. Explaining the sub-section, this Court states that the word 'is' in the sub-section clearly indicates a newly started business, and the words 'has been' a business which has been in existence before. It is, therefore, held that the period of infancy must be calculated from the first establishment of the factory and not from the moment of time when the figure of 20 or more is first reached.

9. Applying these rulings, it is quite clear that in this case, the factory must be taken to have started in the year 1957 and that is the point of time when the establishment first came into existence. On 13th November, 1962, it had already a life of 5 years, and on that date when 20 workmen came to be employed, the scheme under the Employees' Provident Funds Act began to apply. The learned Magistrate was therefore wrong in calculating the period of infancy from the first employment of 20 workmen. He had to calculate that period from the first day on which the establishment came into existence. The acquittal of the respondent Satpal in the three appeals was therefore erroneous and must be set aside. We accordingly set aside the acquittal of Satpal and convicting him under Section 14 of the Act read with Para 75, sentence him to pay a fine of Rs. 50/- in each case; in default of payment of fine, there will be simple imprisonment for a period of one week, in respect of each default. We do not consider it necessary to record a finding about the partnership firm.

Appeals allowed.

AIR 1970 SUPREME COURT 658

(V 57 C 128)

(From: Allahabad)

HIDAYATULLAH, C. J., A. N. RAY AND
I. D. DUA, JJ.

Ch. Laiq Singh and others, Appellants
v. The State of Uttar Pradesh, Respondent.

Criminal Appeal No. 3 of 1967, D/- 2-12-1969.

Penal Code (1860), Section 365 — Abduction — Sentence — Mitigating factor — Existence of illicit relationship between accused and abducted girl over long period — Sentence reduced.

(Paras 4, 5)

The Judgment of the Court was delivered by

HIDAYATULLAH, C. J. :— The appellant Laiq Singh, a former member of the Legislative Assembly of Uttar Pradesh is the appellant before us with several others who all have been convicted under Section 365 read with Section 149 and Section 147 of the Indian Penal Code. Laiq Singh has been sentenced in the aggregate to three years' rigorous imprisonment and the others have been sentenced in the aggregate to one year's rigorous imprisonment. Previously, the Additional Sessions Judge, Kanpur had acquitted them in the trial before him. The State Government appealed and the acquittal was set aside and the conviction and the sentences as stated above resulted.

2. In the appeal before the High Court parties had put in an application for compounding the offence. There were several other offences with which these persons were charged. They were all compoundable. The offence for which they stand now convicted could not be compounded even with the permission of the Court with the result that the acquittal was recorded by the High Court in respect of the other offences, but the conviction and sentences in respect of the two offences which were mentioned above have been recorded.

3. In arguing the appeal, Mr. Chari did not seek to have the conviction set aside. He rather aimed at having the sentences reduced in the case to the period of imprisonment already undergone by the appellants. He made out a case on the record showing that the complainant Shashi Kala who was supposed to have been abducted with a view to her being either murdered or confined, was not a person who would have been taken with this purpose. He took us through the history of the relationship between Laiq Singh and the complainant Shashi Kala and showed that they had been in intimate relations for several years. It appears that Laiq Singh was the guardian of Shashi Kala, but taking advantage of his position, he seduced her and got her pregnant on more than one occasion. Two abortions are deposed to by Shashi Kala. Subsequently she refused to have an abortion and a child was born to her. It was after this that Shashi Kala pressed upon Laiq Singh the fact of her having become the mother and asked him to marry her. Laiq Singh could not marry her, because he had already a wife living and the incident which is deposed to took place after

Shashi Kala had gone to a cinema in the company of a Sub-Inspector, a relation of Laiq Singh and was returning from the cinema. According to Shashi Kala the Sub-Inspector got down from the jeep and three persons and the wife of Laiq Singh got into the jeep. The jeep was then driven away and it was Shashi Kala's case that she was gagged while she was in the jeep so that she could not make any noise. However, the jeep was stopped at one place when the gag was removed, she shouted for help and that is how the party came to be arrested. Shashi Kala's apprehension was that she was being taken away by them to be murdered or to be confined in some place. The learned Judges in the High Court have accepted the latter version and have held that there was abduction with a view to confining Shashi Kala.

4. The offence would have been serious but for certain facts which have emerged in the case mainly through Shashi Kala herself. We have already stated that Shashi Kala and the main appellant Laiq Singh were in intimate relations over a long period. In fact Shashi Kala says that she was seduced when she was only 16 years or 17 years of age. At the time of the prosecution, Shashi Kala's age was about 24 years which shows that a period of about 7 years had passed between her first seduction and the complaint which resulted in this prosecution. During this time, Shashi Kala herself states that she became pregnant on three occasions and that finally she had a child after two abortions had been practised upon her. She also admits that she was introduced to some persons with a view to marriage with them, but she declined to marry the persons to whom she was introduced. One such person by name Khandlekar lived with her for some months and Shashi Kala is candid enough to admit that she got into close intimate relations with him also. Another person by name Navin was also introduced to Shashi Kala so that she could be married to him. Some letters have passed between them although they do not seem to have been proved as they should have been. However the fact is admitted by her that she was in his company for sometime.

5. It appears to us therefore, that Shashi Kala was a girl of easy virtue and although she was set on the path of depravity mainly by Laiq Singh, she perhaps was not averse to what was happening to her. In these circumstances, we

think that not much serious notice can be taken of the allegation of abduction. We cannot take into account the previous relationship between Laiq Singh and the girl. After all we are not punishing him for having seduced the innocent girl although the account of the girl reads like Justine of Marquis de Sade. That is not the offence for which Laiq Singh is being tried and we must take it away from our mind in assessing the punishment for the guilt which has been brought home to him. She was being taken away in the jeep forcibly and this may have happened on more than one occasion and not much serious notice can be taken of this in view of their relationship. We think that in the circumstances of this case, it is not necessary to impose the heavy sentence which has been imposed upon him. The ends of justice will be satisfied by reducing the sentence to the period of imprisonment already undergone by him. In coming to this conclusion, we must take note of the fact that Laiq Singh is a person interested in politics. He was a member of the Assembly before and now after his conviction, he will not have the chance of representing any constituency in the future. The sentence of the other appellants is also reduced to the period of imprisonment already undergone by them. With this modification of the sentence, the appeal fails and is dismissed. Bail bonds shall stand cancelled.

Appeal dismissed.

AIR 1970 SUPREME COURT 659
(V 57 C 129)

(From: Calcutta)

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

Deb Dutt Seal, Appellant v. Raman Lal Phumra and others, Respondents.

Civil Appeal No. 1355 of 1966, D/-6-11-1969.

Registration Act (1908), Ss. 17 and 49 — Equitable mortgage — Document evidencing mortgage by deposit of title deeds — Registration when essential — Principles indicated — On construction document was held not to require registration and as such admissible in evidence as it did not create a mortgage or any interest in property but merely recorded a past transaction. (1873) 11 Beng LR (OC) 405, Not approved — (Per Sikri and Jaganmohan Reddy, JJ. Mitter J., Dissenting) —

BN/CN/F656/69/KSB/M

(Transfer of Property Act (1882), Ss. 58 (D and 59).

The plaintiff brought a mortgage suit on the basis of a letter dated 17-12-1951 written and signed by defendant 1 at the plaintiff's residence. In the morning on 17-12-1951 plaintiff had advanced a large sum to defendant 1 on basis of bundies executed by defendant 1 and accepted by defendant 2. In the evening defendant 1 brought the title deeds of his residential bouse for perusal of the plaintiff and after their approval by the plaintiff drew up two documents (1) list of the title deeds deposited with plaintiff and (2) the letter in suit) and handed them over to plaintiff. The letter dated 17-12-1951 ran as follows:—

"I write to record that I delivered to and deposited with you this day my title deeds relating to the premises No. 36 Puddapukur Road Calcutta, solely belonging to me with intent to create security for my liability for the moneys payable under the three bundies dated this day for the sum of Rs. 80,000 drawn by me in your favour and I have undertaken to execute a legal mortgage at my costs whenever called upon by you to do so. I further assure you that the said premises No. 35, is free from all encumbrances and the same absolutely belongs to me." The defence was that the letter required registration and was therefore, inadmissible in evidence.

Held, (per Sikri and Jaganmohan Reddy, JJ., Mitter, J. dissenting) that the letter on its true interpretation and in the surrounding circumstances merely recorded a past transaction and did not intend to create any mortgage. The undertaking to *execute a legal mortgage and the assurance* that the premises were free from all encumbrances did not create or declare any interest in the premises. AIR 1965 SC 1591, Rel. on. (Paras 5, 7)

It is not correct to say that even if a document on the face of it and properly interpreted in the light of the circumstances does not disclose the creation of a mortgage, or even if the document itself is not an operative instrument and is merely evidential, it requires registration. AIR 1939 PC 167, Ref. to; (1873) 11 Beng LR 405 (OC), Not approved.

(Para 10)

In order to require registration the document must contain all the essentials of the transaction and one essential is that the title deeds must be deposited by virtue of the instrument or acknowledge an earlier deposit of title deeds and say

further that the title deeds shall be held as security on the said mortgage.

(Para 11)

What is registrable under the Registration Act is a document and not a transaction. Since the document in suit was not an operative document and did not contain all the essentials of the transaction it did not require registration and, therefore, was admissible in evidence.

(Paras 12, 27)

Per Mitter, J. (dissenting).

The following propositions may be laid down from decided cases relevant to the topic.

(a) The facts and circumstances attendant on the deposit of title deeds and the execution of the memorandum must be considered as a whole.

(b) If the transaction of deposit of title deeds with intent to create a security be completed before the parties have a memorandum, registration of the document is not required unless as in AIR 1939 PC 167 the parties proceed to create a mortgage over again in writing.

(c) The form and text of the memorandum although of paramount importance are not conclusive.

(d) If the memorandum does not contain all the terms necessary to give it efficacy as a contract of mortgage no registration is necessary.

(e) If the evidence shows that the memorandum was executed with the intention that it should be the repository of the bargain between the parties then the document alone can be looked into. In the absence of registration, the bargain cannot be proved.

(f) The deposit of title deeds contemporaneously with the execution of the memorandum containing the terms of mortgage gives a strong indication of the document being considered as the bargain between the parties. Case law reviewed. (Para 25)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1591 (V 52) =
1968 SCD 44, United Bank of
India v. Lekharam Sonaram and
Co. 6, 8, 24
(1950) AIR 1950 SC 272 (V 37) =
1950 SCR 548, Rachpal Maharaj
v. Bhagwan Das Daruka 8, 23
(1939) AIR 1939 PC 167 (V 26) =
66 Ind App 184, Hari Sanker
Paul v. Kedarnath Saha 10, 11, 21, 25
(1931) AIR 1931 PC 36 (V 18) =
53 Ind App 68, Obla Sundara-
chariar v. Narayana Ayyar 20

(1923) AIR 1923 PC 50 (V 10) =
 50 Ind App 77, Subramanian v. Lutchman 19
 (1916) AIR 1916 PC 115 (V 3) =
 43 Ind App 122, Pranjiwan Das Mehta v. Chan Ma Phee 17
 (1873) 11 Beng LR (OC) 405 =
 20 Suth WR 150, Kedarnath Dutta v. Shamlal Khettry 9, 18, 27
 (1872) 5 HL 321 = 42 LJ Ch 49,
 Shaw v. Foster 17
 The following judgments of the Court were delivered by

SIKRI, J. (on behalf of himself and **P. Jaganmohan Reddy, J.**): This appeal by certificate of fitness granted by the High Court under Art. 133 of the Constitution is directed against its judgment and decree modifying the decree passed by the Trial Court. The Trial Court had decreed the suit and granted a preliminary decree against the appellant and another and had declared that the house at No. 35, Paddapukur Road, Bhowanipore, stood charged and/or mortgaged in favour of the plaintiffs (respondents before us) for the due payment of the sum of Rupees 92182/3/6, and future interest was allowed at the contracted rate. The High Court modified the interest to 6 p. c. per annum till suit and the same rate till realisation. As the High Court had modified the decree it granted a certificate under Art. 133 of the Constitution.

2. The only point raised by the learned counsel for the appellant is that the document Ex. 2, dated December 17, 1951, required registration and was inadmissible in evidence. The said letter reads as follows:

"Calcutta, the 17th December, 1951

Girdhari Lal Phumra, Esqr.,
 56, Burtolla Street,
 Calcutta

Dear Sir,

Re: 35, Puddo Pukur Road.

I write to record that I delivered to and deposited with you this day at No. 56, Burtolla Street, Calcutta my title deeds relating to the premises No. 35, Puddo-pukur Road, Calcutta, solely belonging to me with intent to create security for my liability for the moneys payable under the three hundies dated this day for the sum of Rs. 80,000 (Rupees Eighty thousand only) drawn by me in your favour and I have undertaken to execute a legal mortgage at my costs whenever called upon by you to do so. I further assure you that the said premises No. 35, Puddo Pukur Road, is free from all

encumbrances and the same absolutely belongs to me.

Yours faithfully,
 Sd/- Debdutt Seal
 (DEBDUTT SEAL)
 17-12-1951"

3. The only evidence led as to the circumstances in which this letter was executed is that of P. W. 1, Raman Lal Phumra s/o late Giridharilal Phumra. The defendant denied the execution of the hundies referred to in the letters. It is necessary to extract the relevant evidence of P. W. 1. He says:

"I know the defendants 1 and 2. On 17-12-51 my father and myself lent Rs. 80,000 to defendant No. 1 for the purpose of his business and then the defendant No. 1 executed 3 Hundis for Rs. 35,000, Rs. 35,000 and Rs. 10,000 respectively on that date. The body of the Hundis was typed. The defendant No. 1 executed all the three Hundis and the defendant No. 2 accepted the same in my presence. The Hundis are marked Exts. 1 and 1B. Consideration for all Hundis was paid in my presence. On the same date, the defendant No. 1 gave his title deeds re: 35 Puddapukur Road after the execution of the Hundis as the security for the money. He gave the title deeds at our Gaddi at 56, Burtolla Street. He gave us this letter at the time of handing over the title deeds. The defendant No. 1 signed the letter of the list of title deeds in my presence. Letter is marked Ext. 2. List of documents is marked Ext. 3."

In cross-examination he stated:

"On 17-12-51 the defendant came to us and requested for a loan of Rs. 80,000 on the ground that it was urgently needed for business . . . My father read and approved of the title deeds and the defendant No. 1 made out the list. We know from long before that 35, Pudda Pukur Road belonged to defendant No. 1. . . . I drafted the letter (Ex. 2) according to the draft usually made in such cases. The letters and title deeds were given together in the afternoon and the money was paid in the morning of the same day."

4. Both the Trial Court and the High Court have held that this letter did not require registration. It seems to us that on the evidence reproduced above what happened was this. In the morning the money was advanced and the Hundis executed. In the afternoon the defendant brought the title deeds with a view

to create an equitable mortgage. He gave the title deeds to the father. The title deeds were approved and a list made by defendant No. 1 and at that moment the creation of equitable mortgage by deposit of title deeds was complete. Then the letter, Ex. 2 was given. When the witness says in cross-examination that the letters and the title deeds were given together in the afternoon it does not mean that the title deeds had not already been given.

5. Ex. 2, dated December 17, 1951, on the face of it clearly does not create any mortgage. It records a past transaction and then the writer undertakes to execute a legal mortgage and further assures that the premises are free from all encumbrances, etc. The latter two provisions cannot make the document registrable because they do not create or declare any interest in the premises.

6. The learned counsel for the appellant contends that we should read the words "delivered to and deposited" occurring in the first line of the letter as "I hereby deliver and deposit with you". But we are unable to see how we can change the wording of the document. He says that this letter reduces all the terms of the bargain to writing and, therefore, the letter itself constitutes the bargain and is registrable. He says it mentions the amount secured and the three Hundis executed and thus inferentially the interest on the Hundis under Section 80 of the Negotiable Instruments Act. The law on the point is quite clear and has been considered by this Court on at least three occasions. It is only necessary to mention the latest decision in *United Bank of India v. Lakharam Sonaram and Co.*, AIR 1965 SC 1591 where Ramaswami, J., reviewed the earlier decisions bearing on the point.

7. The only question is whether the parties intended to create a charge by the execution of Ex. 2 or was it merely a record of the transaction which had already been concluded and under which rights and liabilities had already been created. It seems to us that the document did not intend to create a charge by its execution.

8. In the *United Bank of India case*, AIR 1965 SC 1591 one letter, Ex. 12, was considered not to have created a mortgage. The letter read:

"This is to place on record that I have this day deposited with you at your Head Office at Clive Street, Calcutta, the

undemoted documents of title relating to my properties, viz., Giridh Malho properties as described in the title deeds with intent to create an equitable mortgage upon all my rights, title and interest in the said properties to secure the repayment on demand of all moneys now owing or which shall at any time hereafter be owing from me or from M/s. Lakharam Sonaram and Co. either singly or jointly or otherwise to Bengal Central Bank Limited, whether on balance of account or by discount or otherwise in respect in any manner whatsoever and including interest with monthly rests commissions and other Banking charges and any law costs incurred in connection with the amount. I do hereby put on record that the properties mentioned below are free from all encumbrances."

Ramaswami, J., says this about the letter:

"As regards Ex. 12 also, it is not possible to accept the argument of the respondents that it created a charge for the reason that the language in Ex. 12 suggests that it recorded a transaction which had already been concluded and under which rights and liabilities had already been agreed upon. It is also significant that Ex. 12 is written not by Lakharam — the Karta of the joint family — but by Bahulal Ram. It recites that he had deposited the title deeds with an intent to create an equitable mortgage "upon all my rights, title and interest in the said properties." The language of Ex. 12 is identical in material respects with the language of the document construed by this Court in 1950 SCR 548 = AIR 1950 SC 272 and is covered by the decision in that case."

9. It was said that if a transaction had already been entered into by the parties then Ex. 2 may not require registration, but if a transaction had not already been entered into it requires registration. Reliance was placed especially on *Kedarnath Dutt v. Shamlall Khettry*, (1873) 11 Beng. LR 405. The words in the memorandum in that case were:

"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with 'the plaintiff', as a collateral security by way of equitable mortgage, title-deeds of my property. . . ." The Court held that the memorandum did not require registration on the ground that this was "not a writing which the parties

had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred." Earlier the Court had observed:

"When we consider what the memorandum is, we find it is not the contract for the mortgage, — not the agreement to give a mortgage for the Rs. 1,200, but nothing more than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given."

10. We are not concerned with the correct interpretation of that memorandum but if the decision lays down that even if a document on the face of it and properly interpreted in the light of the circumstances does not disclose the creation of a mortgage, or in the words of the Privy Council in *Hari Sankar Paul v. Kedar Nath Saha*, 66 Ind App 184 = (AIR 1939 PC 167), even if the document itself is not an operative instrument and is merely evidential, it requires registration, the decision cannot be approved.

11. It seems to us that the document must contain all the essentials of the transaction and one essential is that the

1. Date
2. Date of repayment
3. Sum secured
4. Nature of mortgage
5. Subject matter of mortgage.

The two defendants in the suit were the appellant and one Deb Dutta Films Ltd. who was not a party to the mortgage. The facts about which there can be no dispute are as follows. A sum of Rupees 80,000/- had been advanced on three hundies to which the defendants were parties on December 17, 1951 repayable within 60 days after date without grace. The hundies were silent as to interest. The money was advanced at the creditor's place in the morning and in the afternoon Deb Dutta Seal, the appellant, went there with the title deeds of the above mentioned property which were examined by Giridharilal Phumra, the original plaintiff (now represented by the respondents). They were approved and

deeds must be deposited by virtue of the instrument or acknowledge an earlier deposit of title deeds and say further, as was said in the case of *Hari Sankar Paul* 66 Ind App 184 = (AIR 1939 PC 167) that the title deeds shall be held as security on the said mortgage.

12. Stress was also laid on the time element. Assuming that we are wrong in the interpretation that the deeds mentioned in the letter, after being shown to the father and approved, were handed back together, even then we are of the view that the document does not require registration because it is not an "operative instrument". It does not contain all the essentials of the transaction. What is registrable under the Indian Registration Act is a document and not a transaction.

13. In the result the appeal fails and is dismissed. There will be no order as to costs in this Court.

14. MITTER, J.: With regret, I am unable to concur in the judgment just now delivered. The only question canvassed in this appeal is, whether the respondents are entitled to have a mortgage decree in respect of premises No. 35, Puddapukur Road, Calcutta belonging to the appellant. The particulars of the mortgage as given in the plaint are:

17th December 1951.

15th February, 1952.

Rs. 80,000 with interest thereon at 8% p. a. and costs of realisation thereof.

Equitable mortgage by deposit of title deeds.

Defendant No. 1's house at premises No. 35, Puddapukur Road, Bhowanipore, District 24-Parganas.

two documents Exs. 2 and 3 were drawn up according to the drafts made by the first respondent Ramanlal Phumra, son of Giridharilal Phumra. They were signed by the appellant and the title deeds of the documents were made over to the creditors at the same time. Ex. 3 bore the superscription:

"List of title deeds of premises No. 35 Puddapukur Road Calcutta deposited by me this day with Giridharilal Phumra at his residence No. 56 Burtolla Street, Calcutta. Below this was set down a list of various original conveyances and documents and certified copies of court records and municipal plans and rate bills. Ex. 2 was worded as follows:

Calcutta, the 17th December,
1951.

Giridhari Lal Phumra Esq.,
56, Burtolla Street,
Calcutta.

Dear Sir,

Re: 35, Puddopukur Road.

I write to record that I delivered to and deposited with you this day at No. 56 Burtolla Street, Calcutta my title deeds relating to the premises No. 35 Puddopukur Road, Calcutta belonging to me with intent to create security for my liability for the moneys payable under the three bundies dated this day for the sum of Rs. 80,000 drawn by me in your favour and I have undertaken to execute a legal mortgage at my cost whenever called upon by you to do so. I further assure you that the said premises No. 35, Puddopukur Road is free from all encumbrances and the same absolutely belongs to me.

Sd/- Debdutt Seal.
17-12-51."

15. The only oral evidence adduced in this case which need be taken into consideration is that of Ramanlal Phumra, his father having died after the institution of the suit. In his examination-in-chief he said that the money had been advanced to the defendant No. 1 for the purpose of his business on December 17, 1951 and on the same day he gave his title deeds regarding 35 Puddopukur Road after the execution of the bundies as the security for the money. He also gave the letter Ex. 2 at the time of the banding over of the title deeds. His cross-examination makes it clear that the money was advanced in the morning and the two letters and title deeds were given together in the afternoon after his father had looked into the deeds and approved of them. The letters were drafted by the witness.

16. The short question which arises is, whether the above document on the facts of the case required registration under Section 17 of the Registration Act, and whether if the document was inadmissible in evidence under Section 49 of the Registration Act, the plaintiff was entitled to a mortgage decree. Both the lower courts have held that the document did not require registration and it is the contention of counsel for the appellant that the said courts have gone wrong.

17. The cases on this point are legion but the principles of law have been stat-

ed over and over again in various decisions of the Judicial Committee of the Privy Council and of this Court, not to speak of the innumerable decisions of various High Courts. The principles of law are quite clear and were summarised as follows in *Pranjivandas Mehta v. Chan Ma Phee*, 43 Ind App 122 at p. 125 = (AIR 1916 PC 115 at p. 116):

"(1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security. In the words of Lord Cairns in the leading case of *Shaw v. Foster*, (1872) 5 HL 321 at p. 341: 'Although it is a well-established rule of equity that a deposit of a document of title, without more, without writing, or with word of mouth will create in equity a charge upon the property referred to, . . . that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed.'"

18. The difficulty which has arisen in various cases had been mainly duo to the form and text of the memorandum and the respective contentions of the parties based thereon and the surrounding circumstances. In the case of (1873) 11 Beng LR 405 at p. 412 decided by the Calcutta High Court about a hundred years back it was said by Couch C. J.:

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, or their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and

would come within Section 17 of the Registration Act."

In that case the defendant had deposited certain title deeds with the plaintiff as security for the repayment of Rs. 1200 advanced to him at the time when the deposit was made. On the evening of the same day the defendant by way of further security gave to the plaintiff a promissory note for the amount of the loan endorsed therein the following memorandum:

"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with Baboo Shamlal Khetty, as a collateral security by way of equitable mortgage title deeds of my property etc."

The court held that the equitable mortgage was complete without the memorandum and the latter was not a writing which the parties had made as the evidence of their contract, but was only a writing which was evidence of the fact from which the contract was to be inferred.

19. In *Subramanian v. Lutchman*, 50 Ind App 77 = (AIR 1923 PC 50) the relevant portion of the memorandum was as follows:

"We hand you herewith title deeds relating to fifth class Lot with building thereon belonging to Suleman Ahmad Seedat, also his promissory note for Rs. 63,000 due to us, this please hold as security against advances made to us"

There was evidence that the document was drafted and typed after the parties had come to an agreement and it was drawn up at the time they came together. Referring to the oral testimony of the plaintiffs agent that the arrangement to deposit the title deeds was made in the presence of the eldest son of E. Soloman who gave evidence to the above effect the Judicial Committee held that the evidence on the subject was conclusive that the memorandum constituted the bargain between the parties.

20. In *Obla Sundarachariar v. Narayana Ayyar*, 58 Ind App 63 = (AIR 1931 PC 36) there were two documents signed by the debtor, one was a promissory note for Rs. 60,000 payable on demand and the other was a memorandum consisting of a list of the title deeds with the following introductory words:

"Written to F. H. A. Samee Bhattar by Krishnaswami Ayyar of S. V. Ramaswami Ayyar and Brothers. As agreed upon in

person I have delivered to you the under-mentioned documents as security."

Both the documents were dated March 14, 1921. The evidence showed that the joint family of the debtors owed a sum of money exceeding Rs. 36,000 and wanted further accommodation to make up the total of Rs. 60,000. Security was demanded and five properties were considered adequate. The transaction was completed on March 14, 1921 between 4 p. m. and 6 p. m. in the house of the plaintiff's son. Before the plaintiff arrived on the scene, the Manager of the joint family had already handed the deeds to the plaintiff's son with two documents which he had written out and signed and mentioned above. The Judicial Committee held that the memorandum merely recorded particulars of the deeds the subject of the deposit and there was nothing in the circumstances connected with the creation of the memorandum or in the way in which the parties dealt with it which permitted or required some other meaning or effect to be given to it. The memorandum did not embody the terms of agreement between the parties.

21. In 66 Ind App 184 = (AIR 1939 PC 167) there were two agreements between the parties. On July 24, 1924 a document was signed by one of the debtors setting out the terms and conditions of Rs. 25,000/- to be advanced to them. It also provided that Rs. 12,000/- should be paid on that day and the balance Rs. 13,000/- on or before 31st July, 1924. The advance of Rs. 12,000/- was to be made on the deposit of the documents of title relating to a named property and after the balance of Rs. 13,000/- was paid the mortgagors were to execute a memorandum evidencing the deposit and embodying the terms and conditions of the loan. The title deeds were formally handed over and the sum of Rs. 12,000/- paid out. Subsequently on 2nd August, 1924 the balance of Rs. 13,000/- was paid and the formality of handing the title deeds to the appellants' attorney was gone through once more and later on the same day another memorandum of agreement was executed. This document recited the advance of Rs. 12,000 on 24th July, the deposit of documents of title and purported to declare that:

"In consideration of the two sums of Rs. 12,000 and Rs. 13,000 paid before the execution of the memorandum, the title deeds described in the second schedule 'which said deeds, evidences and writings

have as hereinbefore stated prior to the execution of this agreement been delivered by the mortgagors to the mortgagees said agent in the town of Calcutta with intent to create a security of the said hereditaments and premises etc. etc. shall be held by the mortgagees as such security as aforesaid for the payment by the mortgagors to the mortgagees at the time and in the manner hereinafter mentioned.

22. It was held by the Judicial Committee that the statement that the title deeds had been previously delivered with intent to create a security did not alter the character of the memorandum itself in that it purported to create a mortgage over again in writing. It was observed:

"The memorandum does not merely evidence a transaction already completed: its language is operative. It is contractual in form, and it embodies an agreement that the title deeds in question are to be held as security for the advances made, and it speaks of the moneys 'hereby secured'."

23. In *Rachpal Maharaj v. Bhagwan-das Daruka*, 1950 SCR 548 = (AIR 1950 SC 272) Patanjali Sastri, J. said at p. 551 (of SCR) = (at pp. 273, 274 of AIR):

"The crucial question is: Did the parties intend to reduce their bargain regarding the deposit of the title deeds to the form of a document? If so, the document requires registration. If, on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document, being merely evidential does not require registration."

In the last case the memorandum ran as follows:

"We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No. 7 Sambhu Mallick Lane, relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys in-

cluding interest that may be found due and payable by us to you on account of the said transactions. . . . This Court held that the parties did not intend by the memorandum to create the charge. The document purported only to record a transaction which had been concluded and under which the rights and liabilities had been orally agreed upon.

24. In AIR 1965 SC 1591 where most of the decisions were reviewed the Court negatived the plea that the memorandum in that case required registration mainly on the ground that the same did not mention what was the principal amount borrowed or to be borrowed and it did not refer to the rate of interest for the loan.

25. In my view, the following propositions emerge from the above decisions:—

(a) The facts and circumstances attendant on the deposit of title deeds and the execution of the memorandum must be considered as a whole.

(b) If the transaction of deposit of title deeds with intent to create a security be completed before the parties have a memorandum, registration of the document is not required unless as in *Harl Sankar Paul's case*, 66 Ind App 184 = (AIR 1939 PC 167) (supra) the parties proceed to create a mortgage over again in writing.

(c) The form and text of the memorandum although of paramount importance are not conclusive.

(d) If the memorandum does not contain all the terms necessary to give it efficacy as a contract of mortgage no registration is necessary.

(e) If the evidence shows that the memorandum was executed with the intention that it should be the repository of the bargain between the parties then the document alone can be looked into. In the absence of registration, the bargain cannot be proved.

(f) The deposit of title deeds contemporaneously with the execution of the memorandum containing the terms of mortgage gives a strong indication of the document being considered as the bargain between the parties.

26. In this case but for the use of the past tense in the expression "I delivered to you and deposited with you" there is nothing in the memorandum which would suggest that it is not an operative document. All the terms of the bargain which

the plaintiff sought to prove by oral evidence are contained in this document. It shows that the deposit was with intent to create a security for the liability for the moneys payable under the three hundies for the sum of Rs. 80,000/-. The principal amount is thus mentioned; the rate of interest is impliedly stated in the expression "my liability for the moneys payable under the hundies" which under the Negotiable Instruments Act was fixed at 6 per cent and was the rate allowed by the courts below. It mentions the property given by way of mortgage. It also impliedly fixes the date for repayment as contemporaneous with "the liability under the hundies". This is borne out by the plaint which shows that the plaintiff understood the date of repayment to be 60 days from the date of execution of the hundies.

27. In my opinion the use of the past tense in the memorandum does not conclude the matter. One must consider the evidence relating to the deposit and the surrounding circumstances in which the deposit was made and the memorandum signed. There is nothing in the evidence of Ramanlal Phumra to suggest that the deposit was dissociated from the execution of the letter Ex. 2 in point of fact. As already noticed they were contemporaneous as admitted by Ramanlal Phumra. The letter was given when the title deeds were handed over. The use of the past tense in the opening sentence of the memorandum was either incorrect or untrue. It was untrue if the words "deposited and delivered" were used wilfully because a man cannot truthfully say that he "deposited and delivered" document at the moment of time when he was actually delivering or depositing them. More likely the use of the past tense was incorrect but unintentional because according to Ramanlal Phumra he was dictating the draft from a similar draft used in the past. However that may be it is clear that the creditors were not content with merely getting an admission from the appellant that the title deeds of the property had been lawfully deposited by the debtor with them. Exhibit 3 together with the oral testimony that the deposit was made with intent to create a security for the liability of the debtor would have been enough to prove the mortgage. If the creditor merely wanted the fact of deposit to be recorded in writing the letter Ex. 3

would have served his purpose. The execution of the hundies was sufficient to prove the extent of the loan. If the terms of the bargain were not meant to be recorded the execution of Ex. 2 was unmeaning and vain. The real necessity for the execution of Ex. 2 was in my opinion, to fix the appellant with the terms recorded therein. Though brief in words Ex. 2 contains all the terms of a valid mortgage by deposit of title deeds. That the execution of it was attended with some solemnity is evident from the declaration of the debtor that the property was free from all encumbrances and that he was willing to execute a regular mortgage whenever called upon. In my opinion, the document was not created merely to record the character of the deposit but to pin the executant down to the terms set forth therein. That Deb Dutta Seal was a person for whom mere word of mouth had no sanctity is apparent from the written statement filed by him where he denied the plaintiff's claim in its entirety. Ordinarily when a deposit of title deeds is made with intent to create a security for any liability and thereafter a document is executed which records some but not all the terms which the nature of the transaction demands, there is scope for contending that the document is merely evidential and not operative but when the document contains all the terms and is executed contemporaneously with the deposit of title deeds, it and it alone can be considered in evidence and if the law of registration shuts the document out of consideration, unfortunate though the result may be, the law must take its course regardless of the hardship caused. In Kedarnath Dutt's case (1873) 11 Beng LR 405 the use of the present tense regarding the deposit on the facts of the case was said not to make the document the contract between the parties. Besides one must always remember that the language of a document in English drafted by ordinary commercial people of India is not unoften tainted with faulty grammar and does not have the same precision as in the text of a Bacon or a Chalmers.

28. In the result, I would allow the appeal and hold that no mortgage decree can be passed but there being no defence to the claim of the plaintiff on the three hundies, I would allow a decree for the principal amount of Rs. 80,000/- with interest at 6 per cent up to the date of de-

creed and interest at the same rate thereafter.

BY THE COURT

29. In accordance with the Opinion of the majority, this appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 663

(V 57 C 130)

(From: Mysore)

J. C. SHAH AND K. S. HEGDE JJ.

Murtaza and Sons and another, Appellants v. Nazir Mohd. Khan and others, Respondents.

Civil Appeal No. 1708 of 1967 D/- 24-11-1969.

(A) Constitution of India, Article 136 — Grant of special leave in Civil cases — Effect — Entire case is not at large — Only those grounds, fit to be urged when leave to appeal is asked for, can be urged at final hearing. AIR 1950 SC 169, Foll. (Para 2)

(B) Constitution of India, Article 136 — Special leave to file appeal — When granted.

Supreme Court does not generally grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. AIR 1950 SC 453, Foll. (Para 2)

Cases Referred: Chronological Paras (1950) AIR 1950 SC 169 (V 37) =

1950 SCR 453, Pritam Singh v.

State

2

The Judgment of the Court was delivered by

SHAH, J.:— This is an appeal against the orders of the High Court of Mysore setting aside an order passed by the District Court adjudicating Respondents Nos. 2 to 6 insolvents under the Mysore Insolvency Act. The appeal is filed with special leave.

2. This Court has held in Pritam Singh v. State, 1950 SCR 453 at p. 459 = (AIR 1950 SC 169 at p. 172): "Generally speaking this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features

of sufficient gravity to warrant a review of the decision appealed against". It was also said in that case that the view that once an appeal has been admitted by special leave the entire case is at large and that the appellant is free to contest all the findings of fact and raise every point which could be raised in the High Court is wrong. Only those points can be urged at the final hearing of the appeal which are fit to be urged at the preliminary stage when leave to appeal is asked for. This principle was stated, it is true, in a criminal case but it is of as much significance in civil cases as in the trial of criminal appeals. It is necessary to emphasise this because the learned counsel on behalf of the appellants has attempted to persuade us to reappraise the evidence and come to a conclusion different from the one recorded by the High Court.

3. The appellants filed an application for adjudicating as insolvent Respondent No. 6 which is a partnership of which Respondents Nos 1 to 5 were alleged to be partners. It was alleged in the application (1) that Respondents 1 to 6 had on February 17, 1962, executed a deed of simple mortgage in favour of the 7th Respondent for a sum of Rs. 50,000 which constituted an act of insolvency and also a fraudulent transfer made with intent to give the said creditor a preference over the general body of creditors and therefore, the mortgage was void under Section 54 of the Mysore Insolvency Act; (2) that on February 23, 1962 Respondents 1 to 6 made a transfer of their properties to the 7th Respondent under a deed of trust for the benefit of the creditors; the execution of the deed of trust itself constituted an act of insolvency; (3) that the respondents had departed from their place of business and had set up business at another place and that they were generally found absent from their dwelling house and thereby they had prevented all means of communication with them.

4. The Trial Court held that the 1st Respondent was not a partner of the 6th Respondent firm and rejected the application against him but ordered that Respondents Nos. 2 to 5 be adjudicated insolvents mainly on the finding that they had transferred all or substantially all their properties to a third person for the benefit of his creditors generally.

5. In appeal to the High Court of Mysore this finding was reversed and the High Court held that the act of in-

solvency alleged had not been proved. Prima facie the finding of the High Court is based upon the averments made in the petition and the evidence led before the Court and no substantial question of law arises. There was no averment in the petition filed by the appellants that Respondents Nos. 2-6 had made a transfer of all or substantially all their properties to a third person nor was there any allegation that they had transferred their properties with intent to defeat or delay the general body of the creditors. In view of the defective pleading and the absence of reliable evidence the High Court came to the conclusion that the act of insolvency pleaded under Section 6 (a) of the Mysore Insolvency Act was not made out.

6. We do not think that that conclusion of the High Court is liable to be challenged in an appeal to this Court with special leave. It is true that there was an averment in the petition that the respondents had shifted their place of business and had prevented communication with them; but the Trial Court rejected that contention and the High Court was not called upon to deal with that question. Mr. Venkataranga Iyengar on behalf of the appellants, contended that in any case there was an averment in the petition that the mortgage dated February 17, 1962 was executed by the respondents in favour of the 7th Respondent and that mortgage constituted an act of insolvency and also a fraudulent transfer with a view to give that creditor a preference over the general body of creditors. That, according to Counsel, was a sufficient plea which attracted the application of Section 6 (a) of the Mysore Insolvency Act. But here again, the finding of the High Court, in our judgment, is clear that there is no evidence to support the case made out that the mortgage in favour of the 7th Respondent dated February 17, 1962 was made with intent to defraud the creditors.

7. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 669
(V 57 C 131)

(From Punjab: ILR (1968) 1 Punj 621)
J. C. SHAH AND K. S. HEGDE, JJ.

M/s. Silver Screen Enterprises, Appellant v. Devki Nandan Nagpal, Respondent.

Civil Appeal No. 1896 of 1967, D/- 28-11-1969.

Civil P. C. (1908), Order 23, Rule 3 — Provision of Rule 3 is mandatory — Compromise between parties to withdraw appeal — Factum and validity of compromise not disputed — Court must dismiss appeal — ILR (1968) 1 Punj 621 Reversed. (Para 3)

The Judgment of the Court was delivered by

HEGDE J. :—This appeal by special leave arises from the decision of the High Court of Punjab and Haryana in Civil Revision No. 189 of 1966 on its file. (Reported in ILR (1968) 1 Punj 621). The respondent is the owner of a Cinema House. That Cinema House had been leased to the appellant. The respondent filed an application under Section 13 (2) (i) of the East Punjab Urban Rent Restriction Act, 1949 (East Punjab Act 3 of 1949) for the ejectment of the tenant on the ground of non-payment of rent. That application was dismissed by the Rent Controller. Against that order the respondent went up in appeal. At the same time there were several other litigations between the appellant and the respondent. By an agreement dated January 7, 1964, the appellant and the respondent settled all their pending disputes excepting one Regular First Appeal pending in the High Court of Punjab and Haryana. One of the disputes pending at that time was an application made by the appellant to the Rent Controller for fixing a fair rent for the Cinema House in question. As per the agreement the respondent was required to withdraw the appeal filed by him against the order dismissing his application to eject the appellant from the premises in question. That agreement also provided that the appellant should withdraw his application for fixing a fair rent for that premises. The appellant accordingly withdrew his application but when the appeal in respect of the ejectment proceedings came up for hearing the respondent refused to withdraw the same. The appellant moved the court to dismiss the appeal on the strength of the com-

promise referred to earlier. The appellate Court accordingly dismissed the appeal. As against that order the respondent went up in revision to the High Court. The High Court allowed that revision petition and set aside the order of the Appellate Court holding that there was no provision in the Code of Civil Procedure under which an appellant can be compelled to withdraw his appeal.

2. The High Court did not hold against the correctness of the compromise put forward or as to its validity. The only ground on which the appeal was allowed was as mentioned earlier that the appellate court was incompetent to compel the appellant to withdraw his appeal. This conclusion ignored the fact that the appellate court could always dismiss an appeal on the ground that it has been settled out of Court.

3. The compromise in question specifically says that the parties thereto have compromised all their disputes mentioned therein including the two matters referred to earlier. On the basis of that compromise both the appellant and the respondent were required to withdraw all the pending proceedings excepting the one mentioned earlier. There is no dispute that one of the matters compromised is that relating to the appeal with which we are concerned herein. Once a dispute is validly settled out of Court, it is open to a party to a litigation to move the Court to pass a decree in accordance with the compromise. Rule 3 of Order 23, of Code of Civil Procedure provides that where it is proved to the satisfaction of the Court that a suit (which expression includes an appeal) has been settled wholly or in part by any lawful agreement, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to that suit. This is a mandatory provision. It is somewhat surprising that the High Court should have felt itself helpless under the circumstances of the case to do justice between the parties. Clause 12 of the compromise provides that if the respondent does not carry out the terms of the compromise, he shall be held responsible for all the losses that the appellant may suffer because of its breach. This clause does not preclude the appellant from putting forward the compromise and asking the Court to dismiss the appeal in accordance with its terms. Both the factum and the validity of the compromise are

not in dispute. Hence the appellate court was bound to accept the same. That Court acted in accordance with law in dismissing the appeal. Hence the High Court was clearly wrong in interfering with the judgment of the appellate court.

4. In the result this appeal is allowed and the decree and judgment of the High Court are set aside and that of the appellate Court restored. The respondent shall pay the costs of the appellant in the High Court and in this Court.

Appeal allowed.

AIR 1970 SUPREME COURT 670 (V 57 C 132)

(From: Orissa)*

J. C. SHAH AND K. S. HEGDE, JJ.

State of Orissa, Appellant v. Maharaja Shri B. P. Singh Deo, Respondent.

Civil Appeals Nos. 2258 and 2259 of 1966, D/- 1-12-1969.

Orissa Agricultural Income Tax Act (24 of 1947), Section 20 (4) — Best judgment assessment — Power of — Power is not arbitrary — Assessment must be based on some relevant material — Income-tax Act (1922), Sec. 23 (4) — Cases Nos. 82 and 83 of 1963 (Orissa), Affirmed. (Para 4)

The Judgment of the Court was delivered by

HEGDE, J.:— These appeals by certificate arise from the decision of the High Court of Orissa in Cases Nos. 82 and 83 of 1963 on its file wherein the High Court in exercise of its powers under Section 29 (iii) of the Orissa Agricultural Income-tax Act (to be hereinafter referred to as the Act) set aside the judgment of the Agricultural Income-tax Appellate Tribunal as well as that of the Assistant Collector of Agricultural Income-tax, Sambalpur. The question for consideration is whether the High Court was justified in law in interfering with the order of the tribunal.

2. These appeals relate to the assessment of the assessee under the Act for the years 1952-1953 and 1953-1954. The assessing authority namely the Agricultural Income-tax Officer being unable to rely on the books of account produced by the assessee, assessed him on the basis of best of judgment. For the assessment

* (Cases Nos. 82 and 83 of 1963 (Orissa.)

year 1952-1953, he estimated his net income at Rs. 34,233/- and for the assessment year 1953-1954 at Rs. 35,100/- and levied tax on that basis. Aggrieved by that decision, the assessee went up in appeal to the Assistant Collector of Agricultural Income-tax. The Assistant Collector not only dismissed the appeal of the assessee but enhanced the assessable income for the year 1952-1953 by Rupees 30,000/- and for the year 1953-1954 by Rs. 20,000/-, after giving notice to the assessee to show cause against the proposed enhancement. The Tribunal affirmed that decision.

3. The Assistant Collector, Agricultural Income-tax called upon the assessee to produce the books mentioned in his notice. The assessee produced only some books out of those mentioned in the notice. The remaining books he did not produce. The Assistant Collector, for the reasons stated in his order, refused to place any reliance on the books produced. In the result he rejected the additional material placed before him. Thereafter he not only confirmed the assessment made, by the Agricultural Income-tax Officer but enhanced the same as mentioned earlier. As regards the assessment made by the Agricultural Income-tax Officer, there is no dispute at present. The only question for consideration is whether the Assistant Collector of Agricultural Income-tax was justified in enhancing the assessment made by the Agricultural Income-tax Officer.

4. Apart from coming to the conclusion that the materials placed before him by the assessee were not reliable, the Assistant Collector has given no reason for enhancing the assessment. His order does not disclose the basis on which he has enhanced the assessment. The mere fact that the material placed by the assessee before the assessing authorities is unreliable does not empower those authorities to make an arbitrary order. The power to levy assessment on the basis of best judgment is not an arbitrary power; it is an assessment on the basis of best judgment. In other words that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet will and pleasure of the concerned authorities. The scope of that power has been explained over and over again by this Court.

5. The Agricultural Income Tax Tribunal gave no reasons in its order for affirming the decision of the Assistant

Collector. It appears to have been of the view that once the assessing authorities reject the material placed before them as being unreliable those authorities can proceed to levy whatever tax they may levy. It failed to bear in mind the scope of the power of the assessing authorities to levy assessment on the basis of best judgment. Therefore the tribunal was clearly in error in confirming the decision of the Assistant Collector. Hence the High Court was justified in interfering with the order of the tribunal.

6. In the result these appeals fail and they are dismissed with costs — hearing fee one set.

Appeals dismissed.

AIR 1970 SUPREME COURT 671 (V 57 C 133)

M. HIDAYATULLAH, C. J., A. N. Ray
AND I. D. DUA, JJ.

Bhrigunath Tewary (in W. P. No. 332 of 1969), Ramlal Rajbhar (in W. P. No. 347 of 1969), Petitioners v. The State of West Bengal, Respondent.

Writ Pctns. Nos. 332 and 347 of 1969,
D/- 1-12-1969.

Public Safety — Preventive Detention Act (1950), Section 3 (2) — Detenu indulging in large-scale operations of stealing railway property — Impairing proper running of trains and communications, thereby — Relevant grounds for detention.

Where the detenu is found carrying on large-scale operations with a view to stealing railway stores and materials and thereby impairing the proper running of trains and communications, and preventing the proper operation of railway facilities to the public, the grounds for his detention are relevant and the detention is not liable to be set aside. (Para 3)

The Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:— These are two petitions under Article 32 of the Constitution seeking writs of Habeas Corpus against the detention of the petitioners under Section 3 (2) of the Preventive Detention Act. The facts in these two petitions are practically the same. We shall take up first the petition of Bhrigunath Tewary (Writ Petition

No. 832 of 1969). He was detained under the orders of the District Magistrate, Burdwan, passed on September 1, 1969 under Section 3 (2) of the Preventive Detention Act. He was arrested a week later and the grounds were served on him the very same day. He made his representation which was rejected by the Government and later by the Advisory Board. His detention has now been confirmed and he petitions against his detention.

2. In the grounds which were furnished to him, 4 matters are stated. He was seen in the act of removing railway stores and materials on 5-1-1969 in a truck. Later, on 9-4-1969, he was associated in a raid on a railway siding and the raiding party stole railway stores and materials and carried them off in a truck. His name was being taken by his associates and it was presumed that he was one of the raiders. On 9-8-1969 in the early hours of the morning, he was arrested red-handed with a piece of brass with railway markings on it, which was serviceable railway material. Again, on 14-8-1969, two persons were arrested with some brass materials having railway markings on them and they confessed that they were taking them to the petitioner for sale. In the affidavit which has been sworn, it has been stated that the petitioner is a dangerous person who indulges in stealing railway stores and equipments essential for the running of trains and maintenance of railway communications, and by his activities has caused great loss to the railway administration and inconvenience to the general public.

3. We have considered the matter from the ground of expedition which has to be observed in disposing of representations etc., made by detenus. There is no evidence of any delay in this case. We have also considered it from the point of view of whether the grounds are germane to the detention for maintenance of services essential to the community. Affidavit shows that he is carrying on large-scale operations with a view to stealing railway stores and materials and thereby impairing the proper running of trains and communications. This is not a case in which a man steals something which is discarded by the railways and considered to be unserviceable. He steals serviceable and useful parts of railway equipments and thereby prevents the proper operation of railway facilities to the public. His activities cannot be looked at

as isolated incidents. They must be considered to be a part of an organised operation in which not only this petitioner but also the other petitioner before us participated. They were found carrying away railway property not in small quantities but in trucks. In these circumstances we cannot but hold that the grounds are relevant to the detention. The petition accordingly fails and will be dismissed.

4. As regards the remaining petitioner Ramlal Rajbhar (W. P. No. 347/69), it is sufficient to say that the grounds are identical. We see no reason to interfere in the case of this petitioner also. For the reasons we have already given, this petition also fails and will be dismissed.

Petitions dismissed.

AIR 1970 SUPREME COURT 672
(V 57 C 134)

(From: Punjab)

J. C. SHAH AND K. S. HEGDE, JJ.

Shaugin Singh and others, Appellants v.
Desa Singh and others, Respondents.

Civil Appeal No. 155 of 1967, D/- 4-12-1969.

Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 24 (1) and (2) — Cancellation of allotment order — Powers of Chief Settlement Commissioner — Nature — Cancellation of allotment order without considering relevant evidence — Cancellation is liable to be set aside — Constitution of India, Article 226.

The power of Chief Settlement Commissioner under Section 24 (2) to cancel an allotment is judicial and by the use of the expression "is satisfied" the Chief Settlement Commissioner is not made the final arbiter of the facts on which the conclusion is reached. The jurisdiction of the Chief Settlement Commissioner arises only if an allotment is obtained by means of fraud, false representation or concealment of material facts. The relevant satisfaction is a jurisdictional fact on the existence of which alone the power may be exercised. A superior authority or the High Court in a writ petition would, therefore, be entitled to consider whether there was due satisfaction by the Chief Settlement Commissioner on materials placed before him and

BN/CN/A111/70/DVT/M

that the order was made not arbitrarily, capriciously or perversely. (Para 6)

Where the Chief Settlement Commissioner cancelled the allotment order on the ground that the Khasra Girdwari entries produced by the allottee were not genuine, without having the original Khasra Girdwari before him and without considering the relevant evidence, the order is liable to be set aside. Decision of Punjab High Court, Affirmed.

(Para 8)

The Judgment of the Court was delivered by

SHAH, J.— Ram Singh — originally a resident of District Lyallpur (now in West Pakistan), migrated to India in 1947 on the partition of the country. The Rehabilitation Department allotted to Ram Singh an area of land in Village Raipur Arain, District Jullundar in lieu of the land which Ram Singh was compelled to abandon. After the death of Ram Singh his sons respondents 1 to 3 complained to the Rehabilitation Department that Ram Singh was cultivating A grade land in District Lyallpur and was on that account entitled to allotment of A Grade land, he had been allotted in Village Raipur Arain C Grade land which was mostly Banjar Cadim unfit for cultivation and subject to river erosion. Respondents 1 to 3 in support of their application tendered certified extracts from Khasra-Girdwari for 1957-58 showing that the land allotted to Ram Singh was subject to river erosion. The Land Claims Officer held an enquiry and called for a report from the Revenue authorities. The Patwari of the village, the Kanungo-Tahsildar and the Assistant Commissioner verified the recitals made in the application, and recommended the case of respondents 1 to 3 for allotment of other land. The Land Claims Officer cancelled the allotment of land to Ram Singh in village Raipur Arain and allotted in lieu thereof other land in District Hoshiarpur with "permanent rights". Respondents 1 to 3 took possession of the land and started cultivation. They installed wells and built houses on the land.

2. In 1959 the question the Land Claims Officer recommended to the Chief Settlement Commissioner that the previous order cancelling the allotment of land in favour of Ram Singh was made on the basis of "fabricated extracts from the Khasra-Girdwari". The Chief Settlement Commissioner by order dated

September 20, 1962, cancelled the allotment of land to respondents 1 to 3 in District Hoshiarpur.

3. Respondents 1 to 3 then moved a petition before the High Court of Punjab under Article 226 of the Constitution for a writ quashing the order dated September 20, 1962 of the Chief Settlement Commissioner. To this petition the present appellants were on their own application impleaded as parties. They claimed that they had purchased the land allotted to Ram Singh from the original allottee of the land under the orders made by the Land Claims Officer.

4. Mahajan, J., dismissed the petition holding that respondents 1 to 3 obtained the order of exchange and cancellation of the previous allotment by relying upon "fabricated Khasra-Girdwari entries" and the Chief Settlement Commissioner acted properly in setting aside the order made by the Land Claims Officer. Against that order an appeal was preferred to the High Court under the Letters Patent.

5. To determine whether the extracts from Khasra-Girdwari produced by respondents 1 to 3 with their application before the Land Claims Officer were "fabricated" the High Court called upon the State Government to produce the original Khasra-Girdwari for the year 1957-58, but the State did not produce the record on the somewhat specious plea that the Khasra-Girdwari was "not traceable". The State also relied upon an affidavit of the Deputy Secretary to the Government of Punjab, Rehabilitation Department, stating that the order of exchange was obtained by respondents 1 to 3 on the basis of incorrect Khasra-Girdwari entries and that the Tahsildar had signed the copy of the Khasra-Girdwari produced by respondents 1 to 3 without comparing them with the originals as required under the orders of Government. The High Court observed that the Deputy Secretary to the Government of Punjab, Rehabilitation Department, had no personal knowledge and his assertion that the exchange was obtained on the basis of incorrect entries in Khasra-Girdwari was not evidence which supported the claim that the extracts produced were not genuine. The High Court accordingly reversed the order holding that there was no evidence to show that Khasra-Girdwari entries which were produced by the respondents 1 to 3 before the Land Claims Officer on which the previous allotment was cancelled were not true extracts. The High Court relied

upon the report made by the Patwari, Kanungo-Tahsildar and the Assistant Commissioner and held that the claim made by respondents 1 to 3 that the lands allotted to them were "poor quality lands" and it was "difficult to earn any livelihood out of those lands" was correct. With certificate granted by the High Court the appellants have appealed to this Court.

6. Section 24 (2) of the Displaced Persons (Compensation & Rehabilitation) Act 44 of 1954 confers authority upon the Chief Settlement Commissioner to revise the orders of subordinate authorities. In so far as it is relevant it provides:

"Without prejudice to the generality of the foregoing power under sub-section (1), if the Chief Settlement Commissioner is satisfied that any order for payment of compensation to a displaced person or any lease or allotment granted to such a person has been obtained by him by means of fraud, false representation or concealment of any material fact, then, notwithstanding anything contained in this Act, the Chief Settlement Commissioner may pass an order . . . cancelling the lease or allotment granted to him"

The Chief Settlement Commissioner has, therefore, power under sub-section (2) to cancel an allotment if he is satisfied that the order of allotment of land had been "obtained by means of fraud, false representation or concealment of any material fact." The power is judicial and by the use of the expression "is satisfied" the Chief Settlement Commissioner is not made the final arbiter of the facts on which the conclusion is reached. The jurisdiction of the Chief Settlement Commissioner arises only if an allotment is obtained by means of fraud, false representation or concealment of material facts. The relevant satisfaction is a jurisdictional fact on the existence of which alone the power may be exercised. A superior authority or the High Court in a writ petition would, therefore, be entitled to consider whether there was due satisfaction by the Chief Settlement Commissioner on materials placed before him and that the order was made not arbitrarily, capriciously or perversely.

7 The Chief Settlement Commissioner had apparently called for the Jamabandi for the year 1957-58 but it was represented that it was missing. He however,

relied upon the Khasra-Girdwari for 1950-51 to 1955-56 and held that some parts of the land of the village were under cultivation and on that basis he observed that the Enquiry Officer had come to the conclusion that the copies of the Khasra-Girdawari on the basis of which exchange had been obtained were forged and the exchange was liable to be set aside. Even the entries in the Khasra-Girdawari of the earlier years showed that large areas of lands of the village were not capable of full cultivation. There were again the reports of the Patwari, Kanungo-Tahsildar and the Assistant Commissioner that the lands in the village were in danger of being eroded by the action of the river Sutlej, that the displaced persons who were allottee of the lands were in danger of being deprived of their lands and that alternative allotment of land be made to respondents 1 to 3. The revenue authorities had reported that in the village there was a total area of 1102 acres of cultivable land out of which about 822 acres had been rendered uncultivable and only 280 acres remained cultivable. It appears further that when the river Sutlej was in floods it was difficult to save even the abed land, that the residents of the village were permanently in danger of river erosion and that the Kanungo-Tahsildar regarded the condition of all the allottees as "miserable". The Chief Settlement Commissioner did not refer to the report of the Kanungo-Tahsildar and the Assistant Commissioner on the basis of which the Land Claims Officer had cancelled the original allotment.

8. It is clear that the Chief Settlement Commissioner without having the original Khasra-Girdawari before him and without considering the relevant evidence came to the conclusion that the entries produced before the Land Claims Officer in support of their application for cancellation of the allotment were "not genuine". There is in the order of the Chief Settlement Commissioner no reference to any evidence which may support this conclusion. The order of the Chief Settlement Commissioner being quasi-judicial in character and his satisfaction not being decisive of the matter, the High Court, in our view, was justified in holding that the conclusion of the Chief Settlement Commissioner, that the respondents 1 to 3 were guilty of fraud, was based on no evidence and the Court was competent to set aside the

order of the Chief Settlement Commissioner.

9. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 675
(V 57 C 135)

M. HIDAYATULLAH, C. J., J. M. SHELAT, C. A. VAIDIALINGAM, A. N. GROVER AND A. N. RAY, JJ.

Jayanarayan Sukul, Petitioner v. State of West Bengal, Respondent.

Writ Petn. No. 258 of 1969, D/- 5-11-1969.

Public Safety — Preventive Detention Act (1950), Sections 7, 10 — Representation of detenus — Procedure as to — Appropriate Government must itself expeditiously exercise judgment thereon before forwarding it to Advisory Board — Constitution of India, Article 226 (5).

Broadly stated, four principles are to be followed in regard to representation of detenus. First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If however the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory

Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu. (Case law discussed.)

(Para 20)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 97 (V 57) =

W. P. No. 377 of 1968 D/-

1-5-1969, Pankaj Kumar Chakravarty

v. State of W. B. 11, 12

(1970) AIR 1970 SC 269 (V 57) =

W. P. No. 102 of 1969 D/- 4-8-

1969, Shyamal Chakravarty v.

Commr. of Police, Calcutta 14, 15

(1969) AIR 1969 SC 1028 (V 56) =

W. P. No. 327 of 1968 D/- 31-1-

1969 = 1969 Cri LJ 1446, Sk.

Abdul Karim v. State of W. B. 10, 17

(1969) W. Ps. Nos. 198, 205 and 206

of 1969, D/- 2-9-1969 = 1969-2

SCWR 439, In re Durga Show 17

(1969) W. P. No. 246 of 1969, D/- 10-

9-1969 = 1969-2 SCWR 529,

Khairul Haque v. State of

W. B. 13, 15, 16, 19

Miss S. Chakravarty, Advocate, amicus curiae, for Petitioner; Mr. S. P. Mitra, Advocate and Mr. G. S. Chatterjee, Advocate, for Mr. Sukumar Basu, Advocate, for Respondent.

The judgment of the Court was delivered by

RAY J.: The petitioner made an application under Article 32 of the Constitution requiring the respondent to show cause as to why the petitioner should not be released.

2. At the conclusion of the hearing of this petition on 15 October, 1969 we directed the release of the petitioner and stated that the reasons would be given later on. We are stating our reasons for the order.

3. On 5th June, 1969 the District Magistrate 24-Parganas, West Bengal made an order under Section 3 (2) of the Preventive Detention Act, 1950 (hereinafter called the Act) for the detention of the petitioner. On 7th June, 1969 the petitioner was arrested and on the same day grounds of detention were served on the petitioner. On 9th June, 1969 information was given to the State Government. On 14th June, 1969 the Governor was pleased to approve the order of detention and on the same day the Governor sent the report to the Central Government under Section 3 (4) of the Act together with the grounds of deten-

tion. On 23rd June, 1969 the petitioner made a representation to the State Government. On 1st July, 1969 the State Government placed the case of the petitioner before the Advisory Board under Section 9 of the Act together with the said representation. On 13th August, 1969 the Advisory Board after consideration of the materials placed before it was of the opinion that there was sufficient cause for the detention of the petitioner. On 19th August, 1969 the State Government is alleged to have rejected the petitioner's representation. By an order dated 26th August, 1969 the Governor was pleased to confirm the order of detention of the petitioner.

4. The only contention on behalf of the petitioner was that though the petitioner made the representation on 23rd June, 1969 the Government did not consider the said representation with reasonable and proper expedition.

5. On behalf of the State of West Bengal it was contended first that the matter was referred to the Advisory Board along with the petitioner's representation and the State Government considered the report of the Advisory Board and, secondly, the affidavit of Rathindra Nath Sen Gupta affirmed on 19th September, 1969 will show that enquiries were made after the petitioner had made the representation and the Government therefore considered the representation.

6. The affidavit of Rathindra Nath Sen Gupta is of little value. The deponent stated first that he caused further enquiries to be made through the Superintendent, Railway Police after he had received the representation of the petitioner from the State Government, secondly, that the Superintendent, Railway Police took a little time to submit a report, thirdly, the deponent after being satisfied about anti-social activities of the petitioner informed the State Government on 12th August, 1969 to the effect that he did not recommend the release of the petitioner, and, fourthly, that the State Government on 19th August, 1969 rejected the petitioner's representation. There is no affidavit by the Superintendent of Police, Sealdah who is alleged to have made further enquiries. One will look in vain into the affidavit of the deponent to find out as to when the deponent entrusted the said enquiry to the Superintendent, Railway Police and further as to what time was taken for enquiry and report. The Court is entitled to know the time and the steps taken

along with the nature of the enquiry. The importance of the matter lies in the fact that it is a case of preventive detention and the personal liberty of a citizen is under consideration of the State Government. The State Government is, therefore, bound to give the utmost information in this Court.

7. The Preventive Detention Act confers powers on the Central Government or the State Government to make an order for detention of a person. The order of detention can be passed by the District Magistrate or the Additional District Magistrate or the Commissioner of Police or the Collector. When an order is made by any of these Officers he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds and no such order shall remain in force for more than 12 days after the making of the order unless it is approved by the State Government. The State Government shall, as soon as may be, report the fact to the Central Government. Under Section 7 of the Act grounds of order of detention are to be disclosed to the persons affected by the order not later than 5 days from the date of detention and the Act further requires to afford the person affected by the order the earliest opportunity of making a representation against the order to the appropriate Government. In the present petition, we are concerned with the scope and intent of Section 7 of the Act in regard to the representation made by the petitioner.

8. Section 8 of the Act contemplates constitution of Advisory Boards. Section 9 requires the appropriate Government within 30 days from the date of detention to place the grounds and the representation, if any, before the Advisory Board. The Advisory Board under Section 10 is to consider the materials and if the Board considers it essential to hear the person concerned who desires to be heard, the Board will hear the person and make the report. Section 11 of the Act states that the Government may confirm the detention order if the Advisory Board gives an opinion in that effect. Under Section 13 of the Act the State Government may revoke an order passed by its officers and the Central Government may revoke an order made by the State Government.

9. Counsel on behalf of the State of West Bengal contended that the matter was referred to the Advisory Board along with the representation of the detenu

dated 23rd June, 1969 and the State Government on 10th August, 1969 rejected the representation of the petitioner and thus discharged its duty. This contention has to be examined in the light of Article 22 of the Constitution and the provisions of the Act.

10. There have been five recent decisions of this Court on the provisions of this Act particularly in regard to the right of the detenu to have his representation considered by the appropriate Government and the obligation of the appropriate Government in that behalf. In *Sk. Abdul Karim v. The State of West Bengal*, W. P. No. 327 of 1968, D/- 31-1-1969 = (AIR 1969 SC 1028) this Court held that the appropriate Government could not be said to discharge the obligation merely by forwarding the representation of the detenu to the Advisory Board. Article 22 of the Constitution guarantees the right of a detenu to have a proper consideration of the representation by the appropriate authority.

11. In the case of *Pankaj Kumar Chakrabarty v. State of West Bengal*, W. P. No. 377 of 1968, D/- 1-5-1969 = (AIR 1970 SC 97) this Court put in the forefront the distinction between the twin obligations of the appropriate authority under Sections 7 and 8 of the Act. The appropriate Government is to consider the representation of the detenu inasmuch as Section 7 of the Act speaks of affording the detenu the earliest opportunity of making a representation against the order of detenu. The obligation of the appropriate authority to consider the representation of the detenu under Section 7 of the Act is entirely independent of any action of the Advisory Board or any consideration by the said Board of the representation of the detenu. In the case of *Pankaj Kumar Chakrabarty*, W. P. No. 377 of 1968, D/- 1-5-1969 = (AIR 1970 SC 97) (supra) this Court observed: "The peremptory language in clause (5) of Article 22 of the Constitution and Section 7 of the Act would not have been necessary if the Board and not the Government had to consider the representation".

12. There is another reason why the appropriate Government is required to consider on its own the representation of the detenu. If the consideration of the representation of the detenu by the Board sufficed the constitutional guarantee Section 7 of the Act would be robbed of its content. In *Pankaj Kumar Chakrabarty's* case, W. P. No. 377 of 1968, D/- 1-5-1969

= (AIR 1970 SC 97) (supra) this Court emphasised the aspect that the representation was addressed to the Government and not directly to the Advisory Board and it was for the reason that the appropriate authority was to exercise its opinion and judgment in an independent and honest manner.

13. It, therefore, follows that the appropriate authority is to consider the representation of the detenu uninfluenced by any opinion or consideration of the Advisory Board. In the case of *Khairul Haque v. State of West Bengal*, W. P. No. 246 of 1969, D/- 10-9-1969 (reported in 1969-2 SCWR 529) this Court observed that "it is implicit in the language of Article 22 that the appropriate Government, while discharging its duty to consider the representation cannot depend upon the views of the Board on such representation". The logic behind this proposition is that the Government should immediately consider the representation of the detenu before sending the matter to the Advisory Board and further that such action will then have the real flavour of independent judgment.

14. In the case of *Slyamal Chakrabarty v. Commissioner of Police, Calcutta*, W. P. No. 102 of 1969 D/- 4-8-1969 = (AIR 1970 SC 269) one of the contentions was that the detenu's representation was not considered by the Government. There the facts were these. The detenu was arrested on 13th November, 1968. On 8th January, 1969 the Governor was pleased to confirm the order of detention after the Advisory Board had given opinion that there was sufficient cause for detention of the petitioner. The detenu thereafter on 13th or 16th January, 1969 made a representation. On 1st April, 1969 the Commissioner of Police informed the Home Department that he did not recommend the release of the petitioner. On 28th March, 1969 notice was issued under Article 32 of the Constitution to the Commissioner of Police and to the State Government to show cause why the petitioner should not be set at liberty. It is curious that even when Shyamal's case, W. P. No. 102 of 1969, D/- 4-8-1969 = (AIR 1970 SC 269) (supra) was heard in this Court on 4th August, 1969 the representation of the petitioner could not be traced. This Court did not accept the contention of the petitioner that there was any breach of Section 7 of the Act on consideration of the facts that the detenu did not choose to make a representation till after the Advisory Board had

dealt with the matter and further that the State Government was in the process of dealing with the representation and the detenu did not state that the grounds of detention were false. This Court concluded in the case of Shyamal Chakravarty, W. P. No. 102 of 1969, D/- 4-8-1969 = (AIR 1970 SC 269) (supra) by stating that the State Government would deal with the representation and pass a suitable order.

15. When the present Writ Petition came up for hearing on 30th September, 1969 before the Bench consisting of Sikri, Mitter and Reddy, JJ., the matter was referred for decision by a larger Bench to consider as to what would be the question of period within which the Government could dispose of the representation of the detenu because it was felt that there was an apparent conflict between the cases of Shyamal Chakravarty, W. P. No. 102 of 1969, D/- 4-8-1969 = (AIR 1970 SC 269) and Khairul Haque, W. P. No. 246 of 1969, D/- 10-9-1969 (reported in 1969-2 SCWR 529) (supra).

16. In view of the fact that there is a fundamental right of the detenu to have the representation considered by the appropriate Government such right will be rendered meaningless if the Government will not deal with the matter expeditiously but at its own will and convenience. In the case of Khairul Haque, W. P. No. 246 of 1969, D/- 10-9-1969 (reported in 1969-2 SCWR 529) (supra) the petitioner made a representation on 23rd June, 1969. The Advisory Board made its report on 11th August, 1969. On 12th August, 1969 the Governor confirmed the order of detention. On 29th August, 1969 the Governor rejected the petitioner's representation. The delay was not explained in that case. The disposal of the representation by the Government after the receipt of the Report of the Advisory Board was found by this Court to raise a doubt there whether the Government considered the representation in an independent manner. This independent consideration by the appropriate Government is implicit in Article 22 of the Constitution.

17. In the case of Durga Show, W. P. Nos. 193, 205 and 206 of 1969, D/- 2-9-1969 = (reported in 1969-2 SCWR 439) three petitioners were set at liberty. There the representation of one detenu was received on 29th May, 1969, and was rejected on 11th August, 1969. In another case the representation of the detenu was received on 18th June, 1969 and was

rejected by the Government on 16th August, 1969. In the third case the representation of the detenu was received on 28th June, 1969 and was rejected on 14th July, 1969. In the case of Durga Show, W. P. Nos. 193, 205, 206 of 1969, D/- 2-9-1969 = (reported in 1969-2 SCWR 439) (supra) the opinion of this Court in the case of Sk. Abdul Karim, W. P. No. 327 of 1968, D/- 31-1-1969 = (AIR 1969 SC 1028) (supra) was re-stated by emphasising the legal obligation of the appropriate Government to consider the representation of the detenu "as soon as it is received by it".

18. It is established beyond any measure of doubt that the appropriate authority is bound to consider the representation of the detenu as early as possible. The appropriate Government itself is bound to consider the representation as expeditiously as possible. The reason for immediate consideration of the representation is too obvious to be stressed. The personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the fundamental right of a detenu to have his representation considered and it is imperative that when the liberty of a person is in peril immediate action should be taken by the relevant authorities.

19. No definite time can be laid down within which a representation of a detenu should be dealt with save and except that it is a constitutional right of a detenu to have his representation considered as expeditiously as possible. It will depend upon the facts and circumstances of each case whether the appropriate Government has disposed of the case as expeditiously as possible for otherwise in the words of Shelat, J. who spoke for this Court in the case of Khairul Haque, W. P. No. 246 of 1969, D/- 10-9-1969 = (reported in 1969-2 SCWR 529) (supra) "it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning".

20. Broadly stated, four principles are to be followed in regard to representation of detenues. First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory

Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If however the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu..

21. In the present case, the State of West Bengal is guilty of infraction of the constitutional provisions not only by inordinate delay of the consideration of the representation but also by putting off the consideration till after the receipt of the opinion of the Advisory Board. As we have already observed there is no explanation for this inordinate delay. The Superintendent who made the enquiry did not affirm an affidavit. The State has given no information as to why this long delay occurred. The inescapable conclusion in the present case is that the appropriate authority failed to discharge its constitutional obligation by inactivity and lack of independent judgment.

22. The petition is, therefore, allowed. The petitioner is set at liberty.

Petition allowed.

AIR 1970 SUPREME COURT 679
(V 57 C 136)

(From: Allahabad)

J. C. SHAH AND K. S. HEGDE, JJ.

State of U. P., Appellant v. Om Prakash Gupta, Respondent.

Civil Appeal No. 1731 of 1967, D/- 28-10-1969.

BN/CN/F626/69/BNP/M.

(A) Constitution of India, Art. 311(2) — Enquiry under — Non-observance of principles of natural justice by Domestic Tribunal — Court in judging its effect must see whether it results in deflecting course of justice.

It is true that an enquiry under Section 311(2) of the Constitution, must be conducted in accordance with the principles of natural justice. Those principles are not embodied principles. What principle of natural justice should be applied in a particular case depends on the facts and circumstances of that case. All that the courts have to see is whether the non-observance of any of those principles in a given case is likely to have resulted in deflecting the course of justice. (Para 10)

(B) Constitution of India, Arts. 226, 311 — Natural justice — Departmental enquiry — Statements of witnesses recorded in absence of delinquent servant — Statements made available to him thereafter — Opportunity to cross-examine witnesses given — Rules of natural justice not violated. AIR 1963 SC 375, Rel. on. (Para 12)

(C) Constitution of India, Arts. 311(2) and 166 — Substantial charge of mis-demeanour against public servant established — High Court setting aside dismissal on ground of non-compliance of Art. 166 (1) and (2) — Setting aside of dismissal held not proper — Decision of All H. C. Reversed; AIR 1963 SC 779 and AIR 1955 SC 160 and AIR 1964 SC 1823, Foll. (Para 8)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1823 (V 51) =
1964-6 SCR 368, Chitrallekha v.
State of Mysore 17
(1963) AIR 1963 SC 375 (V 50) =
1963-2 SCR 943, State of Mysore v.
Shivabasappa 12
(1963) AIR 1963 SC 779 (V 50) =
(1963) Supp I SCR 648, State of
Orissa v. Bidyabhusan Mohapatra 8
(1958) AIR 1958 SC 300 (V 45) =
1958 SCR 1081, Khemchand v.
Union of India 9
(1955) AIR 1955 SC 160 (V 42) =
1955 SCR 1011, P. Joseph John v.
State of Trav-Co. 17

The judgment of the Court was delivered by

HEGDE, J.: The respondent Om Prakash Gupta was successful in the U. P. Civil Service (Executive) Competition held in 1940. He joined the service on June 20, 1940. Thereafter he was confirmed in due course. After serving in some dis-

tricts in U. P. he was posted to Lakhimpur Kheri in July, 1944. He joined there as S. D. O. on July 20, 1944. On the basis of a report submitted by his Deputy Commissioner on August 20, 1944, the Government placed him under suspension on August 23, 1944. Mr. Bishop, the Commissioner, Lucknow Division was appointed as the enquiry officer to enquire into the allegations made against the respondent. He framed the following four charges against him.

(1) That on or about August 15, 1944, one Mst. Jamila was presented before you in Court by the police under a warrant under Section 100, Cr. P. C. You did not decide the case on the 15th August but postponed it to the 19th August 1944 making over the girl to the custody of one Hafiz Habib Beg. On 17th of August you sent for Mst. Jamila from the bouse of Hafiz Habib Beg at about 7 p.m. through your orderly Jangu Khan and detained the girl at your bouse for immoral purposes. Next morning the girl expressed a desire to go with her father who came to receive her at your bouse but you did not allow her to do so and again sent back the girl to the bouse of Hafiz Habib Beg.

(2) That on or about August 10, 1944, the police, on the complaint of one Puttural produced before you one Mst. Gunga Kurmin for whose arrest you had issued a warrant under Section 100, Cr. P. C. You directed Mst. Gunga and Puttu Lal to be escorted to your bouse by your orderly Jangu Khan. You sent away Puttu Lal and detained Mst. Gunga alone at your bouse for about two hours evidently to use her for immoral purposes.

(3) That sometime in the last week of July, 1944, a girl named Taqderan was produced before you under a warrant of arrest issued by you under Section 100, Cr. P. C. but you asked the parties to present the girl after court hours at your bouse. When the girl was brought to your house you asked the people accompanying her to stay outside and took the girl alone inside your house under the pretext of recording her statement and detained her there for two hours evidently to use her for immoral purposes.

(4) That in all these three cases you conducted yourself in a manner unbecoming of an officer of the U. P. C. S. and, therefore, you are asked to show cause why you should not be dismissed from service."

2. These charges were duly served on the respondent. Thereafter Mr. Bishop

held an enquiry on the basis of those charges in the presence of the respondent. He came to the conclusion that the respondent was guilty of all the charges though he found that there is no positive evidence of any immoral act on his part. The Government accepted those findings and after obtaining the concurrence of P. S. C. dismissed the respondent.

3. The respondent thereupon filed a suit on December 4, 1948, challenging on various grounds, the validity of the order dismissing him. The learned Judge who tried the suit set aside the order of dismissal on the sole ground that a second show cause notice as required by Section 240 of the Government of India Act, 1935 had not been given. This decision was upheld in appeal both by the High Court as well as by this Court. In its judgment, the trial Court had observed that it was open to the Government to continue the second stage of the enquiry in accordance with law. On April 12, 1949, the Government set aside the order of dismissal made by it on November 25, 1944. At about the same time it issued a notice to the respondent calling upon him to show cause why he should not be dismissed from service on the basis of the findings reached by the enquiry Officer. By that notice he was required to show cause against the proposed punishment by May 31, 1949. That notice was served on the appellant on April 30, 1949. On receipt of that notice, the respondent wrote to the Government requesting that he may be allowed time upto July 31, 1949 to show cause against the proposed punishment. But the Government granted him time only upto June 25, 1949. He was told that no further time will be given to him and if he failed to show cause by that time, it will be deemed that he has no cause to show. Despite this warning, the respondent did not show cause against the proposed punishment. On the other hand he challenged the Government's right to call upon him to show cause against the proposed punishment as he proposed to file an appeal against the order of the trial Court in so far as that Court did not uphold his contention that the enquiry held by Mr. Bishop was wholly vitiated. Thereafter the Government proceeded ex parte. It accepted the report of the enquiry officer, came to a tentative conclusion that the respondent should be dismissed; it consulted the Public Service Commission afresh and dismissed the appellant by its order dated August 30, 1949. That order reads thus:

"Government of the United Provinces
Appointment (A) Department.

Notification

Dated Lucknow, August 30, 1949

No. 4795/IIA-125-1948

With effect from August 30, 1949, Shri
Om Prakash Gupta, Deputy Collector,
under suspension is dismissed from ser-
vice.

Sd/-

Bhagwan Sahay
Chief Secretary."

As a result of the aforementioned order another round of litigation started which has culminated in this appeal. The respondent challenged the impugned order in Civil Suit No. 14 of 1953 in the Court of II Addl. Civil Judge, Allahabad on various grounds. The plaint filed by him is prolific. That plaint as amended covers twenty closely printed pages. Most of the grounds taken in the plaint are irrelevant and have no bearing on the issues arising for decision. Several of the grounds alleged against the preliminary enquiry held by the Deputy Commissioner as well as the formal enquiry held by Mr. Bishop are petty and deserve no serious consideration.

4. It is unfortunate that the trial court did not bear in mind the scope of a suit challenging the validity of a departmental enquiry held against a government servant. That court does not appear to have borne in mind that a member of Civil Service in India prior to January 26, 1950 held office during the pleasure of the Crown and that the only safeguard he had was the procedural safeguard guaranteed under sub-section (2) of Section 240 of the Government of India Act, 1935. A perusal of the judgment of the trial court shows that that court constituted itself as an appellate court over the enquiry officer. It admitted evidence to show that the findings reached by the enquiry officer are incorrect. It took upon itself the responsibility of reassessing the evidence relating to those charges. On the basis of the evidence adduced before it, it came to the conclusion that the enquiry officer's findings as regards charges Nos. 2 and 3 are not sustainable but on charge No. 1, it accepted the finding of the enquiry officer. On that charge, it observed that "There is no doubt that this was a most improper conduct of the plaintiff and this was not the way how a Deputy Collector is expected to function." It found that the girl Jamila was sent for from the house of Hafiz Habib Beg by the respondent through his order-

ly Jangu Khan on the 17th of August, 1944; she came to his house at about 8-30 p. m. he asked the girl whether she had her menses and about the time when her hairs had begun to grow. It also found that the girl remained in the Magistrate's house for the whole of the night and that she slept in the night at a distance of two ft. from the cot in which the respondent slept that night. Admittedly there was no other female member in the house of the respondent that night. It may be noted that these findings were reached primarily on the basis of the admissions made by the respondent.

5. The trial court came to the conclusion that there were no serious irregularities in the conduct of the enquiry. It held that even though there were technical breaches of some of the rules, in its opinion, those breaches were not substantial. It further held that specific charges had been served on the respondent; he had been given reasonable time to file his written statement; the oral enquiry was held in his presence and that he was heard in person. It also held that the enquiry officer had given reasonable opportunity to the respondent to cross-examine the witnesses. In conclusion it observed "my clear opinion, therefore, is that there has been no breach of rule 55 as contended to by the plaintiff. The procedure laid down in rule 55 has been substantially adhered to and Mr. Bishop was also conscious of this fact all the time."

6. The trial court rejected the contention of the respondent that he had not been given reasonable opportunity to show cause against the proposed punishment. Rejecting the contention of the respondent that the impugned order is not valid as the same was not made in the name of Governor, the trial court observed that the order was made in the name of the Government. It was made after obtaining the approval of the Premier and with the concurrence of Public Service Commission; hence that order is substantially in accordance with law. In the result it dismissed the respondent's suit with costs.

7. The High Court reversed the decree of the trial court on the following grounds:

(1) The respondent was appointed by the Governor and therefore he could not have been dismissed by the Chief Secretary, an authority subordinate to the Governor;

(2) The order of dismissal did not conform to the requirements of law as the same was not made in the name of Governor as required by Section 59 of the Government of India Act, 1935;

(3) The Premier had not agreed to the dismissal of the respondent. He had only agreed to accept the findings of the enquiry officer and to refer the matter to the Public Service Commission. Dealing with that aspect of the case, this is what the Court observed;

"After perusal of the file pertaining to the dismissal of the plaintiff in the year 1949, we are satisfied that it does not contain any material to show that the order of dismissal of the year 1949 was passed by the Premier himself or that the Premier had applied his mind to the question, and had felt satisfied in the matter. The file contains an office report. It was pointed out in that report that although notice to show cause against the proposed punishment had been issued to the plaintiff, he did not file any reply to the same. It was said that the plaintiff did not show cause against the aforesaid notice, because according to the plaintiff he had filed an appeal in this Court from the decision in Suit No. 1 of 1948 and that no cause could be shown until that appeal has been decided. The office report also said that notice of the appeal had not been received by the State till then. The time given to the plaintiff to show cause had expired and as the plaintiff did not place any fresh material before the authorities, his case should be decided on the basis of the old enquiry and materials that were already before the State authorities, and that it was also said that on the basis of those materials, the Government should be asked to order that the plaintiff be dismissed from service. It was also proposed that as the matter had once been sent to the Public Service Commission at an earlier stage, the matter be again sent to the Public Service Commission. The aforesaid report was placed before the Hon'ble Premier and the Hon'ble Premier wrote on that report 'agree'.

x x x x x x x

In fact we are of the view that the word 'agree' used by the Premier does not imply that he agreed to the dismissal of the plaintiff. Read in the context of the report, the only conclusion that can be arrived at is that the Hon'ble Premier had agreed only to the proposal that the case of the plaintiff be decided on the basis of the old materials and that the

matter be referred to the Public Service Commission. We are, therefore, of the view that even those documents which were contained in the Government file, do not go to establish that the order of dismissal was passed by the Premier or that it was issued after the Premier had applied his mind to the facts of the case and after he had felt satisfied about the same." and

(4) That the enquiry held by Mr. Bishop is vitiated for the following reasons:

(i) That the enquiry officer had not given any finding on the 4th charge:

(ii) That there is no proof to show that Mr. Bishop had been appointed to enquire into the charges by the competent authority or the second show cause notice had been issued by the competent authority;

(iii) That the respondent had not been supplied with a copy of the report of Mr. Bishop before he was called upon to show cause against the proposed punishment; and

(iv) That the enquiry officer did not allow the respondent to cross-examine Hafiz Habib Beg in respect of some portion of his evidence.

8. We are in agreement with the trial court that the first charge levelled against the respondent is conclusively established. In respect of that charge apart from any other evidence, we have the admissions made by the respondent himself in his written statement filed in reply to the charges levelled against him. Therein he admitted that the girl was produced before him in his court by the police on August 15, 1944 after arresting her on the strength of the warrant issued by him under Section 100, Cr. P. C. When he examined her in court, the girl stated that she was 20 years' old but yet he would not release her as according to him, from her appearance he concluded that she was not more than 17 years; therefore he entrusted her to the charge of Hafiz Habib Beg and posted the case to the 19th of that month but on the 17th at about 6 p. m. he sent his orderly Jangu Khan to get the girl to his house and the girl was brought to his house at about 8-30 p. m. He further stated that in order to question her, he took the girl inside his house on the open roof at about 9-30 p. m.; there he asked her whether she had her menses; he went on questioning her till about 10 or 10-15 p. m.; thereafter as the girl was afraid to go to the house of Hafiz Habib Beg, she remained in his house for the night. Pro-

ceeding further he stated "she slept on the ground on open roof. I also slept there. So did my servant. I had no women-folk in the household there. In the morning as soon as Jangu Khan came I asked him to take the girl wherever she liked to go". On his own admissions, it is seen that a young girl who had been brought to court in execution of a warrant issued by him, was brought to his house on a night and that she remained in his house for the whole of that night and further that she slept near his cot that night. If the respondent had any genuine doubt as regards the correct age of the girl, he should have got her examined by a medical officer. The extraordinary course adopted by the respondent is not capable of any innocent explanation. Even if we brush aside all other evidence in the case, on the basis of the respondent's own admissions the only reasonable conclusion any responsible person would have come to is that the respondent is unworthy of holding any responsible post. Any minor irregularity in the matter of conducting the enquiry cannot vitiate a finding which is so obviously correct. Once it is held that the respondent was properly found guilty under Charge No. 1, it is unnecessary to go into the other charges. The gravity of the offence of the respondent under the first charge is such as to merit his dismissal from service. As observed by this Court in *State of Orissa v. Bidyabhusan Mohapatra*, (1963) Supp 1 SCR 648 = (AIR 1963 SC 779) that if the order of the government can be supported on any finding as to substantial misdemeanour for which the punishment imposed can be lawfully imposed, it is not for the court to consider whether that ground alone would have weighed with the authority dismissing the public servant.

9. Reasonable opportunity contemplated by Section 240 of the Government of India Act, 1935 as under Art. 311 (2) of the Constitution primarily consist of (i) opportunity to the concerned officer to deny his guilt and establish his innocence which means he must be told what the charges against him are and the allegations on which such charges are based; (ii) he must be given reasonable opportunity to cross-examine the witnesses produced against him and examine himself or other witnesses on his behalf and (iii) he must be given opportunity to show cause that the proposed punishment would not be proper punishment to inflict which means that the tentative deter-

mination of the competent authority to inflict one of the three punishments must be communicated to him — See *Khem Chand v. Union of India*, 1958 SCR 1081 = (AIR 1958 SC 300).

10. All these requirements have been substantially complied with in the present case. It is true that an enquiry under Section 240 of the Government of India Act, must be conducted in accordance with the principles of natural justice. But those principles are not embodied principles. What principle of natural justice should be applied in a particular case depends on the facts and circumstances of that case. All that the courts have to see is whether the non-observance of any of those principles in a given case is likely to have resulted in deflecting the course of justice. In the present case so far as the first charge is concerned, the fact that the respondent was not given full opportunity to cross-examine Hafiz Habib. Beg could not have in the least affected the finding of the enquiry officer as it was primarily based on the admissions made by the respondent. The High Court was not right in its conclusion that the report of the enquiry officer had not been made available to the respondent before he was called upon to show cause against the proposed punishment. A summary of that report had been given to him when he asked for it for the purpose of submitting a memorial to the Government against the order made in 1944 dismissing him from service. It is not shown that that summary did not contain all the relevant facts and circumstances taken into consideration as well as the conclusions reached by the enquiry officer and the recommendations made by him. The entire records of the enquiry were before the courts in proceedings commenced by the respondent in 1948 and quite clearly it would have included the report of the enquiry officer. Further it was open to the respondent to ask for a copy of that report when he was asked in 1949 to show cause against the proposal to dismiss him. He did not do so nor did he object to the notice calling upon him to show cause why he should not be dismissed, on the ground that he had not been supplied with a copy of the report made by the enquiry officer. The learned judges of the High Court were wholly wrong in holding that there was no proof to show that Mr. Bishop had been appointed to enquire into the allegations. No such plea had been taken

in the plaint. There is a presumption that official acts had been done according to law.

11. In this Court, the respondent who argued his own case contended that the enquiry was vitiated because the enquiry officer had relied on the statements given by some of the witnesses behind his back; that he had not been given the true copies of the statements of the witnesses recorded by the Deputy Commissioner; that the translations of those statements given to him were full of mistakes and that Mr. Bishop was biased against him.

12. This Court has repeatedly laid down that the fact that the statements of the witnesses taken at the preliminary stage of the enquiry were used at the time of the formal enquiry does not vitiate the enquiry if those statements were made available to the delinquent officer and he was given opportunity to cross-examine the witnesses in respect of those statements—see *State of Mysore v. Shivhasappa*, 1963-2 SCR 943 = (AIR 1963 SC 875). It is clear from the records of the case that the respondent had been permitted to go through the statements recorded from the witnesses by the Deputy Commissioner and prepare his own notes; he was supplied with the English translations of those statements and that he was permitted to cross-examine those witnesses in respect of those statements. It may be that there were some mistakes in the translations. In our opinion those mistakes could not have vitiated the enquiry. They were quite trivial mistakes. We agree with the trial court that the enquiry officer had given reasonable time to the respondent to prepare his case.

13. The allegation that Mr. Bishop was biased against the respondent is unsubstantiated. The much too often asserted plea of the respondent that he was prosecuted for his nationalistic views and attitudes is belied by the admitted facts. That plea appears to have been put forward as a mere cloak to cover the reprehensible conduct of the respondent.

14. We are surprised that the High Court should have held that the enquiry is vitiated because the enquiry officer did not give any finding on the fourth charge. The fourth charge is not an independent charge at all. All that it says is that if the delinquent officer is guilty of the first three charges his conduct should be held to be unbecoming of an officer of U. P. C. S. and that he should be asked

to show cause why he should not be dismissed from service. As the enquiry officer came to the conclusion that the respondent is guilty of the first three charges, it follows that he had also come to the conclusion that the respondent's conduct was unbecoming of an officer of U. P. C. S. and therefore he should be asked to show cause why he should not be dismissed from service. It is regrettable that the learned Judges of the High Court while dealing with the appeal ignored the substance and went after shadows.

15. The conclusion of the High Court that the respondent was appointed by the Governor and therefore he could not have been dismissed by the Chief Secretary, an authority lower in rank than the Governor is based on no pleadings. No such allegation was made in the plaint nor any issue raised in that regard. The plaintiff did not lead any evidence to show that he had been appointed by the Governor. The contention that he was dismissed by an authority lower in rank than that appointed him was not urged before the trial court. That contention appears to have been taken for the first time in the High Court. The High Court should not have entertained that contention. Under Section 241 of the Government of India Act, 1935, appointments to the Civil Service and Civil Posts in connection with the affairs of a Province could have been made by the Governor or such person as he might have directed. The material on record does not afford any basis for the conclusion that the respondent was appointed by the Governor. Therefore the High Court, in our opinion, was wholly wrong in holding that the respondent was dismissed by an authority lower in rank than that appointed him.

16. In view of our above conclusion, it is not necessary to go into the question whether the proposal to dismiss the respondent was approved by the Premier though on the basis of the facts found by the High Court, there is hardly any doubt that he did approve the proposal to dismiss the respondent from service.

17. This Court has repeatedly held that the provisions of Article 166 (1) (2) (similar to sub-sections (1) and (2) of Section 59 of the Government of India Act, 1935), are directory and substantial compliance with those provisions is sufficient—See *P. Joseph John v. State of Travancore Cochin*, 1955 SCR 1011 = (AIR 1955

SC 160) and *Chitralekha v. State of Mysore*, 1964-6 SCR 368= (AIR 1964 SC 1823). In this case the impugned order was made in the name of the State Government. It was signed by the Chief Secretary. Therefore prima facie it is a valid order. We need not go further into that question in view of our conclusion that the respondent has failed to prove that he was appointed by an authority higher in rank than the Chief Secretary of the State.

18. For reasons mentioned above this appeal is allowed, the judgment and decree of the High Court are set aside and the decree of the trial Court restored. The respondent shall pay costs of the appellant both in this Court and in the High Court. The respondent brought the suit from which this appeal arises in forma pauperis. Hence he is liable to pay the Court-fees payable on the suit claim.

Appeal allowed.

AIR 1970 SUPREME COURT 685
(V 57 C 137)

J. C. SHAH, J. M. SHELAT, C. A. VAIDIALINGAM, K. S. HEGDE
AND A. N. RAY, JJ.

Shri Mulchand Odhavji, Appellant v. Rajkot Borough Municipality, Respondent.

Civil Appeal No. 542 of 1966, D/- 28-10-1969.

(A) Municipalities — Saurashtra Terminal Tax and Octroi Ordinance (47 of 1949), Sections 3 and 4 — Framing of Octroi Rules under Section 4 by Government — Collection of Octroi by Municipality under those Rules — Framing of independent Rules by Municipality — Consequent withdrawal of Government Rules — Declaration of Municipal Rules as illegal, subsequently — Municipality can still collect octroi — Bombay Municipal Boroughs Act (18 of 1925), Section 61 — Rules under.

Where the Government framed Octroi Rules in exercise of powers under the Ordinance of 1949, enabling the Municipalities to recover octroi, with the purpose that the Rules were to remain in force till the framing of independent rules in that respect by individual Municipalities under Section 61 of the Bombay Municipal Boroughs Act (18 of 1925), and

on framing of rules by a Municipality, notification withdrawing the application of Government Rules was issued but it so happened that the Municipal Rules were declared illegal, it could not be said that the Municipality had no power to collect octroi. From the fact that the notification withdrawing application of Government Rules provided that the Government Rules were to cease to operate from the date the Municipality put into force their independent by-laws, it was clear that the Government rules would cease to apply from the time the Municipality brought into force its own bye-laws and rules under which it could validly impose, levy and recover the octroi duty. The notification did not intend any hiatus when neither the Government rules nor the municipal rules would be in the field. Therefore, if the bye-laws made by the Municipality could not be legally in force for some reason or the other, for instance, for not having been validly made, the Government rules would continue to operate as it could not be said that the Municipality had put into force their independent bye-laws.

(Para 8)

(B) Municipalities — Bombay Municipal Boroughs Act (18 of 1925), Sections 99, 104, 105 — Settlement of accounts periodically under Section 99 — Furnishing of particulars by merchant is condition precedent — His failure to furnish particulars — Municipality can recover tax by distress warrant on basis of bills and demand notice, even without settling accounts.

(Para 10)

(C) Municipalities — Bombay Municipal Boroughs Act (18 of 1925), Secs. 110, 99 — Issue of demand notice in respect of octroi dues without settling accounts — Grievance as to amount claimed — Proper remedy is to prefer appeal under Section 110.

(Para 10)

The Judgment of the Court was delivered by

SHELAT, J.:— In 1948, several States of the then known Kathiawar entered into a Covenant and formed thereunder the United States of Saurashtra later called the State of Saurashtra. Article 9 (3) of the Covenant empowered the Rajpramukh to promulgate ordinances for the peace and good government of the State and provided that, when so promulgated, they would have the force of law as Acts passed by the legislature of the State. Pursuant to the said power, the Rajpramukh promulgated Ordinance 40 of 1949 ad-

opting and applying the Bombay Municipal Boroughs Act, XVIII of 1925 to the State of Saurashtra. The Rajpramukh thereafter promulgated the Saurashtra Terminal Tax and Octroi Ordinance 47 of 1949, which was brought into force with effect from August 31, 1949. The object of the Ordinance was to enable the State Government to levy and collect octroi duty in the towns and cities of the State and to pass on the duty so collected by it to those cities and towns until municipalities therein were constituted under the Act and those municipalities made bye-laws and rules enabling them to levy and collect octroi and other usual municipal taxes. To that end, Section 3 of the Ordinance empowered the Government to impose octroi duty in towns and cities specified in Schedule I thereof, which Schedule included the town of Rajkot. Section 4 authorised the Government to make rules for the imposition and collection of octroi duty. In exercise of the said power, the State Government made rules for the Rajkot Borough Municipality by a notification dated December 5, 1949. These rules were brought into force with effect from December 1, 1950. Under these rules, the respondent-Municipality collected octroi duty until August 1, 1953 when it framed its own rules and bye-laws in exercise of the power so to do under the Act. On the respondent-Municipality bringing those rules and bye-laws into operation, the Government issued a notification dated September 10, 1958 deleting the name of the respondent-Municipality from Sch. I to the said Ordinance No. 47 of 1949. The result contemplated by the said notification was that on and from August 1, 1953 it would be the rules and bye-laws framed by the respondent-Municipality, and not the State rules, which would be applicable in relation to octroi duty and other taxes leviable by the respondent-Municipality.

2. The appellant-firm was at the material time carrying on business as dealers in grains and was for that business importing from time to time grains and other commodities within the limits of the respondent-Municipality. The appellant-firm was served with two bills dated February 10, 1959 for octroi duty payable by it for the period from February 17, 1954 to March 28, 1954 and from April 5, 1954 to November 10, 1954, and also a demand notice therefor dated March 9, 1959.

3. The appellant-firm thereupon filed a suit, being Suit No. 186 of 1959, chal-

lenging the validity of the rules and bye-laws made by the respondent-Municipality on the ground of non-compliance of the procedure laid down in the Act for making such rules and bye-laws and following upon that challenge disputed the legality of the said bills and the demand notice. In the alternative, the appellant-firm contended that the Municipality had maintained under Section 99 of the Act a current account in its name in respect of octroi duty payable by it, but as that account had not been settled within a month as required by that section, the respondent-Municipality had no power to issue the said bills, and the demand notice or to recover the amounts thereunder by distress warrant permissible under Chapter VIII of the Act. The appellant-firm prayed for a declaration of the illegality of the said rules and bye-laws, the said bills and the said demand notice, and for an injunction against the respondent-Municipality restraining it from recovering octroi duty under the said bills. It also pleaded that as the name of the respondent-Municipality had been deleted by the said notification from Sch. I to Ordinance No. 47 of 1949 as from the date when Municipal rules and bye-laws were brought into force, i.e., from August 1, 1953, the rules made by the Government under the said Ordinance no longer applied, and therefore, the respondent-Municipality could not impose and collect octroi duty under those rules also. According to the appellant-firm, the result was that octroi duty was not recoverable from it either under the Government rules or the Municipal rules, the former because they were no longer applicable in relation to the respondent-Municipality, and the latter because they were illegal.

4. The Trial Court found that the said bye-laws and rules of the respondent-Municipality were not made in compliance with Section 61 (1) and Sections 75 and 77 of the Act and were, therefore, illegal, and consequently, the said bills and the demand notice were illegal and the respondent-Municipality could not recover the said duty on the force of the said rules and bye-laws. It accordingly granted the declaration and injunction as prayed. Nonetheless, it made it clear that the notification dated September 10, 1958, deleting the name of the respondent-Municipality from Sch. I to Ordinance 47 of 1949 was conditional in the sense that the Government rules would cease to apply only from the date from which the

Municipality's bye-laws and rules would come into force and that since the said rules and bye-laws were illegal and void they could not be said to have been put into force. Therefore, the Government rules under which the respondent-Municipality could levy and collect octroi duty were still in force and if the Municipality so chose, it could impose and collect octroi duty under the rules made by the Government. The Trial Court further held that respondent-Municipality had maintained an account under the power conferred on it by Section 99. That account could not be settled by reason of the failure of the appellant-firm to give the necessary particulars, and the respondent-Municipality, therefore, would not be debarred from recovering the octroi duty by resorting to Sections 104 and 105 of the Act if the said bills and the said demand notice had been legal.

5. Both parties, being dissatisfied with the judgment and decree of the Trial Court, filed appeals in the District Court. The District Court upheld the conclusions of the Trial Court, except that it held that the bye-laws passed by the respondent-Municipality were not invalid. The appellant-firm thereupon filed a second appeal in the High Court. A single Judge of the High Court summarily dismissed the appeal and refused to grant leave for a Letters Patent appeal and a certificate to file an appeal in this Court. The appellant-firm, however, obtained special leave from this Court and filed the present appeal.

6. The respondent-Municipality not having filed any appeal against the judgment and decree passed by the District Court, its finding as regards the invalidity of the said rules became final. The present appeal, therefore, has to be decided on that footing.

7. Counsel for the appellant-firm submitted that the Trial Court, as also the District Court, were in error in holding that the respondent-Municipality could levy and recover octroi duty from the appellant-firm under the said rules made by the Government. The contention was that the Municipal rules in this behalf having been held to be illegal and the said notification having deleted the name of the respondent-Municipality from Sch. I to Ordinance 47 of 1949, there were no rules under which the octroi duty could be levied and recovered. The Government rules, which were withdrawn by and under the said notification, could not

be revived and no octroi duty could be levied or recovered thereunder as they were withdrawn with effect from August 1, 1953 when the Municipal rules, now declared illegal, were brought into force.

8. This submission, in our view, suffers from a basic error. As already stated, Ordinance 47 of 1949 was promulgated to meet the transitional situation when municipalities in the towns and cities of Saurashtra were yet to be constituted. As it was known that considerable time would be required to hold elections and constitute the municipalities, and those municipalities, after they were constituted, would also require time to frame rules and bye-laws to enable them to impose and levy octroi duty and other taxes permissible to them under the Act in accordance with the procedure laid down therein, the State Government took the power to frame rules for that purpose under Ordinance 47 of 1949 and impose and collect octroi duty through the municipalities which in the meantime would be set up. The rules framed by the Government were thus put in the field until the time when the municipalities could frame rules of their own and levy and collect the octroi duty. When the Government found that the respondent-Municipality had made its own rules and bye-laws and brought them into force, it issued the said notification withdrawing the name of the respondent-Municipality from Sch. I to Ordinance 47 of 1949 as the Government rules made thereunder and the municipal rules framed under the Act could not both operate together. While issuing the said notification, the intention obviously was that once the municipal rules came into operation the Government rules, in so far as they pertained to the respondent Municipality, would cease to operate. The Government rules, however, were to cease to operate as the notification provided "from the date the said Municipality put into force their independent by-laws." It is clear beyond doubt that the Government rules would cease to apply from the time the respondent-Municipality brought into force its own bye-laws and rules under which it could validly impose, levy and recover the octroi duty. The said notification did not intend any hiatus when neither the Government rules nor the municipal rules would be in the field. Therefore, it is clear that if the bye-laws made by the respondent-Municipality could not be legally in force for some reason or the other, for instance, for not having been

validly made, the Government rules would continue to operate as it cannot be said that the Municipality had "put into force their independent bye-laws." The Trial Court, as also the District Court, were, therefore, perfectly right in holding that the respondent-Municipality could levy and collect octroi duty from the appellant-firm under the Government rules. There was no question of the Government rules being revived, as in the absence of valid rules of the respondent-Municipality they continued to operate. The submission of counsel in this behalf, therefore, cannot be sustained.

9. The next submission made by counsel has even less merit than the first one. Under Section 99 of the Act, a municipality, for the convenience of persons and firms and other bodies carrying on business, has been authorised to maintain a current account of octroi duty payable by them instead of recovering it at the time they bring in the leviable goods within the municipal limits. The section provides that such accounts, when maintained, should be settled at intervals not exceeding one month and the balance due on such settlement should be recovered. The power to maintain such accounts is discretionary and would be used only for the convenience of merchants and other bodies carrying on business. Obviously the Municipality is not bound to maintain such accounts. Section 99 further provides that if such an account is maintained, the person, in whose name it is maintained, must give such information and details as are necessary to enable the Municipality to maintain and to settle it at the interval stated therein. This cannot be done if the person whose account is maintained fails to furnish the necessary details. The section also provides that the amount due at the foot of such account shall be recoverable under and in accordance with the provisions of Chapter VIII, i.e., inter alia under Sections 104 and 105, by presentation of a bill and a demand notice and, in case of default, by distress warrant.

10. The argument, was that the respondent-Municipality failed to settle the account maintained by it under this section within the time prescribed by Section 99, and that therefore, it became disentitled to have recourse to the provisions of Chapter VIII of the Act. We are unable to appreciate this submission. The obligation under Section 99 to settle the account is dependent on the merchant furnishing the necessary particulars

of the goods brought into the municipal limits. If such particulars are not furnished, the municipality obviously cannot settle the account at all, much less at the interval contemplated by the section. The merchant in such a case cannot validly make a grievance that as his account is not settled, Chapter VIII should not or cannot be applied to him. The evidence was that the appellant-firm failed to supply the details, and consequently, the respondent-Municipality could not settle his account and had to prepare the bills and serve the demand notice in respect of the duty due by the appellant-firm without settling the said account. If the appellant-firm had any dispute about the amount claimed by the Municipality as due, it had a clear remedy by way of an appeal under Section 110 and ventilate therein its grievance. That remedy was not resorted to. In these circumstances, the appellant-firm could not legitimately object to steps for recovery taken against it by the respondent-Municipality under Chapter VIII of the Act.

11. Both the submissions made on behalf of the appellant-firm thus fail and the appeal is dismissed with costs.

* Appeal dismissed.

AIR 1970 SUPREME COURT 688 (V 57 G 189)

V. BHARGAVA AND K. S. HEGDE, JJ.

Mohd. Shafi and another, Petitioners v. State of Jammu and Kashmir, Respondent.

Writ Petn. No. 183 of 1969, D/- 17-10-1969.

(A) Public Safety — J. and K. Preventive Detention Act (13 of 1964) (as amended in 1967), Section 8 (1) — Detenu challenging detention order on ground of failure to serve grounds of detention within prescribed period — State Government alleging service on particular date — Detenu specifically denying, in his counter-affidavit, service on alleged date — None appearing on behalf of State to swear in affidavit that grounds were actually served on alleged date — Non-production of relevant file — Presumption would be that, if produced it would have supported plea of detenu — Therefore, due to non-compliance of Sec. 8(1) detention order, held, became illegal — (Evidence Act (1872), Section 114 (g)).

The petitioner, a detenu, challenged by the writ petition the validity of his detention order on the ground that the grounds of detention were not served on him within the period prescribed by Sec. 8 (1) of the J. and K. Preventive Detention Act. In reply to the affidavit filed by the State Government he specifically stated in the counter-affidavit that the grounds of detention were not served on him on the date mentioned by the State. An opportunity was given to the State Government to file re-joinder affidavits bringing to the notice of the Court the correct facts about service of the grounds of detention and to produce relevant records for perusal of the Court. Two rejoinder affidavits were filed but none appeared on behalf of the State to swear in an affidavit that the grounds were actually served in his presence on the alleged date. On perusal of records produced the Court found a note on the copy of the letter with which the grounds of detention were sent from the Government to the jail authorities to the effect that the grounds were communicated on that particular date and the original letter was kept in a file, the number of which was given in that note. That file containing the original letter was not produced before the Court. On the other hand it was stated by the Counsel for State that no such file exists.

Held that the non-production of that file, raised a strong presumption that, if produced, it would have supported the case of the detenu. Therefore, the plea of the detenu that there was non-compliance with the provisions of Section 8 (1) of the Act, must be accepted. On that non-compliance, his detention became illegal. (Para 2)

(B) Public Safety — J. and K. Preventive Detention Act (13 of 1964) (as amended in 1967), Sections 14 (2) and 13 (1) — Detenu in jail under detention order — Fresh order of detention under Sec. 14 (2) held illegal.

Where the detenu was in jail under the detention and there was no suggestion that any of his activities in jail could constitute fresh facts justifying a fresh order;

Held that the fresh order of detention following the revocation of the earlier order of detention which was in force and in pursuance of which he was kept in detention, was contrary to law and invalid. (Para 3)

A fresh order of detention could be made only if fresh grounds came into existence after the expiry or revocation of the earlier order of detention. No such fresh order could be made on grounds which existed prior to the revocation or expiry of the earlier order of detention. AIR 1969 SC 43 & W. P. No. 211 of 1969 D/- 19-9-1969 (SC), Foll. (Para 3)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 43 (V 56) =

Civil Appeal No. 1210 of 1963, D/- 22-4-1968 — 2-5-1968=1969

Cri LJ 274, Hadibandhu Das v.

District Magistrate, Cuttack 3

(1969) Writ Pctn. No. 211 of 1969,

D/- 19-9-1969= (1969) 2 SCWR 586, Kshetra Gogoi v. State of Assam 3

The Judgment of the Court was delivered by

BHARGAVA, J.:— In this petition under Article 32 of the Constitution, there are now two petitioners before us Mohd. Shafi and Mohd. Yaqub. Both these petitioners were originally detained under the Defence of India Rules. In January, 1968, when the President issued the notification terminating the Emergency so that the Defence of India Rules became ineffective, steps were taken to detain both these petitioners under the Jammu and Kashmir Preventive Detention Act No. 13 of 1964 as amended by the Jammu and Kashmir Preventive Detention (Amendment) Act No. 8 of 1967 (hereinafter referred to as "the Act"). In both cases, the orders of detention were passed on the 3rd January, 1968 and these were served on the detenues. Mohd. Shafi is continuing under Detention even now under that order of 3rd January, 1968, while, in the case of Mohd. Yaqub, that order was revoked and a fresh order of detention was served on him on the 25th August, 1969. Both the petitioners challenged their detention in this writ petition on the ground that their detention under the orders dated 3rd January, 1968 had become illegal. During the pendency of this petition, the order of 3rd January, 1968 in respect of Mohd. Yaqub having been revoked and a fresh order having been served on him on the 25th August, 1969, Mohd. Yaqub filed a supplementary affidavit to challenge his detention under this later order.

2. Mohd. Shafi challenged the validity of his detention order primarily on the ground that the grounds of detention were not served on him within the period

of 10 days laid down by Section 8 (1) of the Act. According to the affidavit filed on behalf of the Government, the detention order dated 3rd January, 1968 became effective on 10th January, 1968, and the grounds of detention were served on 12th January, 1968, so that, even if the period of 10 days is counted from the date of the order, viz., 3rd January, 1968, the service of the grounds was within the period laid down in Section 8 (1). Mohd. Shafi, on the other hand, filed a counter-affidavit alleging that the grounds of detention were not served on him on 12th January, 1968 but were served much later. In view of this new affidavit filed by Mohd. Shafi, an opportunity was given to the State Government to file rejoinder affidavits bringing to the notice of the Court the correct facts about service of the grounds of detention on him. The Government was also directed to produce the relevant records of the Secretariat and the jail for perusal of the Court. Two rejoinder affidavits have been filed. These affidavits are by Dina Nath, retired Deputy Superintendent, Central Jail, Jammu, who was occupying that post at the relevant time, and by Girdhari Lal Alma, Head-Assistant, Home Department (Internal Security Section), Jammu and Kashmir Government, Srinagar. Their affidavits disclose that information was sent from the Jammu jail to the Secretariat on the 2nd April, 1968, giving intimation that the grounds of detention had been served on Mohd. Shafi on 12th January, 1968. Dina Nath, the retired Deputy Superintendent of the Jail has not stated on oath that he himself served the grounds on Mohd. Shafi on 12th January, 1968. All he says is that on 12th January, 1968 when the copies of grounds of detention were served upon various detenus, the duplicates in respect of them were with the jail authorities and on the basis of the said duplicates, he prepared the letter dated the 2nd April, 1968, addressing it to the Secretary to Government. In this letter, according to him, it was stated that the grounds of detention were delivered to the detenus concerned on the 12th January, 1968. Thus, no one on behalf of the State Government has come forward to swear in an affidavit that the grounds of detention were actually served in his presence or by himself on Mohd. Shafi on 12th January, 1968. As against this, there is the definite statement in the affidavit of Mohd. Shafi that the grounds were not served on him on 12th January, 1968.

The circumstance that intimation of the service was sent as late as 2nd April, 1968, by the jail authorities to the Government lends considerable strength to the assertion made by Mohd. Shafi. If the grounds were served on 12th January, 1968, there is no reason why immediate intimation of that service was not sent to the Government soon after the 12th January, 1968. Further, we have found on a perusal of the records produced before us a note on the copy of the letter with which the grounds of detention were sent from the Government to the jail authorities to the effect that the grounds were communicated on 12th January, 1968 and the original letter was kept in a file, the number of which is given in that note. That file containing the original letter has not been produced for our perusal. If the original letter had been produced, it would have shown when the grounds were actually communicated and acknowledgment of the communication was taken from Mohd. Shafi. Learned counsel appearing for the State Government stated before us that he had received instructions that no such file exists. What has happened to that file is not known. The very fact that a note regarding that file is contained on the copy of the letter leads to the inference that such a file at one time did exist. The non-production of that file, therefore, raises a strong presumption that, if produced, it would have supported the case of the detenu. In view of these circumstances, we have no hesitation in accepting the plea of the detenu that the grounds of detention were not served on him on 12th January, 1968, and that there was, in fact, non-compliance with the provisions of Section 8 (1) of the Act. On that non-compliance, the detention of Mohd. Shafi under the order dated 3rd January, 1968 became illegal, so that he is entitled to be set at liberty.

3. So far as Mohd. Yaqub is concerned, similar grounds were taken by him also to challenge his detention order dated 3rd January, 1968, but those grounds have now become immaterial in view of the fact that, at present, he is being detained under the order of detention served on him on 25th August 1969. That order was passed on the 20th August, 1969. This order followed the revocation of the earlier order dated 3rd January, 1968, which was in force and in pursuance of which he was kept in detention up to 25th August, 1969. This continued detention under the order dated 20th August, 1969, has been challenged

on the ground that such an order could not be validly made by the State Government in view of the provisions of Section 14 (2) of the Act. Section 13 (1) of the Act laid down the maximum period for which a person may be detained in pursuance of any detention order as two years from the date of detention. Then, Section 14 (2) removed the bar against the Government making a fresh order of detention on revocation or expiry of a detention order. This power was made subject to the fresh order being made where fresh facts may have arisen after the date of revocation or expiry which could lead to the satisfaction of the detaining authority that a fresh order was needed. These provisions contained in Sections 13 (1) and 14 (2) of the Act are very similar to the provisions contained in Section 11-A (1) and Section 13 (2) of the Preventive Detention Act, 1950. These two provisions of the Preventive Detention Act were interpreted by this Court in *Hadibandhu Das v. District Magistrate, Cuttack*, Civil Appeal No. 1210 of 1968, D/- 22-4-1968 — 2-5-1968 = (reported in AIR 1969 SC 43). In that case, this Court held that, in view of the provisions of Sec. 11-A and Sec. 13 (2) of the Preventive Detention Act, a fresh order of detention could be made only if fresh grounds came into existence after the expiry or revocation of the earlier order of detention. No such fresh order could be made on grounds which existed prior to the revocation or expiry of the earlier order of detention. This decision was subsequently followed in *Kshetra Gogoi v. State of Assam*, Writ Petn. No. 211 of 1969, D/- 19-9-1969 (SC). The principle laid down in these cases fully applies to the interpretation of Sections 13 (1) and 14 (2) of the Act. Consequently, in the case of *Mohd. Yaqub*, a valid fresh order of detention could have been passed in August, 1969, only if that order was based on fresh facts which came into existence after the order dated 3rd January, 1968, was revoked. On the face of it, no such grounds could possibly come into existence, because *Mohd. Yaqub* was in jail under detention and there is no suggestion that any of his activities in jail could constitute such fresh facts justifying a fresh order. The fresh order of detention dated 20th August, 1969 is, thus, contrary to law and invalid. His detention is, therefore, illegal. He is also entitled to be set at liberty.

4. As a result, the petition of both these petitioners is allowed. They shall

be released forthwith unless required in connection with some other charge.

Petitions allowed.

AIR 1970 SUPREME COURT 691 (V 57 C 139)

(From: Madhya Pradesh)

J. C. SHAH AND K. S. HEGDE, JJ.

The Commissioner of Income-tax, Madhya Pradesh, Appellant v. Lady Kanchanbai, Respondent.

Civil Appeal No. 19 of 1969, D/- 16-12-1969.

Income-tax Act (1922), Section 2 (11) (i) (a) proviso — “Previous year”, interpretation of — Expression “where in respect of a particular source of income, profits and gains”, in proviso means income from a particular source which has been brought to tax under the Act and not which has been taken into consideration for computing total world income of assessee. (Para 7)

The expression that “where in respect of a particular source of income, profits and gains” in the proviso to Section 2 (11) (i) (a) means the income from a particular source which has been brought to tax under the Act and not which has been taken into consideration for computing the total world income of the assessee. In the context the word “assessee” in the proviso to Section 2 (11) (i) (a) refers to the person whose income, profits or gains, in respect of a particular source had been once assessed to tax. (Para 8)

Section 2 (11) (i) (a) does not refer to the income of the assessee generally but to his “separate sources of income, profits and gains”. Hence it is possible for an assessee to have a different “previous year” for each “separate source of income, profits and gains”. ‘Source’ means not a legal concept but which a practical man would regard as a real source of income. AIR 1947 Mad 147 & (1941) 9 ITR (Supp) 45, Rel. on. (Para 6)

In the returns submitted by the assessee, a resident of Madhya Bharat which after coming into force of the Constitution became ‘taxable territory’ by virtue of Finance Act, 1950, prior to the assessment year 1950-51, it had proceeded on the basis that its account year ended on Diwali day; but for the assessment year 1950-51, in respect of its income accrued from its business in Madhya Bharat, it

chose the financial year ending on March 31, 1950 as the "previous year". For the purpose of finding out the total "world income" of the assessee, the income derived by the assessee from its business outside the taxable territories had been taken into consideration in the past. That was done only for the purpose of determining the rate at which the assessee's income should be assessed. No tax was imposed on the income from those businesses.

Held that in the circumstances of the case, the assessee was entitled to take the year ended on 31-3-1950 as the "previous year" relevant to the assessment year 1950-51 in respect of his sources of income arising outside the "taxable territories." (Para 8, 9)

Cases Referred: Chronological Paras

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|---|---|
| (1949) AIR 1949 PC 159 (V 36)= | |
| (1949) 17 ITR 209, Badridas Daga v. Commr. of Income Tax Central and United Provinces | 7 |
| (1947) AIR 1947 Mad 147 (V 34)= | |
| (1946) 14 ITR 185, Commr. of Income Tax v. Savumiamurthy | 6 |
| (1941) 1941-9 ITR (Supp) 45= 1940 AC 774, Rhodesia Metals Ltd. v. Commr. of Taxes | 6 |
| (1938) AIR 1938 PC 175 (V 25)= | |
| (1938) 6 ITR 414, Commr. of Income Tax, Bombay v. Khembchand Ramdas | 7 |

The Judgment of the Court was delivered by

HECDE, J.:— In this appeal by certificate the question that arises for decision is whether under the circumstances of the case having regard to Section 2 (11) (i) (a) of the Income-tax Act, 1922 (to be hereinafter referred to as the Act), the assessee is entitled to take the year ended on 31-3-1950 as the "previous year" relevant to the assessment year 1950-51 in respect of his sources of income arising outside the "taxable territories". This question under Section 66 (1) of the Act was answered in favour of the assessee by the High Court of Madhya Pradesh. Aggrieved by that decision, the Commissioner of Income-tax, Madhya Pradesh has brought this appeal.

2. The assessee (the respondent) is a Hindu Undivided Family with its Head-office at Indore and branches at several places. It derives income from property, business in cotton and oil seeds, speculation, dividends, managing agency commissions etc. Prior to the assessment

year 1950-51, the assessee was assessed under the Indian Income-tax Act, 1922 in the status of a non-resident Hindu Undivided Family. The income which accrued to or was received by the assessee in the former Indian States was not subject to tax under the Act but was taken into consideration in computing its "world income" for the purpose of determining the rate. After the Constitution came into force, the present definition of "taxable territories" was incorporated in the Income-tax Act by the Finance Act, 1950 and the areas in which the assessee was carrying on the businesses with which we are concerned in this appeal were included therein. The result of the amendment was that for the assessment year 1950-51, the assessee who was a resident of Madhya Bharat, was deemed to be a resident in the "taxable territories" during the "previous year" and hence liable to be taxed in respect of its income that accrued or received in Madhya Bharat. For the purpose of its accounts the assessee was adopting the year ending on Diwali day. In the returns submitted by the assessee, prior to the assessment year 1950-51, it had proceeded on the basis that its account year ended on Diwali day; but for the assessment year 1950-51, in respect of its income accrued from its businesses in Madhya Bharat, it chose the financial year ending on March 31, 1950 as the "previous year." The Income-tax Officer as well as the Appellate Assistant Commissioner rejected the claim of the assessee that it could make such a choice. The Income-tax Officer assessed the assessee on the basis that the "previous year" in respect of the concerned sources ended on Diwali of 1949. That decision was affirmed by the Appellate Assistant Commissioner but the Income-tax Appellate Tribunal reversed the finding of the Income-tax Officer and the Appellate Assistant Commissioner and agreed with the stand taken by the assessee. Thereafter a reference was made to the High Court of Madhya Pradesh under Section 66 (1) of the Act at the instance of the Commissioner of Income-tax but the High Court agreed with the view taken by the tribunal. Hence this appeal.

3. The question for our consideration is whether the view taken by the High Court is correct? In order to decide that question, it is necessary to find out the true scope of Section 2 (11) (i) (a) of the Act, which provision defines the term "previous year" thus:

“Previous year” means—

(i) in respect of ‘any separate source of income, profits and gains’—

(a) the twelve months ending on 31st day of March, next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then, at the option of the assessee, the year ending on the date to which his accounts have been so made up:

Provided that where in respect of a particular source of income, profits and gains, an assessee has once been assessedhe shall not, in respect of that source or, as the case may be, business, profession or vocation, exercise the option given by this sub-clause so as to vary the meaning of the expression “previous year” as then applicable to him except with the consent of the Income-tax Officer and upon such conditions as the Income-tax Officer may think fit to impose.” (Emphasis herein ‘is ours’).

4. From the above provision, it is clear that in respect of any separate source of income, profits or gains, unless the assessee had made a choice in accordance with 2nd part of Section 2 (11) (i) (a), the twelve months ending on 31st day of March next the preceding year for which the assessment is made is the “previous year”.

5. Therefore all that we have to see is whether the assessee’s income, profits or gains in respect of the businesses in Madhya Bharat had been assessed previously. If they had not been previously assessed then the assessee’s case comes within the first part of Sec. 2 (11) (i) (a). In that event his return was in accordance with law. Therefore we have first to see what is meant by “source of income” in Section 2 (11) (i) (a) of the Act and then proceed to consider whether those sources of income had “once been assessed”.

6. It is necessary to note that Sec. 2 (11) (i) (a) does not refer to the income of the assessee generally but to his “separate sources of income, profits and gains”. Hence it is possible for an assessee to have a different “previous year” for each “separate source of income, profits and gains” as held by the Madras High Court in Commr. of Income-tax v. Savumiamurthy, (1946) 14 ITR 185= (AIR 1947 Mad

147). In Rhodesia Metals Ltd. v. Commr. of Taxes, (1941) 9 ITR (Supp) 45, the Judicial Committee observed that “source” means not a legal concept but which a practical man would regard as a real source of income. There is hardly any room for doubt, nor was it contended otherwise — that the business of the assessee in Madhya Bharat constituted a separate source or sources. Hence all that we have to see is whether the income accruing from those businesses had “once been assessed” under the Act.

7. This takes us to the question what exactly is the meaning of the expressions “assessed” and “assessee” in the proviso to Section 2 (11) (i) (a). The words “assessed”, “assessment” and “assessee” have different meaning in different contexts. As observed by Judicial Committee, in Commr. of Income-tax, Bombay v. Khemchand Ramdas, (1938) 6 ITR 414= (AIR 1938 PC 175) the word “assessment” is used in the Act as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the procedure laid down in the Act for imposing liability upon the tax payer. Similarly the word “assessee” connotes different meanings in different contexts — see Badridas Daga v. Commr. of Income-tax Central and United Provinces, (1949) 17 ITR 209= (AIR 1949 PC 159).

8. It is true that for the purpose of finding out the total “world income” of the assessee, the income derived by the assessee from its businesses outside the taxable territories had been taken into consideration in the past. That was done only for the purpose of determining the rate at which the assessee’s income should be assessed. No tax was imposed on the income from those businesses. In other words, the income derived by the assessee from the businesses carried on by it in territories outside the “taxable territories” was not brought to tax under the Act. The expression that “where in respect of a particular source of income, profits and gains” in the proviso to Section 2 (11) (i) (a) means the income from a particular source which has been brought to tax under the Act and not which has been taken into consideration for computing the total world income of the assessee. In the context the word “assessee” in the proviso to Section 2 (11) (i) (a) refers to the person whose income, profits or gains, in respect of a particular source had been once assessed to tax. The word “assess-

ed" in that proviso means subject to levy or imposition of tax not computed.

9. For the reasons mentioned above, we agree with the view taken by the High Court. In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 694
(V 57 C 140)

(From: Rajasthan)

HIDAYATULLAH, C. J., S. M. SIKRI,
A. N. RAY AND P. JAGANMOHAN
REDDY, JJ.

Smt. Kanta Kathuria, Appellant v.
Manak Chand Surana, Respondent.

Civil Appeal No. 1869 (MCE) of 1968,
D/- 18-10-1969.

(A) Constitution of India, Article 191
(1) (a) — Word "Office" — Meaning — Appointment of advocate as Special Government Pleader to conduct particular case — He does not hold "Office" — No question of incurring disqualification — Decision of Raj. High Court, Reversed.

Per Majority (Hidayatullah, C. J. and
Mitter, J. contra.)

An advocate appointed as a Special Government Pleader to assist the Government Pleader in a particular case does not hold any "office" and hence he cannot incur disqualification under Art. 191. Decision of Raj. H. C., Reversed.

(Paras 27, 36)

The word "office" has various meanings depending upon its context. The words 'its holder' occurring in Art. 191 (1) (a), indicate that there must be an office which exists independently of the holder of the office. Further, the very fact that the Legislature of the State has been authorised by Article 191 to declare an office of profit not to disqualify its holder, contemplates existence of an office apart from its holder. In other words, the Legislature of a State is empowered to declare that an office of profit of a particular description or name would not disqualify its holder and not that a particular holder of an office of profit would not be disqualified. (Case Law discussed.)

(Para 27)

Further, neither Order 27, Rule 8-B read with Section 2 (7) of Civil P. C. shows that the notification of Counsel's name under Rule 8-B, amounts to the

creation of an 'office', nor even assuming that Rule 4 of Order 27 applies, does it mean that an Advocate on Record holds an office under the client.

(Para 34)

(B) Rajasthan Legislative Assembly Members (Prevention of Disqualification) Act (5 of 1969), S. 2 — Removal of disqualification retrospectively — Act not invalid on that ground — It does not amend Representation of the People Act (1951) — Constitution of India, Art. 191.

Rajasthan Legislative Assembly Members (Prevention of Disqualification) Act (5 of 1969) is not invalid on ground that it removes disqualification retrospectively. The Act also does not amend or alter the Representation of the People Act (1951), in any respect whatsoever.

(Paras 13, 37)

Article 191 itself recognises the power of the Legislature of the State to declare by law that the holder of an office shall not be disqualified for being chosen. There is nothing in the words of the Article to indicate that this declaration cannot be made with retrospective effect. The word 'declared' in Article 191 (1) (a), does not imply any limitation on the powers of the Legislature. Declaration can be made effective as from an earlier date. The apprehension that it may not be a healthy practice and this power might be abused in a particular case are no grounds for limiting the powers of the State Legislature. Practice of the British Parliament does not also imply any restriction on retrospective validation of election. Decision of Rajasthan High Court Affirmed.

(Paras 13, 34, 39, 40 41)

(C) Representation of the People Act (1951), Section 82 — Parties to petition — Joinder of — Allegation of corrupt practice against elected candidate and a candidate from another constituency — Petition not had for non-joinder of another candidate — Words "any other candidate" in S. 82 mean candidates from same election and not candidates at other elections.

(Paras 15, 43)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1495 (V 55) =

Civil Appeal No. 647 of 1967,
D/- 2-4-1968 = 1968 Lah 1C
1525, Statesman (P) Ltd v. H. R.
Deh

6

(1968) Civil Appeal No. 1832 of
1967, D/- 15-10-1968 (SC), Maha-
deo v. Shantihai

6, 30

(1960) 1960-2 All ER 218, Mitchell
v. Ross

30

(1955) AIR 1955 SC 166 (V 42)=
 (1955) 1 SCR 1004, Sakhawat
 Ali v. State of Orissa 35
 (1943) 24 Tax Cas 190, Mcmillan v.
 Guest (H. M. Inspector of Taxes)

(1942) 1942 AC 561= 111 LJ KB
 398, McMillan v. Guest 6
 (1922) 8 Tax Cas 231= 1922-2 AC
 1, Great Western Rly. Co. v. Bater 6, 28, 29
 (1920) 1920-3 KB 266 = 90 LJKB
 41, Great Western Rly. v. Bater 29
 121 Journ 220, In re Cambridge
 Case 31

The following judgments of the Court
 were delivered by

HIDAYATULLAH, C. J. (On behalf of
 himself and G. K. MITTER, J.): We regret
 our inability to agree that the appellant
 Mrs. Kanta Kathuria was not holding an
 office of profit under the Government of
 Rajasthan when she stood as a Candidate
 for election to the Rajasthan Legislative
 Assembly from the Kolayat Constituency.

2. Mrs. Kathuria is an advocate practising at Bikaner. She contested the above election held on February 18, 1967 against seven other candidates. She was declared elected on February 22, 1967. One of the defeated candidates filed the election petition, from which this appeal arises, questioning her election on several grounds. We are concerned only with one of them, namely, that on the date of her nomination and election she was disqualified to be chosen to fill the seat as she held the office of Special Government Pleader, which was an office of profit under the Government of Rajasthan.

3. Article 191 of the Constitution, which is relevant in this connection, reads:

"191: Disqualifications for membership:
 (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

xx xx xx xx
 Mrs. Kathuria was appointed by the Government of Rajasthan as Special Government Pleader to conduct arbitration cases between the Government and Modern Construction Company arising

out of the construction of Rana Pratap Sagar Dam and Jawahar Sagar Dam. The order was passed on June 26, 1965 (Ex. 1). The order reads:

ORDER

"Sub: Construction of R. P. S. Main Dam Contract of M/s. M. C. C. (Pvt.) Ltd., Arbitration in disputes arising out of.

In pursuance of R. 8 (b) of O. XXVII of the First Schedule to the Code of Civil Procedure, 1908 read with Cl. (7) of Section 2 of the Code, the Governor is pleased to appoint Smt. Kanta Kathuria, Advocate Bikaner as Special Government Pleader to conduct the above noted case on behalf of the State of Rajasthan along with Shri Murali Manohar Vayas, Government Advocate, Jodhpur.

By order,
 Sd. D. S. Acharya
 25-6-65

(D. S. Acharya)
 Joint Legal Remembrancer".

By subsequent orders, which we do not consider necessary to quote here, her remuneration was fixed at Rs. 150/- per day for each date of hearing, Rs. 75/- per day for days of travel and dates on which the case was adjourned, and days spent on preparation of the case. Mrs. Kathuria began appearing in the case from March 27, 1965. It is an admitted fact that she was paid for work between that date and November 28, 1966 a sum of Rs. 26,325/- and again from February 26, 1967 to March 2, 1967 a sum of Rs. 900/- and that the arbitration proceedings were continuing on the date of the filing of the election petition. Therefore for over two years she was employed as Special Government Pleader and was still employed when her election took place. It is also admitted by her that prior to this employment, she had never paid income-tax in excess of Rs. 1200/- in any year.

4. On these facts, the High Court held that Mrs. Kathuria was disqualified. Before this appeal came on for hearing before us, the Governor of Rajasthan by Ordinance 3/68 (December 24, 1968) removed the disqualification retrospectively. The Ordinance was followed by Act V of 1968 (April 4, 1969). The operative portions of the Act which are the same as of the Ordinance read:

"Prevention of disqualification of membership of the State Legislative Assembly—

(1) It is hereby declared that none of the following offices, in so far as it is an office of profit under the State Government, shall disqualify or shall be deemed ever to have disqualified the holder thereof from being chosen as, or for being, a member of the Rajasthan Legislative Assembly, namely:—

(a) the office of a Government Pleader or Special Government Pleader or Advocate for the Government, appointed specially to conduct any particular suit, case or other proceeding by or against the State Government, before any Court, tribunal, arbitrator or other authority;

(b) the office of a Government Pleader, a Special Government Pleader or Advocate for the State Government, appointed specially to assist the Advocate-General, Government Advocate or Pleader, or Special Government Pleader, or Advocate for Government, in any particular suit, case or other proceeding by or against the State Government before any Court, tribunal, arbitrator or other authority;

(c) the office of a panel lawyer if the holder of such office is not entitled to any retainer or salary, by whatever name called;

(d) the office of a Pradhan or Pramukh as defined in the Rajasthan Panchayat Samitis and Zila Parishads Act, 1959 (Rajasthan Act 37 of 1959).

(2) Notwithstanding any judgment or order of any Court or Tribunal, the aforesaid offices shall not disqualify or shall be deemed never to have disqualified the holders thereof from being chosen as, or for being, members of the Rajasthan Legislative Assembly as if this Act had been in force on the date the holder of such office filed his nomination paper for being chosen as a member of the Rajasthan Legislative Assembly."

The Ordinance and the Act seem to have been passed to nullify the decision in this case. One of the contentions of the answering respondent is that the Legislature of Rajasthan could not remove the disqualification retrospectively since the Constitution contemplates disqualifications existing at certain time in accordance with the law existing at that time. We shall deal with this matter later.

5. When the Government of Rajasthan appointed Mrs. Kathuria it had two courses open to it. Firstly, Government could have engaged Mrs. Kathuria to conduct the particular arbitration case or cases, or even to assist the Government Advocate in those cases. Alternatively

Government could create a special office of Special Government Pleader and appoint Mrs. Kathuria or any other lawyer to that office. It is obvious that Government did not choose the first course. There were as many as 26 arbitration cases then pending and more were likely to arise. Government thought that they should be conducted by the Government Advocate but as the work involved was too much an additional office had to be created and given to a lawyer. An office was, therefore, created and given to Mrs. Kathuria.

6. In a recent case *Mahadeo v. Sbanti-hai*, (Civil Appeal No. 1832 of 1967 (SC) decided on 15-10-1968) we held that a panel lawyer engaged to watch cases on behalf of the Central and Western Railway Administrations, held an office of profit. The duty of the panel lawyer was to watch cases coming up for hearing against the Railways at Ujjain and to appear in court and ask for an adjournment. The lawyer was paid Rs. 5 for each such adjournment if he was not entrusted with the case later. In dealing with this matter reliance was placed by us on the meaning to the word 'office' given in the *Statesman (P) Ltd. v. H. R. Deb*, Civil Appeal No. 647 of 1967 D/- 2-4-1968= (reported in AIR 1968 SC 1495). In the *Statesman* case, Civil Appeal No. 647 of 1967, D/- 2-4-1968= (reported in AIR 1968 SC 1495)* this Court approved of the observations of Lord Wright in *Macmillan v. Cuest*, 1942 AC 561 to the following effect:

"The word 'office' is of indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purpose of this case the following:

"A position or place to which certain duties are attached, especially one of a more or less public character."

Our brother Sikri has also relied upon the same case and has referred to the observations of Lord Atkin where he approved of the observations of Rowlatt, J. in *Great Western Rly. Co. v. Bater*, (1922) 8 Tax Cas 231 at p. 235. Justice Rowlatt said thus:

"Now it is argued, and to my mind argued most forcibly, that that shows that what those who use the language of the Act of 1942 meant, when they spoke of an office or employment which was a

*Editorial Note: We have not been able to trace this passage in *Statesman* case, as reported in AIR 1968 SC 1495.

subsisting, permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders, and if you merely had any man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He hereby was employed to do certain things and that is an end of it, and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being."

We say with profound respect for this most succinct exposition, that we entirely agree. The distinction that we are making is precisely the distinction which has been brought out by Rowlatt J. If Mrs. Kathuria had been briefed as a lawyer and given all the Government litigation in Rajasthan to conduct on behalf of the Government she could not have been described as holding an office of profit. The aggregate of her work and her activities could not have created an office nor could she have been described as anything but an advocate. What happened here was different. An office was created which was that of a Special Government Pleader. Now it is admitted that the office of a Government Pleader is an office properly so-called. Therefore an office going under the names 'Additional Government Pleader', 'Assistant Government Pleader', 'Special Government Pleader' will equally be an office properly so-called. It matters not that Mrs. Kathuria was to conduct a group of arbitration cases and against the same party. For that matter Government is always at liberty to create offices for special duties. They might have even created another office of Special Government Pleader for Land Acquisition cases or a group of cases or Railway cases or a group of cases arising out of a particular accident and so on and so forth. What matters is that there was an office created apart from Mrs. Kathuria. It is in evidence that it was first held by Mr. Maneklal Mathur another advocate. It is likely that if Mrs. Kathuria had declined some one else would have been found. Therefore, there was an office which could be successively held; it was independent of Mrs. Kathuria who filled it, it was a substantive position and as permanent as supernumerary offices are.

Every one of the tests laid down by Rowlatt J. are found here.

7. We would, therefore, hold that the High Court was right in its conclusion that Mrs. Kathuria held an office. Since there is no dispute that it was for profit and under the State, the election of Mrs. Kathuria must be held to be void as she was disqualified to stand for the election.

8. This brings us to the next question. Does the Act of the Rajasthan Legislature remove the disqualification retrospectively, in other words; can such a law be passed by the Legislature after the election is over?

9. The first question is whether the new law is remedial or declaratory. If it was declaratory then it would be retrospective; if remedial only, prospective unless legally made retrospective. That it has been made expressly retrospective lends support to its being remedial. Its retrospective operation depends on its being effective to remove a disability existing on the date of nomination of a candidate or his election. Of course, there is no difficulty in holding the law to be perfectly valid in its prospective operation. The only dispute is in regard to its retrospective operation.

10. Our brother Sikri has cited an instance of the British Parliament from May's well-known treatise when the Coatbridge and Springburn Elections (Validation) Bill was introduced to validate the irregular elections. Halsbury's Laws of England (3rd Edn. Vol. 14 p. 5) has the following note:

"If a person is elected when disqualified, his disqualification for being a member of Parliament may be remedied or he may be protected from any penal consequences by an Act of Validation or indemnity."

11. The position of the British Parliament is somewhat different from that of the Indian Parliament and the Legislatures of the States. British Parliament enjoys plenary sovereignty and the Acts of the British Parliament no court can question. In India the sovereignty of Indian Parliament and the Legislatures is often curtailed and the question, therefore, is whether it is in fact so curtailed.

12. At the hearing our attention was drawn to a number of such Acts passed by our Parliament and the Legislatures of the States. It seems that there is a settled legislative practice to make validation laws. It is also well recognised that

Parliament and the Legislatures of the States can make their laws operate retrospectively. Any law that can be made prospectively may be made with retrospective operation except that certain kinds of laws cannot operate retrospectively. This is not one of them.

13. This position being firmly grounded we have to look for limitations, if any, in the Constitution. Article 191 (which has been quoted earlier) itself recognises the power of the Legislature of the State to declare by law that the holder of an office shall not be disqualified for being chosen as a member. The Article says that a person shall be disqualified if he holds an office of profit under the Government of India or the Government of any State unless that office is declared by the Legislature not to disqualify the holder. Power is thus reserved to the Legislature of the State to make the declaration. There is nothing in the words of the article to indicate that this declaration cannot be made with retrospective effect. It is true that it gives an advantage to those who stand when the disqualification was not so removed as against those who may have kept themselves back because the disability was not removed. That might raise questions of the propriety of such retrospective legislation but not of the capacity to make such laws. Regard being had to the legislative practice in this country and in the absence of a clear prohibition either express or implied we are satisfied that the Act cannot be declared ineffective in its retrospective operation.

14. The result, therefore, is that while we hold that Mrs. Kathuria held an office of profit under the State Government, we hold further that this disqualification stood removed by the retrospective operation of the Act under discussion.

15. As regards the supplementary point that the petition was bad for non-joinder of Mr. Mathura Das Mathur against whom corrupt practices were alleged in the petition, we are of opinion that S. 82 of the Representation of the People Act, 1951, in its Cl. (b) speaks of candidates at the same election and not persons who are candidates at other elections. As Mr. Mathur was a candidate from another constituency he need not have been made a party here.

16. For the above reasons we would allow the appeal but make no order about costs since the election of the appellant is saved by a retrospective law passed after the decision of the High Court.

17. SIKRI, J.: This appeal arises out of an election petition filed under Section 80 of the Representation of the People Act, 1951, hereinafter referred to as the 1951 Act by Shri Manik Chand Surana, a defeated candidate, challenging the election of Smt. Kanta Khaturia, before the High Court. The High Court (Jagat Narayan J.) allowed the election petition on the ground that the appellant held an office of profit within the meaning of Article 191 of the Constitution on the day on which she filed the nomination paper and was thus disqualified for being chosen as a member of the Rajasthan Legislative Assembly. This judgment was given on August 12, 1968. An appeal was filed in this Court on August 20, 1968. During the pendency of the appeal, the Rajasthan Legislative Assembly Members (Prevention of Disqualification Act, 1969 (Act No. 5 of 1969) (hereinafter referred to as the impugned Act), was passed, which received the assent of the Governor on April 4, 1969.

18. The impugned Act inter alia provides:

"2. Prevention of disqualification of membership of the State Legislative Assembly. (1) It is hereby declared that none of the following offices, in so far as it is an office of profit under the State Government shall disqualify or shall be deemed ever to have disqualified the holder thereof from being chosen as, or for being, a member of the Rajasthan Legislative Assembly, namely:—

(a) the office of a Government Pleader or Special Government Pleader or Advocate for the Government, appointed specially to conduct any particular suit, case or other proceeding by or against the State Government, before any court, tribunal, arbitrator or other authority;

(b) the office of a Government Pleader or Special Government Pleader or Advocate for the State Government appointed specially to assist the Advocate General, Government Advocate or Pleader, or Special Government Pleader, or Advocate for Government in any particular suit, case or other proceeding by or against the State Government before any court, tribunal, arbitrator or other authority;

xxx

xxx

xxx

(2) Notwithstanding any judgment or order of any Court or Tribunal, the aforesaid offices shall not disqualify or shall be deemed never to have disqualified the holders thereof for being chosen as, or

for being, members of the Rajasthan Legislative Assembly as if this Act had been in force on the date the holder of such office filed his nomination paper for being chosen as a member of the Rajasthan Legislative Assembly."

19. We may note another fact on which an argument is sought to be made by the learned Counsel for the appellant. It was alleged in the election petition that the appellant was a close friend of one Shri Mathura Dass Mathur who was a Minister in the State of Rajasthan at the time of the election, who contested elections as a candidate in a constituency different from that of the appellant. Shri Mathur visited the constituency during the election very frequently and during these visits the appellant accompanied by Shri Mathur visited several places in the Constituency where Shri Mathur in the presence of the appellant offered and promised to get several works done in those areas if the electors were to cast votes for the appellant at the said election. In spite of these allegations of corrupt practice, Shri Mathur was not made a party to the petition.

20. The learned Counsel for the appellant, Mr. Gupte, contends that the High Court erred in holding that the appellant held an office of profit within the meaning of Article 191 of the Constitution. In the alternative he contends that the Rajasthan Act No. 5 of 1969 is retrospective and the disqualification if it existed cannot now be deemed to have existed because of this Act. The last point raised by him is that the petition was not in accordance with law as the respondent, Shri Surana, had not impleaded Shri Mathur as respondent to the petition.

21. The facts relevant for appreciating the first point are these:—

22. The appellant was an advocate at all material times. Disputes arose between M/s. Modern Constitution Company Private Ltd. and the State of Rajasthan in connection with some works relating to the Rana Pratap Sagar Dam. These disputes were referred to arbitration. Shri Murli Manohar Vyas, Government Advocate in the High Court of Rajasthan at Jodhpur was appointed by the Government to represent it in these arbitration proceedings. The Government Advocate wanted one more advocate to assist him. On his suggestion Shri Manak Lal Mathur Advocate was appointed to assist the Government Advo-

cate. As there was a possibility that Shri Manak Lal Mathur may not be available to help the Government Advocate, the appellant was, on the suggestion of the Government Advocate, appointed to assist him in the absence of Shri Mathur. This proposal was approved by the Rajasthan Law Minister on March 30, 1965 and on June 26, 1965, and the Government issued the following order:—

"Sub: —Construction of R. P. S. Main Dam Contract of M/s. M. C. C. (Pvt.) Ltd. Arbitration in dispute arising out of—

In pursuance of Rule 8 (b) of O. 27 of the First Schedule to the Code of Civil Procedure, 1908 read with Clause (7) of Section 2 of the Code, the Governor is pleased to appoint Smt. Kanta Khaturia Advocate, Bikaner as Special Government Pleader to conduct the above noted case on behalf of the State of Rajasthan along with Shri Manohar Vyas, Government Advocate, Jodhpur."

23. Later, on September 3, 1965, the Government laid down the fees payable to the appellant. It was stated in the order dated September 3, 1965 that "Smt. Kanta Khaturia who has been appointed to assist the Government Advocate in the absence of Shri Mathur will get her share of fee in proportion to the assistance rendered by her out of the daily fee of Rs. 150 to Shri Manak Lal Mathur."

24. As Shri Manak Lal Mathur was not able to appear in the case, on November 18, 1966 the Governor sanctioned the payment of daily fee of Rs. 150 to the appellant instead of Shri Manak Lal Mathur, for days of actual hearing. The appellant appeared from March 27, 1965 to November 28, 1966, but she did not appear from November 29, 1966 to February 25, 1967. She again started appearing in the case from February 26, 1967. The appellant claimed travelling allowance, incidental charges and daily allowance, but the Government decided that the appellant was not entitled to any travelling allowance or daily allowance in addition to the fees.

25. By a notification, the Election Commission of India called upon the electors of the Kolayat Assembly Constituency of the Rajasthan Legislative Assembly to elect a member to the Rajasthan Legislative Assembly and invited nomination papers for the elections to be held on February 18, 1967. The appellant was declared duly elected by the Returning Officer on February 22, 1967,

the appellant having secured 11926 and the respondent having secured 8311 votes.

26. The relevant portion of Art. 191 reads as follows:—

"191. (1) A person shall be disqualified for being chosen as, and for being a member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule other than an office declared by the Legislature of the State by law not to disqualify its holder;

(e) if he is so disqualified by or under any law made by Parliament.

(2) For the purposes of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

27. It seems to us that the High Court erred in holding that the appellant held an office. There is no doubt that if her engagement as Special Government Pleader amounted to appointment to an office, it would be an office of profit under the State Government of Rajasthan. The word 'office' has various meanings and we have to see which is the appropriate meaning to be ascribed to this word in the context. It seems to us that the words 'its holder' occurring in Art. 191 (1) (a), indicate that there must be an office which exists independently of the holder of the office. Further, the very fact that the Legislature of the State has been authorised by Article 191 to declare an office of profit not to disqualify its holder, contemplates existence of an office apart from its holder. In other words, the Legislature of a State is empowered to declare that an office of profit of a particular description or name would not disqualify its holder and not that a particular holder of an office of profit would not be disqualified.

28. It seems to us that in the context Justice Rowlatt's definition in (1922) 8 Tax Cas 231 is the appropriate meaning to be applied to the word 'office' in Article 191 of the Constitution.

Justice Rowlatt observed at p. 235:—

"Now it is argued, and to my mind argued most forcibly, that that shows that what those who use the language of the Act of 1842 meant, when they spoke of an office or an employment, was

an office or employment which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders; and if you merely had a man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He merely was employed to do certain things and that is an end of it; and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being. And I think myself that that is sound. I am not going to decide that, because I think I ought not to in the state of the authorities, but my own view is that the people in 1842 who used this language meant by an office a substantive thing that existed apart from the holder."

This definition was approved by Lord Atkinson at page 246.

29. This language was accepted as generally sufficient by Lord Atkin and Lord Writ in *McMillan v. Guest* (H. M. Inspector of Taxes), (1943) 24 Tax Cas 190 Lord Atkin observed at p. 201:—

"There is no statutory definition of 'office'. Without adopting the sentence as a complete definition, one may treat the following expression of Rowlatt, J. in *Great Western Ry. Co. v. Bater*, (1920) 3 KB 266 at p. 274, adopted by Lord Atkinson in that case, (1922) 2 AC 1 at p. 15, as a generally sufficient statement of the meaning of the word: 'an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders.' Lord Wright at p. 202 observed:

"The word 'office' is of indefinite content; its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following: 'A position or place to which certain 'duties are attached, especially one of a more or less public character.' This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular (1922) 2 AC 1, where the legal construction of these words, which had been in Schedule E since 1803 (43 Geo. I III, c. 122, Section 175), was discussed."

30. In Civil Appeal No. 1832 of 1967, D/- 15-10-1968 (SC) Mitter, J. speaking for this Court, quoted with approval the definition of Lord Wright. In our view there is no essential difference between the definitions given by Lord Wright and Lord Atkin. The Court of Appeal in the case of *Mitchell v. Ross*, (1960) 2 All ER 218 at pp. 225-226 thought that both the noble and learned Lords had accepted the language employed by Rowlatt, J. as generally sufficient. In *Mahadeo's case*, Civil Appeal No. 1832 of 1967, D/- 15-10-1968 (SC) (Supra) this Court was dealing with a panel of lawyers maintained by the Railway Administration and the lawyers were expected to watch cases. Clause (13) of the terms in that case read as follows:—

"You will be expected to watch cases coming up for hearing against this Railway in the various courts at UJB and give timely intimation of the same to this office. If no instructions regarding any particular case are received by you, you will be expected to appear in the court and obtain an adjournment to save the ex parte proceedings against this Railway in the Court. You will be paid Rs. 5 for every such adjournment if you are not entrusted with the conduct of the suit later on."

31. That case in no way militates against the view which we have taken in this case. That case is more like the case of a standing counsel disqualified by the House of Commons. It is stated in *Rogers on Elections*, Vol. II, at page 10:—

"However in the Cambridge case (121 Journ. 220), in 1866, the return of Mr. Forsyth was avoided on the ground that he held a new office of profit under the Crown, within the 24th Section. In the scheme submitted to and approved by Her Majesty in Council was inserted the office of standing counsel with a certain yearly payment (in the scheme called "salary") affixed to it, which Mr. Forsyth received, in addition to the usual fees of counsel. The Committee avoided the return...."

32. It is urged that there can be no doubt that the Government Pleader holds an office and there is no reason why a person who assists him in the case should also not be treated as a holder of office, specially as the notification appointed the appellant as Special Government Pleader. We see no force in these contentions.

33. Rule 8B. of Order 27, C. P. Code reads as follows:—

"In this Order unless otherwise expressly provided: "Government" and "Government pleader" mean respectively —

(a) In relation to any suit by or against the Central Government or against a public officer in the service of that Government, the Central Government and such pleader as that Government may appoint whether generally or specially for the purposes of this Order;

(c) in relation to any suit by, or against a State Government or against a public officer in the service of a State, the State Government and the Government Pleader, as defined in Clause (7) of Section 2 or such other pleader as the State Government may appoint, whether generally or specially, for the purposes of this order." This rule defines who shall be deemed to be a Government Pleader for the purpose of the Order. 'Government Pleader' is defined in Section 2 of Clause (7), C. P. Code thus—

"(7) "Government Pleader" includes any officer appointed by the State Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader."

34. It follows from reading Order 27, Rule 8B and Clause (7) of Section 2, C. P. Code together that even if a pleader who is acting under the directions of the Government Pleader would be deemed to be a Government Pleader for the purpose of Order 27. Therefore, no particular significance can be attached to the notification made under Rule 8B appointing the appellant as Special Government Pleader. We cannot visualise an office coming into existence, every time a pleader is asked by the Government to appear in a case on its behalf. The notification of his name under Rule 8B, does not amount to the creation of an 'office'. Some reliance was also placed on Rule 4 of Order 27, C. P. Code, which provides that:

"The Government Pleader in any Court shall be the agent of the Government for the purpose of receiving processes against the Government issued by such Court." This rule would not apply to the facts of this case because the appellant was appointed only to assist the Government Advocate in a particular case. Assuming it applies, it only means that processes

could be served on the appellant, but processes can be served on an Advocate under Rule 2 of Order XLV of the Supreme Court Rules, 1966. This does not mean that an Advocate on Record would hold an office under the client. The learned Counsel for the respondent, Mr. Chagla, urges that we should keep in view of fact that the object underlying Article 191 of the Constitution is to preserve purity of public life and to prevent conflict of duty with interest and give an interpretation which will carry out this object. It is not necessary to give a wide meaning to the word "office" because if Parliament thinks that a legal practitioner who is being paid fees in a case by the Government should not be qualified to stand for an election as a Member of Legislative Assembly, it can make that provision under Art. 191 (1) (a) of the Constitution.

35. The case of Sakawat Ali v. State of Orissa, (1955) 1 SCR 1004= (AIR 1955 SC 166) provides an instance where the Legislature provided that a paid legal practitioner should not stand in the municipal elections.

36. In view of the above reasons, we must hold that the appellant was not disqualified for election under Art. 191 of the Constitution. But assuming that she held an office of profit, this disqualification has been removed retrospectively by the Rajasthan Legislative Assembly by enacting the impugned Act.

37. Mr. Chagla, learned Counsel for the respondent, contends that the Rajasthan State Legislature was not competent 'to declare retrospectively' under Article 191 (1) (a) of the Constitution. It seems to us that there is no force in this contention. It has been held in numerous cases by this Court that the State Legislatures and Parliament can legislate retrospectively subject to the provisions of the Constitution. Apart from the question of fundamental rights, no express restriction has been placed on the power of the Legislature of the State, and we are unable to imply, in the context, any restriction. Practice of the British Parliament does not oblige us to place any implied restriction. We notice that the British Parliament in one case validated the election: (Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament—Seventeenth (1964) Edition) —

"After the general election of 1945 it was found that the persons elected for

the Coatbridge Division of Lanark and the Springburn Division of Glasgow were disqualified at the time of their election because they were members of tribunals appointed by the Minister under the Rent of Furnished Houses Control (Scotland) Act, 1943, which entitled them to a small fee in respect of attendance at a Tribunal. A Select Committee reported that the disqualification was incurred inadvertently and in accordance with their recommendation the Coatbridge and Springburn Elections (Validation) Bill was introduced to validate the irregular elections (H. C. Deb. (1945-46) 414, c. 564-6). See also H. C. 3 (1945-46); *ibid.* 71 (1945-46) and *ibid.* 92 (1945-46)."

38. We have also noticed two earlier instances of retrospective legislation e. g. The House of Commons (Disqualification) Act, 1618 (Halsbury Statutes of England p. 467) and Section 2 of the Re-election of Ministers Act, 1919 (*ibid.* p. 515).

39. Great stress was laid on the word 'declared' in Article 191 (1) (a), but we are unable to imply any limitation on the powers of the Legislature from this word. Declaration can be made effective as from an earlier date.

40. The apprehension that it may not be a healthy practice and this power might be abused in a particular case are again no grounds for limiting the powers of the State Legislature.

41. It is also urged that by enacting the impugned Act the State Legislature has amended the 1951 Act. We are unable to appreciate this contention. The State Legislature has exercised its powers under Article 191 to declare a certain office not to have ever disqualified its holder. The impugned Act does not amend or alter the 1951 Act, in any respect whatsoever. It is said that under the 1951 Act as it existed before the impugned Act was passed, the appellant was not qualified to be chosen for this particular election. By enacting the impugned Act the appellant's disqualification has been removed and the 1951 Act is, so to say made to speak with another voice. But that is what the State Legislature is entitled to do, as long as it does not touch the wording of the 1951 Act. The answer given by the 1951 Act may be different but this is because the facts on which it operates have by valid law been given a different garb.

42. It is further urged that the impugned Act violates Article 14 of the

Constitution because the Central Government might have appointed Government Pleader under R. 8B of O. 27 and the impugned Act nowhere mentions the alleged offices held by them. No material has been placed to show that any such offices exist. We cannot therefore entertain this point. In view of the above reasons we are of the opinion that the impugned Act is valid and removes the disqualification if it existed before.

43. There is no force in the third point raised by the learned counsel for the appellant. Section 82 of the Representation of the People Act, 1951, reads as follows:

"82. A petitioner shall join as respondents to his petition—

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.

In this context the words 'any other candidate' plainly mean a candidate in the election for the constituency which is the subject matter of the petition.

44. In the result the appeal is allowed, the judgment of the High Court set aside and the petition dismissed. In the circumstances of the case the parties will bear their own costs throughout.

Appeal allowed.

AIR 1970 SUPREME COURT 703 (V 57 C 141)

(From: Punjab)*

J. C. SHAH, G. K. MITTER, K. S. HEGDE AND A. N. GROVER, JJ.

Arjan Singh and another, Appellants v. The State of Punjab and others, Respondents.

Civil Appeal No. 463 of 1966, D/- 8-10-1968.

(A) Civil P. C. (1908), Pre. — Interpretation of Statutes — Retrospective operation — Retrospective effect not to be extended beyond what was intended.

*(L. P. A. No. 24 of 1963, D/- 30-3-1964 — Punj).

It is a well-settled rule of construction that no provision in a statute should be given retrospective effect unless the legislature by express terms or by necessary implication has made it retrospective and that where a provision is made retrospective, care should be taken not to extend its retrospective effect beyond what was intended. (Para 4)

(B) Tenancy Laws — Pepsu Tenancy and Agricultural Lands Act (13 of 1955), Section 32-KK — Date of commencement — Effect of 1962 Amendment Act, Sections 7 and 1 (2) — Section 32-KK (introduced in 1962) came into force on 30-10-1956 and not from date of principal Act (viz., 6-3-55) — AIR 1964 Punj 30, Overruled — L. P. A. No. 24 of 1963, D/- 30-3-1964 (Punj), Reversed.

There is no basis for saying that Section 32-KK has been given retrospective effect as from the date the principal Act came into force, namely, 6-3-1955.

(Para 5):
On a reading of the various provisions of the Pepsu Tenancy and Agricultural Lands (Amendment and Validation) Act 1962, it is clear that the legislature intended that Section 7 of that Act which introduced into the principal Act (13 of 1955) Section 32-KK should be deemed to have come into force on the 30-10-1956. AIR 1964 Punj 30, Overruled; L. P. A. No. 24 of 1963, D/- 30-3-1964 (Punj), Reversed. (Para 6)

(C) Civil P. C. (1908), Pre. — Interpretation of Statutes — Statute should be construed as a whole and given harmonious construction.

Every statute has to be construed as a whole and the construction given should be a harmonious one. It is not permissible for the Courts to proceed on the basis that the legislature had enacted any provision by oversight. If any mistake had crept into a Section it is for the legislature to correct the same and it is not for the Court to proceed on the supposition that the same was enacted by oversight. (Para 6)

Cases Referred: Chronological Paras.
(1964) AIR 1964 Punj 30 (V 51) =
65 Pun LR 961, Bir Singh v.
State of Punjab 3.

M/s. E. C. Agrawala and Champat Rai, Advocates, for Appellants; M/s. Harbans Singh and R. N. Sachthey, Advocates, for Respondents.

The Judgment of the Court was delivered by

HEGDE, J.— Though several questions of law were raised in this appeal by special leave, after hearing the Counsel for the parties on one of those questions, namely on what date Section 32-KK of the Pepsu Tenancy and Agricultural Lands Act 1955 (Act No. XIII of 1955) (to be hereinafter referred to as the Principal Act) should be deemed to have come into force, we did not think it necessary to hear the Counsel for the parties on the other questions raised in the Appeal.

2. Before examining the question of law referred to hereinbefore it is necessary to set out the material facts.

3. The second appellant is the son of the first appellant. The appellants along with Charanjit Singh and Darshan, the two other sons of the first appellant were members of a joint Hindu family. That family owned agricultural lands in the village Hathoa, Tehsil Malerkotla District Sangrur. The principal Act came into force on March 6, 1955. The preamble to that Act says that it is an Act to amend and consolidate the law relating to tenancies of agricultural lands and to provide for certain measures of land reforms. That Act provided that:

"subject to the provisions of Section 5 every land owner owning land exceeding thirty standard acres shall be entitled to select for personal cultivation from the land held by him in the State as a land owner any parcel or parcels of land not exceeding in aggregate area the permissible limit and reserve such land for personal cultivation by intimating his selection in the prescribed form and manner to the Collector."

The permissible limit is thirty standard acres. Under that Act, there was no provision for Government taking over the lands that were in excess of the permissible limit. The appellant's family divided their family properties as per a registered partition deed on September 6, 1956. Thereafter necessary changes in the mutation register were made. The principal Act was amended in 1956 as per Amendment Act 15 of 1956 which came into force on October 30, 1956. That Act incorporated into the principal Act Chapter 4-A which provides for Government taking over the surplus lands in the hands of a land-owner i. e., the lands in excess of the permissible limit. After the amendment came into force, it appears several alienations were effected by the land

owners to get out of the reach of the law. Neither the principal Act nor the Amendment effected in 1956 prohibited any alienation. Then came the Pepsu Tenancy and Agricultural Lands (Amendment) Act, No. III of 1959 which was made operative from January 19, 1959. Among other provisions that Amendment Act incorporated into the Act Sec. 32-FF which says:

"Save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance or upto 30th July 1958 by a landless person or a small landowner not being a relation as prescribed of the person making the transfer or disposition of land, for consideration upto an area which with or without the area owned or held by him does not in the aggregate exceed the permissible limit, no transfer or other disposition of land effected after 21st August, 1956, shall affect the right of the State Government under this Act to the surplus area to which it would be entitled but for such transfer or disposition."

This section has a proviso which reads:

"Provided that any person who has received any advantage under such transfer or disposition of land shall be bound to restore it, or to make compensation for it to the person from whom he received it." In 1962 the Pepsu Tenancy and Agricultural Lands (Amendment and Validation) Act No. XVI of 1962 was passed. It came into force on July 20, 1962. Two sections in that Act which are relevant for our present purpose are Sections 7 and 1. Section 7 reads:

"Insertion of new Section 32-KK in Pepsu Act 13 of 1955. — After Section 32-K of the principal Act, the following section shall be inserted, namely:—

32-KK. Land owned by Hindu undivided family to be deemed land of one landowner. — Notwithstanding anything contained in this Act or in any other law for the time being in force;—

(a) where, immediately before the commencement of this Act, a landowner and his descendants constitute a Hindu undivided family, the land owned by such family shall, for the purposes of this Act, be deemed to be the land of that landowner and no descendant shall, as member of such family, be entitled to claim that in respect of his share of such land he is a land-owner in his own right; and

(b) a partition of land owned by a Hindu undivided family referred to in

clause (a) shall be deemed to be a disposition of land for the purposes of Section 32-FF."

Explanation:— In this section, the expression "descendant" includes an adopted son."

Section 1 sets out the short title and commencement of the Act. That Section reads:

"This Act may be called the Pepsu Tenancy and Agricultural Lands (Amendment and Validation) Act, 1962.

(2) Section 2, Section 4, Section 5, Section 7 and Section 10 shall be deemed to have come into force on the 30th day of October, 1956 and the remaining provisions of this Act shall come into force at once."

After the Pepsu Tenancy and Agricultural Lands (Amendment) Act No. III of 1959 came into force, the Collector of Sangrur started proceedings under Chapter 4A of the Act for determining the surplus lands in the hands of the appellants. In those proceedings despite the representations of the appellants, the Collector ignored the partition effected in the family of the appellants in determining the surplus lands in the hands of the members of the family. He considered them as one unit and on that basis held that eighteen standard acres and 5½ units of lands are surplus in their hands. There is no dispute that if the partition entered into in the family had been taken into consideration, the lands held by the different sharers are within permissible limit. The appellants unsuccessfully went up in appeal against that order to the Commissioner Patiala Division. Against the order of the Commissioner, the appellants appealed to the State Government but that appeal was rejected on September 11, 1961. Thereafter the appellants filed Civil Writ No. 1418 of 1961 in the High Court of Punjab at Chandigarh under Article 226 of the Constitution challenging the decisions of respondents 1 to 3. The learned Single Judge who heard that petition dismissed the same on November 27, 1962. He held that as Section 32-KK had become a part of the principal Act the words "this Act" in that section must refer to the principal Act and not to Section 7 of the Amendment Act. The decision of the learned Single Judge was affirmed by a Division Bench of that Court. That bench followed an earlier decision of that Court in *Bir Singh v. State of Punjab*, (1963) 65 Pun LR 961= (AIR 1964 Punj 30). At this stage we

may mention that in the Punjab High Court at one stage there were conflicting decisions on the question of law under consideration. It is not necessary to refer to those decisions as grounds on which they differed are referred to in *Bir Singh's* case (supra). The decisions which have taken the same view as taken by the High Court in this case have ignored the significance of Section 1 (2) of the 1962 Amendment Act. They have exclusively focussed their attention on Section 32-KK and the supposed reasons for its enactment.

4. It is a well-settled rule of construction that no provision in a statute should be given retrospective effect unless the legislature by express terms or by necessary implication has made it retrospective and that where a provision is made retrospective, care should be taken not to extend its retrospective effect beyond what was intended.

5. To accept the line of reasoning adopted by the learned Judges of the High Court who decided this case is to completely ignore sub-section (2) of Section 1 of the 1962 Amendment Act. That Section in specific terms says that Section 32-KK (Section 7 of the Amendment Act) shall be deemed to have come into force on the 30th day of October 1956. We fail to see how we can ignore this mandate of the legislature. That provision clearly brings out the intention of the legislature. There is no ambiguity in it. It is not possible to adopt any rule of construction which would necessitate the Court to ignore that provision. It is not possible to accept the conclusion of the High Court that Section 32-KK must be deemed to have come into force on the date the principal Act came into force, namely, on March 6, 1955. That is not even the case of the respondents. Clause (b) of Section 32-KK which is the clause relevant for our present purpose would be a meaningless provision unless the same is read along with Section 32-FF which was for the first time incorporated into the principal Act in 1959 though it affects all transfers and other dispositions of land effected after August 21, 1956. It is not the case of the respondents that the transfers effected or the partitions made before August 21, 1956 are within the mischief of Section 32-FF or Section 32-FF read with Section 32-KK. Therefore there is no basis for saying that Section 32-KK has been given retrospective effect as

from the date the principal Act came into force.

6. On a reading of the various provisions of the Pepsu Tenancy and Agricultural Lands (Amendment and Validation) Act 1962, it appears to us that the legislature intended that Section 7 of that Act which introduced into the principal Act Section 32-KK should be deemed to have come into force on the 30th October 1956. Evidently the draftsman when he drafted Section 7 of that Act had in his mind the Amendment Act and not the principal Act. The words "this Act" in Section 7 of the Amendment Act (Section 32-KK of the principal Act) in our opinion were intended to refer to the Amendment Act and not to the principal Act. It is true that ordinarily when a Section is incorporated into the principal Act by means of an amendment, reference in that Section to "this Act" means the principal Act. But in view of sub-section (2) of Section 1 of the Amendment Act of 1962 that construction has become impermissible. Every statute has to be construed as a whole and the construction given should be a harmonious one. It may be that the legislature intended that Section 32-KK should be deemed to have come into force on the 30th day of October, 1956, on which day Section 32-FF became a part of the principal Act. It is possible that the legislature did not intend to give to that Section the same retrospective effect as it had given to Section 32-FF. It is not permissible for us to proceed on the basis that the legislature had enacted sub-section (2) of Section 1 of the Amendment Act 1962 by oversight. If any mistake had crept into that Section it is for the legislature to correct the same and it is not for this Court to proceed on the supposition that the same was enacted by oversight.

7. For the reasons mentioned above this appeal is allowed and the orders impugned in the Writ Petition are quashed. The respondents shall pay the costs of the appellants both in this Court as well as in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 706
(V 57 C 142)

(From: Madhya Pradesh)*

S. M. SIKRI, R. S. BACHAWAT, JJ.

Badri Prasad, Appellant v. The State of Madhya Pradesh and another, Respondents.

Civil Appeal No. 18 of 1966, D/- 11-10-1968.

(A) Tenancy Laws — Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act 1950 (1 of 1951), Ss. 3, 4 (a) — Trees agreed to be severed before sale or under the contract of sale are goods — Contract to cut trees of certain measure — Held trees were not ascertained goods and property would pass only on cutting — Trees vested in State under the Act before cutting.

It is true that trees which are agreed to be severed before sale or under the contract of sale are "goods" for the purposes of the Sale of Goods Act. But before they cease to be "proprietary" right or interest in proprietary rights within the meaning of Sections 3 and 4 (a) of Act 1 of 1951 they must be felled under the contract.

Under clause 1 of the contract the plaintiff was entitled to cut teak trees of more than 12 inches girth. It had to be ascertained which trees fell within that description. Till this was ascertained, they were not "ascertained goods" within Section 19 of the Sale of Goods Act. Clause 5 of the contract contemplated that stumps of trees after cutting had to be 3 inches high. In other words, the contract was not to sell the whole of the trees.

Held that in these circumstances property in the cut timber would only pass to the plaintiff under the contract at the earliest when trees were felled. But before that happened the trees had vested in the State under the Act. AIR 1959 SC 735, Rel. on. (Para 11)

(B) Contract Act (1872), Ss. 2 (a), (b) — Offer and acceptance — Invitation to other party to make offer — No unconditional acceptance — No contract.

On February 1, 1955, the Divisional Forest Officer wrote to the plaintiff as follows:—

"Kindly inform whether you are ready to pay further Rs. 17,000/- for the con-

*(F. A. No. 94 of 1959, D/- 9-10-1962 — Madh Pra.)

tract of big trees of Sunderpani Village of Makrai Circle which (contract) is under dispute at present. This contract can be given to you on this compromise only. If you do not wish to pay this amount you may, in future, take any action you deem fit. You may express your desire within seven days of the receipt of this letter. If you fail to do this it will be presumed that you are not inclined to make a mutual compromise."

On receipt of your reply the State Government will be informed."

On 5-2-1955 the plaintiff wrote in return—

"I am ready to pay Rs. 17,000/- provided my claim to have the refund of Rs. 17,000/- already paid, from the owner of the Village or any other relief consequential to the judgment of that case remains unaffected. I reserve my right to claim the said or like amount. Subject to those conditions I shall pay Rs. 17,000/- as required in your referred letter."

Held that no contract was concluded between the Government and the plaintiff. It was extremely doubtful whether the letter dated February 1, 1955, was an offer. It seemed to be an invitation to the plaintiff to make an offer. Even if it was treated as an offer there was no unconditional acceptance by the letter dated February 5, 1955. The alleged acceptance of the offer made on February 1, 1955, was conditional and qualified.

(Para 12)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 1218 (V 55)=
Civil Appeal No. 393 of 1965,
D/- 20-2-1968, Mulamchand v.
State of Madhya Pradesh 9

(1962) AIR 1962 SC 1916 (V 49)=
(1963) 3 SCR 13, State of Madhya
Pradesh v. Yakinuddin 8, 9

(1959) AIR 1959 SC 735 (V 46)=
1959 Supp 2 SCR 339, Mahadeo
v. State of Bombay 7

(1958) AIR 1958 SC 532 (V 45)=
1959 SCR 265, Shantabai v. State
of Bombay 7

(1956) AIR 1956 SC 17 (V 43)=
(1955) 2 SCR 919, Ananda Behera
v. State of Orissa 6, 7

(1953) AIR 1953 SC 108 (V 40)=
1953 SCR 476, Chhotabhai Jetha-
bhai Patel v. State of Madhya
Pradesh 5, 6, 7, 8

M/s. G. L. Sanghi and A. G. Ratnapar-
khi Advocates, for Appellant; Mr. I. N.
Shroff, Advocate, for Respondent No. 1.

The following Judgment of the Court was delivered by

SIKRI, J.— This appeal by special leave is directed against the judgment and decree of the Madhya Pradesh High Court allowing the appeal of the State of Madhya Pradesh and dismissing the suit brought by the appellant, Badri Prasad — hereinafter referred to as the plaintiff.

2. The relevant facts for determining the points raised before us are these. On December 27, 1950, a contract was entered into between Kumar Bharat Shah, minor, through his guardian, and the plaintiff, in respect of forests in Mouza Sunderpani Jagir. The terms were reduced to writing and an agreement was signed on January 21, 1951. It is necessary to reproduce the agreement in extenso as it would be necessary to interpret it carefully.

"Deed of agreement executed by Shri Kumar Bharat Shah minor, guardian Shrimati Rani Umarmkar Sahiba, Jagirdar of Mouza Sunderpani.

Conditions of contract, area, forest, Mouza Sunderpani.

1. Out of the area of 1704.46 acres of Mouza Sunderpani Jagir contract of all the teak trees of more than 12 inches girth standing in the 1000 acres of the forest of big trees and excluding those teak trees which have girth upto 12 inches is given to contractor Badri Prasad Moolchand firm of Timarni for a sum of Rs. 17,000/- seventeen thousand rupees on payment of the amount in a lump sum.

2. In respect of the teak trees mentioned in paragraph No. 1 contractor Shri Badri Prasad deposited with me the total amount of Rs. 17,000/- seventeen thousand rupees, as under:—

Rs. 6,000/-, six thousand rupees on 27-12-50.

Rs. 11,000/- eleven thousand rupees on 21-1-51.

Receipts have been passed for depositing the above amount.

3. The transfer of the forest shall not be done without consent of the owner. The contractor shall have to pay Rs. 100/-, one hundred rupees, for transfer.

4. For the proper execution of work of the forest the felling of the forest shall have to be done from one side. Excluding the teak trees upto the girth of 12 inches the cutting of those teak trees which are above that girth shall have to be serially done.

5. After felling, the stumps of teak trees should be 3 inches high from the ground and slanting so as to drain the water off. It shall be necessary to prepare the stumps within a week. Till the stumps are passed the wood cannot be removed. Only the pairing can be done. The coupe guard shall make a hammer mark of passing on the stump and end of the paired wood.

6. The contractor shall have to get the transit of goods done by the coupe guard. The contractor shall have to do the transit of goods through the licence book and submit the monthly accounts. Without licence no goods shall be transported out of the forest.

7. The contractor shall have to take care of the teak trees of 12 inches girth standing in the forest. If damage is caused proper penalty shall be charged.

8. The contractor can appoint an agent with permission.

9. The contractor shall have to deposit Rs. 100/-, one hundred rupees for properly preparing the stumps of the teak trees of the forest before starting the work. This amount shall be returned on completion of the work if the stumps are properly prepared otherwise the expenses which may be incurred shall be deducted.

10. The contractor shall be responsible for any damage caused to the forest by the contractor or his agent and he shall have to pay the penalty.

11. The period of the contract shall be 3 years, i.e., from 27-12-50 to 27-12-1953.

Hence the agreement in execution and the same is genuine. The contractor and the owner of the forest shall be bound by this."

On January 22, 1951, the Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act 1 of 1951) — hereinafter referred to as the Act — received the assent of the President and was published in the Gazette on January 26, 1951. The plaintiff started working under the contract in March, 1951. On March 31, 1951, a notification was issued vesting the estates in the State and the State Government prohibited the plaintiff from cutting timber in exercise of the rights under the contract. Apparently negotiations took place between the State Government and the plaintiff, and on February 1, 1955, the Divisional Forest Officer wrote to the plaintiff as follows:

"Subject :—Contract of big trees of Sunderpani village of Makrai State.

Reference :— Memo No. 5424-4339-II, dated 21-10-54 of the Forest Department of Madhya Pradesh Government.

Kindly inform whether you are ready to pay further Rs. 17,000 (seventeen thousand rupees), for the contract of big trees of Sunderpani village of Makrai Circle which (contract) is under dispute at present. This contract can be given to you on this compromise only. If you do not wish to pay this amount you may, in future, take any action you deem fit.

2. You may express your desire within seven days of the receipt of this letter. If you fail to do this it will be presumed that you are not inclined to make a mutual compromise.

3. On receipt of your reply the State Government will be informed."

It is this letter which the plaintiff contends was an offer and which he accepted by the following letter dated February 5, 1955:

"Subject: Contract of sale of teak-trees in Sunderpani Forest in Makrai Range.

Reference:—Your letter No. 180 dated 1-2-1955.

Dear Sir,

I am ready to pay Rs. 17,000 provided my claim to have the refund of Rs. 17,000 already paid, from Shri Bharatshah, the owner of the village or any other relief consequential to the judgment of that case remains unaffected. I reserve my right to claim the said or like amount. Subject to those conditions I shall pay Rs. 17,000 as required in your above referred letter."

By memorandum dated October 24, 1956, the Government wrote to the plaintiff as follows:

"Reference:— Your application dated 12-9-56, addressed to the Minister for Forest, Madhya Pradesh.

Government regret that the request made in your application under reference cannot be acceded to. Your application has, therefore, been rejected."

This application dated September 12, 1956, is not included in the printed record but the plaintiff states that it is by this memorandum that the Government finally repudiated its obligations under the contract.

Thereupon the plaintiff filed the suit praying for a declaration that the rights granted to the plaintiff under the licence dated January 21, 1951 had not been affected by the vesting of the estates in the States under the Act. In the alternative he prayed that he was entitled to

specific performance and delivery of the contract which was completed on February 5, 1955. He further prayed that in case he was not entitled to these reliefs, Rs. 50,000 damages be awarded against the State.

3. Three points have been raised before us:

(1) that the forest and trees did not vest in the State under the Act;

(2) that even if they vested, the standing timber having been sold to the plaintiff did not vest in the State under the Act;

(3) that a new contract was completed on February 5, 1955, and the plaintiff was entitled to specific performance of the contract.

4. The Act and the rights of persons holding contracts to cut and take away timber and fruits of the trees have been the subject-matter of consideration by this Court on several occasions. But the learned counsel for the plaintiff contends that none of those cases cover the case of the plaintiff because, according to him none of those cases dealt with standing timber. He says that the plaintiff's contract is a contract for the sale of goods and the property in the goods had vested in him and, therefore, it stands on a different basis from the contracts construed in the earlier cases. The learned counsel for the respondents, on the other hand, maintains that the plaintiff's case is covered by the earlier decisions and all the arguments which he has advanced have been rejected by this Court in those cases.

5. The relevant statutory provisions of the Act are these:

"Section 3. Vesting of proprietary rights in the State.—

(1) Save as otherwise provided in this Act, on and from a date to be specified by a notification by the State Government in this behalf, all proprietary rights in an estate, mahal, alienated village or alienated land, as the case may be, in the area specified in the notification, vesting in a proprietor of such estate, mahal, alienated village, alienated land, or in a person having interest in such proprietary right through the proprietor, shall pass from such proprietor or such other person to and vest in the State for the purposes of the State free of all encumbrances.

(2) After the issue of a notification under sub-section (1), no right shall be acquired in or over the land to which

the said notification relates, except by succession or under a grant or contract in writing made or entered into by or on behalf of the State; and no fresh clearing for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the State Government in this behalf

Section 4. Consequences of the vesting:—

(1) When the notification under Section 3 in respect of any area has been published in the Gazette, then, notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force and save as otherwise provided in this Act, the consequences as hereinafter set forth shall, from the beginning of the date specified in such notification (hereinafter referred to as the date of vesting) ensue, namely:—

(a) all rights, title and interest vesting in the proprietor or any person having interest in such proprietary right through the proprietor in such area including land (cultivable or barren), grass-land, shrub jungle, forest, trees, fisheries, wells, tanks, ponds, water channels, ferries, pathways, village sites, hats, bazars and melas; and in all subsoil, including rights, if any, in mines and minerals, whether being worked or not, shall cease and be vested in the State for purposes of the State free of all encumbrances, and the mortgage debt or charge or any proprietary right shall be a charge on the amount of compensation payable for such proprietary right to the proprietor under the provisions of this Act.....

Section 5. Certain properties to continue in possession of proprietor or other person.—Subject to the provisions in Sections 47 and 63—

(a) all open enclosures used for agricultural or domestic purposes and in continuous possession for twelve years immediately before 1948-49; all open house-sites purchased for consideration; all buildings, Places of worship, well situated in and trees standing on lands included in such enclosures or house-sites or land appertaining to such buildings or places of ownership, within the limits of a village-site belonging to or held by the outgoing proprietor or any other person shall continue to belong to or be held by such proprietor or other person, as the case may be, and the land thereof with the areas appurtenant thereto shall be settled with him by the State Govern-

ment on such terms and conditions as it may determine;

(b) all private wells and buildings on occupied land belonging to or held by the outgoing proprietor or any other person shall continue to belong to or be held by such proprietor or other person;

(c) all trees standing on land comprised in a home-farm or home-stead and belonging to or held by the outgoing proprietor or any other person shall continue to belong to or held by such proprietor or other person;

(d) all trees standing on occupied land other than land comprised in home-farm or homestead and belonging to or held by a person other than the outgoing proprietor shall continue to belong to or be held by such person;

(e) all tanks situate on occupied land and belonging to or held by the outgoing proprietor or any other person shall continue to belong to or held by such proprietor or other person;

(f) all tanks, belonging to or held by the outgoing proprietor which are situate on land other than village site or occupied land and in which no person other than such proprietor has any rights of irrigation, shall belong to or be held by such proprietor;

(g) all tanks and embankments (bandhana) belonging to or held by the outgoing proprietor or any other person which are situate on land other than village site or occupied land and the beds of which are under cultivation of such proprietor or such other person shall belong to or be held by such proprietor or such other person and the land under such tanks and embankments shall be settled with such proprietor or such other person on such terms and conditions as the State Government may determine;

(h) all groves wherever situate and recorded in village papers in the name of the outgoing proprietor or any other person shall continue to belong to or be held by such proprietor or such other person and the land under such groves shall be settled with such proprietor or such other person by the State Government on such terms and conditions as it may determine.

Section 6. Certain transfer to be void.

(1) Except as provided in sub-section (2), the transfer of any rights in the property which is liable to vest in the State under this Act made by the proprietor at any time after the 16th March, 1950, shall, as from the date of vesting, be void."

Let us now look at the decision of this Court and see what has been laid down therein. In *Chhotabhai Jethabhai Patel v. State of Madhya Pradesh*, 1953 SCR 476 at pp. 479, 481, 483 = (AIR 1953 SC 108 at pp. 109-110) which we may mention has since been overruled, the contract was in respect of the right to pluck, collect and carry away tendu leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and other species of trees and bamboos. The Court observed:

"It is clear from the provisions in the impugned Act that only those rights of the proprietor vest in the State which the proprietor had on the specified date ... The scheme of the Act as can be gathered from the provisions referred to above makes it reasonably clear that whatever was done before 16th March, 1950, by the proprietors by way of transfer of rights is not to be disturbed or affected, and that what vests in the State is what the proprietors had on the vesting date. If the proprietor had any rights after the date of vesting which he could enforce against the transferee such as a lessee or a licensee those rights would no doubt vest in the State. In all these petitions, the several contracts and agreements were before the date of vesting, and many of them were prior even to the 16th March, 1950. The petitioners had taken possession of the subject matter of the contracts namely, tendu leaves, lac palsadies, teak, timber and hardwood, bamboos and miscellaneous forest produce."

The Court construed the contracts in that case thus:

"The contracts and agreements appear to be in essence and effect licenses granted to the transferees to cut, gather and carry away the produce in the shape of tendu leaves, or lac, or timber, or wood." The Court further held that the rights of the petitioners were not encumbrances within the meaning of the expression "free from encumbrances" in Section 3 (1) of the Act. The Court accordingly issued a writ prohibiting the State from interfering in any manner with the enjoyment of those rights by the petitioner. It may be mentioned that in that case the Court was dealing with an application under Article 32 of the Constitution.

6. *Chhotabhai's case*, 1953 SCR 476 = (AIR 1953 SC 108) was distinguished in *Ananda Behera v. State of Orissa*, (1955)

2 SCR 919 = (AIR 1956 SC 17) which again dealt with a petition under Article 32 of the Constitution. In (1955) 2 SCR 919 = (AIR 1956 SC 17) the subject-matter of licence was fishery rights and the Act which was construed was the Orissa Estate Abolition Act, 1951. The Court held that the rights ought to be acquired by the petitioner by their several purchases was not in respect of any future goods as claimed by them but was a license to enter on the land coupled with a grant to catch and carry away the fish, in other words, a profit à prendre which is immovable property within the meaning of the Transfer of Property Act read with Section 3 (25) of the General Clauses Act. The Court further held that as it was an oral licence it contravened Section 54 of the Transfer of Property Act, and therefore, no title or interest therein passed to the petitioners in that case. The Court distinguished Chhotabhai's case, 1953 SCR 476 = (AIR 1953 SC 108) on the following ground:

"It is necessary to advert to 1953 SCR 476 = (AIR 1953 SC 108) and explain it because it was held there that a right to "pluck, collect and carry away" tendu leaves does not give the owner of the right any proprietary interest in the land and so that sort of right was not an "encumbrance" within the meaning of the Madhya Pradesh Abolition of Proprietary Rights Act. But the contract there was to "pluck, collect and carry away" the leaves. The only kind of leaves that can be "plucked" are those that are growing on trees and it is evident that there must be fresh crop of leaves at periodic intervals. That would make it a growing crop and a growing crop is expressly excepted from the definition of "immovable property" in the Transfer of Property Act. That case is distinguishable and does not apply here."

7. In Mahadeo v. State of Bombay, 1959 Supp 2 SCR 339 = (AIR 1959 SC 735) which was again a petition under Article 32 of the Constitution, Chhotabhai's case, 1953 SCR 476 = (AIR 1953 SC 108) was not followed. In this case some of the proprietors had granted to the several petitioners rights to take forest produce, mainly tendu leaves, from the forests included in the Zamindaris belonging to the proprietors. The agreements conveyed to the petitioners in addition to the tendu leaves other forest produce like timber, bamboos, etc., the soil for

making bricks, and the right to build on and occupy land for the purpose of their business. These rights were spread over many years but in the case of a few the period during which the agreements were to operate expired in 1955. This Court held that the agreements required registration and pointed out that some aspects had not been brought to the notice of the Court in Chhotabhai's case, 1953 SCR 476 = (AIR 1953 SC 108). Hidayatullah, J., as he then was, speaking for the Court observed:

"But what was the nature of those rights of the petitioners? It is plain, that if they were merely contractual rights, then as pointed out in the two later decisions, in 1955-2 SCR 919 = (AIR 1956 SC 17), Shantabai's case, 1959 SCR 265 = (AIR 1958 SC 532) the State has not acquired or taken possession of these rights but has only declined to be bound by the agreements to which they were not a party. If, on the other hand, the petitioners were mere licensees, then also, as pointed out in the second of the two cases cited, the licenses came to an end on the extinction of the title of the licensors. In either case there was no question of the breach of any fundamental rights of the petitioners which could support the petitions which were presented under Article 32 of the Constitution."

8. The Court then construed the agreements in question and came to the conclusion that the agreements could not be said to be contracts of sale of goods simpliciter. Then the Court examined the provisions of the Central Provinces Land Revenue Act and came to the following conclusion:

"From this, it is quite clear that forests and trees belonged to the proprietors, and they were items of proprietary rights. The first of the two questions posed by us, therefore, admits of none but an affirmative answer.

If then the forest and the trees belonged to the proprietors as items in their 'proprietary rights' it is quite clear that these items of proprietary rights have been transferred to the petitioners. The answer to the second question is also in the affirmative. Being a "proprietary right" it vests in the State under Ss. 3 and 4 of the Act. The decision in Chhotabhai's case, 1953 SCR 476 = (AIR 1953 SC 108) treated these rights as bare licenses, and it was apparently given per incuriam, and cannot therefore be followed."

It seems to us that this decision concludes the controversy before us. This decision was followed in *State of Madhya Pradesh v. Yakinuddin*, (1963) 3 SCR 13 = (AIR 1962 SC 1916). Various agreements were constructed in that case; one agreement was to propagate lac, another agreement was to collect tendu leaves, and another agreement was with respect to a right to collect fruits and flowers of Mahua trees. It was contended that these rights were saved in view of the provisions of Section 6 of the Act, but this contention was negatived. Sinha, C. J. speaking for the Court, observed that the distinction between a bare licence and a licence coupled with grant or profit *à prendre* was irrelevant because "whatever may have been the nature of the grant by the outgoing proprietors in favour of the respondents, those grants had no legal effect as against the State, except in so far as the State may have recognised them. But the provisions of the Act leave no manner of doubt that the rights claimed by the respondents could not have been enforced against the State, if the latter was not prepared to respect those rights and the rights created by the transactions between the respondent and their grantors did not come within any of the saving clauses of Section 5.

Earlier he had observed that

"any person claiming some interest as a proprietor or as holding through a proprietor in respect of any proprietary interest in an estate has got to bring his interest within Section 5, because on the date of vesting of the estate, the Deputy Commissioner, takes charge of all lands other than occupied lands and homestead, and of all interests vesting in the State under Section 3. Upon such taking over of possession, the State becomes liable to pay the compensation provided for in Section 8 and the succeeding sections. The respondents have not been able to show that their interest comes under any of the clauses aforesaid of Section 5."

9. The last case in which this Act was construed was *Mulamchand v. State of Madhya Pradesh*, Civil Appeal No. 393 of 1965, D/- 20-2-1968 = (reported in AIR 1968 SC 1218). In that case *Mulamchand* had purchased a right to pluck, collect and remove forest produce like lac, tendu leaves, etc., from the proprietors of the different *Malguzari* jungles. This Court followed (1963) 3 SCR 13 = (AIR 1962 SC 1916) and negatived the claim of *Mulamchand* to exercise his rights under the agreement.

10. In view of these cases it is too late in the day to contend that the forest and the trees did not vest in the State under the Act.

11. There is no force in the contention of the learned counsel that under the contract the plaintiff had become owner of trees as goods. It is true that trees which are agreed to be severed before sale or under the contract of sale are "goods" for the purposes of the Sale of Goods Act. But before they cease to be "proprietary" right or interest in proprietary rights within the meaning of Sections 3 and 4 (a) of the Act they must be felled under the contract. It will be noticed that under Clause 1 of the contract the plaintiff was entitled to cut teak trees of more than 12 inches girth. It had to be ascertained which trees fell within that description. Till this was ascertained, they were not "ascertained goods" within Section 19 of the Sale of Goods Act. Clause 5 of the contract contemplated that stumps of trees, after cutting had to be 3 inches high. In other words, the contract was not to sell the whole of the trees. In these circumstances property in the cut timber would only pass to the plaintiff under the contract at the earliest when trees are felled. But before that happened the trees had vested in the State.

12. This brings us to the last point, namely, whether a new contract was concluded between the Government and the plaintiff. It is extremely doubtful whether the letter dated February 1, 1955, is an offer. It seems to be an invitation to the plaintiff to make offer. Be that as it may, even if it is treated as an offer there was no unconditional acceptance by the letter dated February 5, 1955. The plaintiff expressly reserved his right to claim a refund of Rs. 17,000. According to the letter of the Divisional Forest Officer, dated February 1, 1955, the plaintiff had to give up his claim to Rs. 17,000 which he had already paid and had to pay a further sum of Rupees 17,000. The High Court in our opinion, rightly held that the alleged acceptance of the offer made on February 1, 1955, was conditional and qualified.

13. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 713

(V 57 C 143)

(From: Punjab)*

**J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.**

Malkiat Singh and another, Appellants
v. The State of Punjab, Respondent.

Criminal Appeal No. 186 of 1966, D/-
8-11-1968.

Essential Commodities Act (1955), Sections 8, 7A, 7 and 3 — Order under Section 3 — Punjab Paddy (Export Control) Order (1959) Para 2 — Preparation to commit offence — Not punishable under Act — Preparation and attempt to commit offence — Distinction — Decisive test — Seizure of truck with paddy in Punjab territory — No export within meaning of para 2 — Conviction under Section 7 held illegal — Cri. Revn. No. 263 of 1965 and Cri. Misc. No. 224 of 1965, D/- 4-11-1965 (Punj), Reversed.

There is no provision in the Act which makes a preparation to commit an offence punishable. (Para 4)

As a matter of law a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the actus reus of a criminal attempt. The sufficiency of the actus reus is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it. If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket, but if he bends down near the stack and lights a match which he extinguishes on

* (Cri. Revn. No. 263 of 1965 and Cri. Misc. No. 224 of 1965, D/- 4-11-1965 — Punj.)

perceiving that he is being watched, he may be guilty of an attempt to burn it. (Para 4)

The test for determining whether the act of the accused person constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. (Para 4)

The truck carrying 75 bags of paddy weighing about 140 maunds was stopped by the Sub-Inspector of Food and Supplies Department at Samalkha Barrier which is 32 miles from Delhi. Delhi-Punjab boundary was, at the relevant point of time, at about the 18th mile from Delhi. The truck as also the bags were taken into possession by the Sub-Inspector and accused persons were prosecuted for contravention of the Punjab Paddy (Export Control) Order. It was alleged by the prosecution that the consignment of paddy was booked from Malerkotla to Delhi. In the trial the driver, one of the accused, admitted that he was given the paddy for being transported to Delhi:

Held, that the accused persons could not be convicted under Section 7 as there was no contravention of the Order. The truck loaded with paddy being seized at Samalkha well inside the Punjab boundary there was no "export of paddy" within the meaning of Para 2 (a) of the Order. There was merely a preparation on the part of the accused to commit the offence of export. It was quite possible that the accused might have been warned that they had no licence to carry the paddy and they might have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey. Cri. Revn. No. 263 of 1965 and Cri. Misc. No. 224 of 1965, D/- 4-11-1965 (Punj), Reversed.

(Paras 4 and 5)

Pritam Singh Safeer, Advocate, for Appellants; M/s. Harbans Singh and R. N. Sachthley, Advocates, for Respondent.

The following Judgment of the Court was delivered by:

RAMASWAMI, J. — This appeal is brought, by special leave, from the judgment of the Punjab High Court dated November 4, 1965 by which Criminal Revision Petition No. 263 of 1965 and Criminal Miscellaneous Case No. 224 of 1965 were dismissed.

2. The case of the prosecution is that on October 19, 1961 Sub-Inspector Banarsi Lal Food and Supplies Department was present at Smalkha Barrier along with Head Constable Badan Singh and others. The appellant Malkiat Singh then came driving truck No. P. N. U. 967. Babu Singh was the cleaner of that truck. The truck carried 75 bags of paddy weighing about 140 maunds. As the export of paddy was contrary to law, the Sub-Inspector took into possession the truck as also the bags of paddy. It is alleged that the consignment of paddy was booked from Malerkotla on October 18, 1961 by Qimat Rai on behalf of M/s. Sawan Ram Chiranji Lal. The consignee of the paddy was Messrs. Devi Dayal Brij Lal of Delhi. It is alleged that Qimat Rai also gave a letter, Ex. P-3 addressed to the consignee, Sawan Ram and Chiranji Lal were partners of Messrs. Sawan Ram Chiranji Lal and they were also prosecuted. In the trial court Malkiat Singh, admitted that he was driving the truck which was loaded with 75 bags of paddy and the truck was intercepted at Samalkha Barrier. According to Malkiat Singh, he was given the paddy by the Transport Company at Malerkotla for being transported to Delhi. The Transport Company also gave him a letter assuring him that it was an authority for transporting the paddy. But it later transpired that it was a personal letter from Qimat Rai to the Commission agents at Delhi and that it was not a letter of authority. Babu Singh admitted that he was sitting in the truck as a cleaner. The trial Court convicted all the accused persons, but on appeal the Additional Sessions Judge set aside the conviction of Sawan Ram Chiranji Lal and affirmed the conviction of Qimat Rai and of the two appellants. The appellants took the matter in revision to the High Court but the revision petition was dismissed on November 4, 1965.

3. It is necessary at this stage to reproduce the relevant provisions of the Essential Commodities Act, 1955 (Act 10 of 1955). Section 3 (1) is to the following effect:

"3. (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribu-

tion thereof and trade and commerce therein."

Section 7 states:

"7. (1) If any person contravenes any order made under Section 3—

(a) he shall be punishable—

(i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of the section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which may extend to three years and shall also be liable to fine:

Provided that if the Court is of opinion that a sentence of fine only will meet the ends of justice, it may, for reasons to be recorded, refrain from imposing a sentence of imprisonment; and

(b) any property in respect of which the order has been contravened or such part thereof as the Court may deem fit including in the case of an order relating to food-grains, any packages, coverings or receptacles in which they are found and any animal, vehicle, vessel or other conveyance used in carrying food-grains shall be forfeited to the Government:

Provided that if the Court is of opinion that it is not necessary to direct forfeiture in respect of the whole or, as the case may be, any part of the property or any packages, coverings or receptacles or any animal, vehicle, vessel or other conveyance, it may, for reasons to be recorded, refrain from doing so.

(2) If any person to whom a direction is given under clause (b) of sub-section (4) of Section 3 fails to comply with the direction he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."

By Section 2 of Punjab Act No. 34 of 1950 the Punjab Legislature added a new section, Section 7-A in the Central Act No. 10 of 1955 which reads as follows:

"Forfeiture of certain property used in the commission of the offence.—Whenever any offence relating to foodstuffs which is punishable under Section 7 has been committed, the Court shall direct that all the packages, coverings or receptacles in which any property liable to be forfeited under the said section is found and all the animals, vehicles, vessels or other conveyances used in carrying the said property shall be forfeited to the Government."

On January 3, 1959 the Central Government promulgated the Punjab Paddy (Export Control) Order, 1959 in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955. Para 2 of the Order states :

"2. Definitions — In this Order unless the context otherwise requires, —

- (a) 'export' means to take or cause to be taken out of any place within the State of Punjab to any place outside the State.
- (b) 'paddy' means rice in husk.
- (c) 'State Government' means the Government of the State of Punjab."

Para 3 of the Order provides as follows:

"Restrictions on export of paddy. — No person shall export or attempt to export or abet the export of paddy except under and in accordance with a permit issued by the State Government or any officer authorised by the State Government in this behalf :

Provided that nothing contained herein shall apply to the export of paddy, —

- (i) not exceeding five seers in weight by a bona fide traveller as part of his luggage; or
- (ii) on Government account; or
- (iii) under and in accordance with Military Credit Notes."

4. The question to be considered in this appeal whether upon the facts found by the lower Courts any offence has been committed by the appellants. It is not disputed that the truck carrying the paddy was stopped at Samalkha Barrier which is 32 miles from Delhi. It is also not disputed that the Delhi-Punjab boundary was, at the relevant point of time, at about the 18th mile from Delhi. It is therefore evident that there has been no export of paddy outside the State of Punjab boundary. It follows therefore that there was no export of paddy within the meaning of Para 2 (a) of the Punjab Paddy (Export Control) Order, 1959. It was however argued on behalf of the respondent that there was an attempt on the part of the appellants to transport paddy to Delhi, and so there was an attempt to commit the offence of export. In our opinion, there is no substance in this argument. On the facts found, there was no attempt on the part of the appellants to commit the offence of export. It was merely a preparation on the part of the appellants and as a matter of law a preparation for committing an offence is different from attempt to commit it.

The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person may be convicted of an attempt to commit a crime he must be shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the *actus reus* of a criminal attempt. The sufficiency of the *actus reus* is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it. If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket but if he bends down near the stack and lights a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it. Sir James Stephen, in his Digest of Criminal Law, Article 50, defines an attempt as follows:

"an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case."

The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress the acts already done would be completely harmless. In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey. Section 8 of the Essential Commodities Act states that "any person who attempts to contravene, or abets a contravention of, any order made under Section 3 shall be deemed to have contravened that order." But there is no provision in the Act which makes a prepara-

tion to commit an offence punishable. It follows therefore that the appellants should not have been convicted under Section 7 of the Essential Commodities Act.

5. For these reasons we allow this appeal and set aside the conviction of the appellants under Section 7 of the Essential Commodities Act and the sentence of fine imposed upon each of them. We also set aside the conviction and sentence of Qimat Rai and the order of forfeiture passed by the trial Magistrate with regard to 75 bags of paddy and truck No. P. N. U. 967. The fines, if paid by any of the convicted persons must be refunded.

Appeal allowed.

AIR 1970 SUPREME COURT 716 (V 57 C 144)

(From Patna: 1962 BLJR 774)

S. M. SIKRI AND R. S. BACHAWAT, JJ.
Rama Shankar Singh and another, Appellants v. Mst. Shyamlatā Devi and others, Respondents.

Civil Appeal No. 23 of 1966, D/- 10-10-1968.

(A) Contract Act (1872), Section 43 — Lease deed — Deed mentioning share of each lessee and annual rent for purpose of indicating what amount would be contributed by each of them towards rent jointly payable by them — Joint liability of the lessees however clearly indicated by the provision that the entire lease would be terminable on default of payment of rent for two consecutive years — Held having regard to Section 43 of the Contract Act, 1872 defendants 1 and 2 were jointly and severally liable to pay the rent — The High Court was in error in holding that defendant 2 was liable to pay only 5 anna share in the rent.

(Para 2)

(B) Tenancy Laws — Bihar Tenancy Act (8 of 1885), Section 184 — Suit instituted after expiry of period of limitation was liable to be dismissed though limitation was not pleaded in written statement — Absence of plea did not cause plaintiff any prejudice — Appellate Court could allow defendant to raise plea of limitation for first time. (Para 3)

(C) Tenancy Laws — Bihar Tenancy Act (8 of 1885), Section 193 — Lease giving lesses right to cut and appropriate trees of certain types and fruits and

flowers of certain fruit bearing trees — Held lease deed granted lease in respect of forest right only — Right to open roads and to construct buildings were incidental to the right to enjoy forest produce — Suit being for recovery of rent in respect of forest produce was governed by Article 2 (b) (i) of Schedule III to the Bihar Act — Special period of limitation applied though claim for arrears of rent was founded on a registered instrument — (1908) 7 Cal LJ 152 & AIR 1915 Cal 135 & (1892) ILR 19 Cal 1 (FB), Rel. on.

(Para 4)

(D) Tenancy Laws — Bihar Tenancy Act (8 of 1885), Sections 193 and 67 — Section 67 overrides contractual stipulation in respect of rent. (Para 5)

Cases Referred: Chronological Paras
(1915) AIR 1915 Cal 135 (V 2)=

19 Cal WN 415, Bande Ali Fakir

v. Amud Sarkar

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(1908) 7 Cal LJ 152, Abdullah v.

Asraf Ali

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(1892) ILR 19 Cal 1 (FB), Mackenzie

v. Haji Syed Muhammad Ali Khan

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Mr. U. P. Singh, Advocate, for Appellants; Mr. Sarjoo Prasad, Senior Advocate, (Mr. R. C. Prasad, Advocate, with him), for Respondents Nos. 1 and 2.

The following Judgment of the Court was delivered by

BACHAWAT, J.:— The plaintiffs, defendants 5 to 7 and the ancestor of defendants 8 to 13 were the sixteen anna proprietors of certain villages in district Shahbad. By a registered deed dated October 3, 1944 they leased the forest rights in the villages to the defendants 1 and 2 for a period of 9 years ending Bhado 30, 1360 Fasli corresponding to September 2, 1953 at an annual rent of Rs. 16000/-. The plaintiffs had 6 annas share in the proprietary rights in the villages and Rs. 6000/- was fixed as their share of the annual rent. The defendant No. 3 was a transferee of a portion of lessees' interest from defendant 1. On September 3, 1954 the plaintiff instituted a suit claiming a decree against defendants 1 and 2 for Rs. 36,405/- on account of their share of the rent for 1356 to 1360 Faslis and interest thereon at 1 per cent per annum. During the pendency of the suit, defendant 2 died and his heirs were substituted as defendants 2 and 2 (a). The Trial Court decreed the suit on contest against defendants 2 and 2 (a) and ex parte against defendants 1 and 3 with future interest and costs. On appeal, the High Court held that (1) as defendant 2

had only 4 anna share in the lessees' interest as mentioned in the lease deed and as he had acquired another one anna share in the lessees' interest subsequently, defendants 2 and 2 (a) were liable to pay only 5 annas share in the annual rent, that is to say, Rs. 1875/- per annum and defendants 1 and 3 were liable to pay the balance rent; (2) that as the lease deed granted a lease of forest rights, the suit was governed by Article 2 (b) (i) of Schedule III of the Bihar Tenancy Act, 1885 and consequently the suit in respect of rent for 1356 and 1357 Faslis was barred by limitation, and (3) in view of Section 67 of the Bihar Tenancy Act the plaintiffs could claim interest at the rate of 6¼ per cent per annum only. Accordingly the High Court allowed the appeal in part and passed a decree against defendants 2 and 2 (a) for 5 annas share of the rent for 1358 to 1360 Faslis and a separate decree against defendants 1 and 3 for the balance rent for those years with interest at 6¼ per cent per annum. The plaintiffs have filed the present appeal after obtaining a certificate from the High Court. The appellants challenge the correctness of all the findings of the High Court.

2. Clause 3 of the lease deed provided:

"that the lessees shall pay an annual Zama of Rs. 16,000/- in respect of the thika property on 1st Kuar of every year. If for any reason, the rent for two consecutive years shall fall into arrears, in that case the lessors shall be competent to enter khas possession and occupation of the thika property and to this the lessors (?) shall have no objection and in case of making default the lessees shall pay an interest at the rate of Re. 1/- per cent till the date of payment. The lessors either separately or jointly shall realise (the amount) to the extent of their respective shares according to their choice by instituting (sic) in Court with interest thereon mentioned above from the persons and properties of the lessees."

At the end of the lease it was stated that defendant 1 had twelve anna share in the lessees' interest and his share of the rent was Rs. 12,000/-. It was also stated that defendant 2 had 4 anna share in the lessees' interest and his share of the rent was Rs. 4,000/-. Clause 3 of the deed clearly shows that the lessees were jointly liable to pay the annual rent of Rs. 16,000/-. The deed mentioned the share of each lessee and the annual rent for the purpose of indicating what

amount would be contributed by each of them towards the rent jointly payable by them. The joint liability of the lessees is clearly indicated by the provision that the entire lease would be terminable on default of payment of rent for two consecutive years. Having regard to Section 43 of the Indian Contract Act, 1872 defendants 1 and 2 were jointly and severally liable to pay the rent. It was not disputed before the High Court that the liability of defendant 3 stood on the same footing. The High Court was in error in holding that defendant 2 was liable to pay only 5 anna share in the rent.

3. The High Court was right in allowing the defendant to raise the point of limitation, though the plea was not taken in the written statement. Under Section 184 of the Bihar Tenancy Act a suit instituted after the expiry of the period of limitation is liable to be dismissed though limitation has not been pleaded. Learned Counsel for the appellants could not tell us what further evidence his clients could adduce on this point. In the circumstances, the absence of the plea of limitation in the written statement did not cause the appellants any prejudice.

4. On a careful reading of the lease deed, we are satisfied that it granted a lease in respect of forest rights only. It gave the lessees the right to cut and appropriate trees of certain types and the fruits and flowers of certain fruit bearing trees. The right to open roads and to construct buildings were incidental to the right to enjoy the forest produce. The suit is for recovery of rent in respect of forest produce and having regard to Sec. 193 of the Bihar Tenancy Act is governed by Article 2 (b) (i) of the Schedule III thereto. This view is supported by the decisions of the Calcutta High Court in *Abdulullah v. Asraf Ali* (1908) 7 Cal LJ 152 and *Bande Ali Fakir v. Amud Sarkar* 19 Cal WN 415 = (AIR 1915 Cal 135). The special period of limitation applies though the claim for arrears of rent is founded on a registered instrument, (see *Mackenzie v. Haji Syed Muhammad Ali Khan*, (1892) ILR 19 Cal 1 (FB)). The High Court was right in holding that the suit in respect of rent for Fasli years 1356 and 1357 was barred by limitation.

5. Having regard to Section 193 all the provisions of the Act applied to a suit. Section 67 (1) provides that arrears of rent shall bear simple interest at the rate of 6¼% per annum. The section overrides the contractual stipulation that

the interest would be payable at 1% per annum. The High Court was right in holding that interest was payable at the rate of 6¼ per cent per annum only.

6. In the result, the appeal is allowed in part and it is declared that defendants 1, 2, 2 (a) and 3 are jointly and severally liable to pay to the plaintiffs Rs. 6,000/- per annum on account of the plaintiffs' share of rent for Fasli years 1358, 1359 and 1360 and simple interest thereon at the rate of 6¼% per annum up to date. We direct that a decree be drawn up accordingly. The decree will carry future interest on the principal sum at the rate of 6 per cent per annum. The aforesaid defendants will pay to the plaintiffs proportionate costs of the suit in the Trial Court. The parties will bear their own costs of the appeal in the High Court and in this Court. This decree will be without prejudice to the payments, if any, made by the defendants to the plaintiffs after the institution of the suit.

Appeal partly allowed.

AIR 1970 SUPREME COURT 718 (V 57 C 145)

(From: Andhra Pradesh)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

The State of Andhra Pradesh, Appellant v. Yedla Perayya, Respondent.

Criminal Appeal No. 195 of 1966, D/- 4-11-1968.

Andhra Pradesh (Andhra Area) Forest Act (5 of 1892), Ss. 43, 47 (as amended by Act 11 of 1963) — Vehicle used in commission of offence — Magistrate is obliged to confiscate vehicle but not so the appellate Court.

The Legislature had originally conferred a discretion both upon the Magistrate and the Court of Appeal to pass appropriate order with regard to the disposal of property used in the commission of the offence as may be just. The Legislature has thereafter amended Section 43 by Act 11 of 1963 and made it obligatory upon the Magistrate to confiscate the property or the vehicle used in the commission of such offence. No such restriction has, however, been placed upon the power of the appellate Court. There

is no warrant for implying that the power conferred by Section 47 of the Act upon the appellate Court is subject to some unexpressed limitation. Assuming that the statute which enjoins the Magistrate to confiscate the vehicle used in the commission of the forest offence even when it is used without the knowledge or consent of the owner, is valid under Article 19 (1) (e) of the Constitution. Section 47 of the Act enables the Court of Session and the High Court to make an appropriate order with regard to the vehicle which is just. (Paras 4, 5)

Mr. P. Ram Reddy, Senior Advocate, (Mr. G. S. Rama Rao, Advocate, with him) for Appellant; Mr. A. V. Rangam, Miss Sen, Miss A. Vedavalli and Miss Subhashini, Advocates, for Respondent.

The following judgment of the Court was delivered by

SHAH, J.:— Motor Lorry No. A. P. P. 4695 belonging to the respondent Yedla Perayya was seized by the Forest Range Officer, Gokavaram, early in the morning of December 25, 1963, when it was being used without a license for carrying eight Yegisi logs on Rajahmundry-Gokavaram Road. The driver of the motor lorry and another person were tried before the 2nd Additional, 2nd Class Magistrate, Rajahmundry on a complaint by the Forest Range Officer for offences under Secs. 35 and 36 of the Andhra Pradesh Forest Act and the rules framed thereunder. The two accused admitted that they had committed the offence of illicit transportation of timber, and on their plea of guilty they were convicted. The respondent applied to the Trial Magistrate for an order releasing the motor lorry on the plea that the offence of transportation of timber was committed without his knowledge and that the value of the timber seized was not more than Rs. 50/- at the relevant time. The learned Magistrate observed:

"After careful perusal of the deposition of P. W. 1, I find that there is nothing in it to indicate that the petitioner knowingly lent his lorry for the illicit transport of timber on the night of 24-12-63. There is also nothing in the case records to show that the petitioner allowed the lorry to illicitly transport the timber on the above date. I accordingly hold that the petitioner cannot be said to have knowingly allowed his lorry to illicitly transport the timber."

But the learned Magistrate was of the view that by Section 43 of the Andhra

* (Criminal Revn Case No. 382 of 1964 D/- 25-2-1966 — Andh Pra.)

Pradesh Forest Act, where it was proved that the value of the timber transported exceeded Rs. 50/-, he was enjoined to direct confiscation of the vehicle in which the forest produce was being transported without a license. In his view the value of eight logs of timber seized from the lorry was Rs. 311/- at the market rate in Rajahmundry.

2. In appeal by the respondent to the Court of Session at Rajahmundry the order of confiscation was set aside and the High Court of Andhra Pradesh confirmed the order of the Court of Session. The State of Andhra Pradesh has appealed to this Court with certificate granted under Article 134 (1) (c) of the Constitution.

3. The Andhra Pradesh (Andhra Area) Forest Act 5 of 1882 provides by Section 41 that when there is reason to believe that a forest offence has been committed in respect of any timber or forest produce, such timber or produce together with all tools, ropes, chains, boats, vehicles and cattle used in committing any such offence may be seized by any Forest officer or Police-officer. Section 43 as amended by Act 11 of 1963 provides:

"Where a person is convicted of any forest offence, the Court sentencing him shall order confiscation to the Government of the timber or the forest produce in respect of which such offence was committed, and also any tool, boat, cattle and vehicle and any other article used in committing such offence:

Provided that it shall be open to such Court not to order confiscation of any tool, boat, cattle, vehicle or any other article used in committing such offence when the value of the timber or the forest produce in respect of which such offence was committed does not exceed fifty rupees."

It may be observed that before the Forest Act was amended by Act 11 of 1963, the Magistrate was not obliged to direct confiscation of the articles, vehicles, cattle, tools or boats used for committing a forest offence.

4. The Trial Magistrate was of the view that after the amendment of the Forest Act by Act 11 of 1963 he had no option and he was bound on conviction of the offender in respect of any forest offence to direct confiscation of the vehicle used in the commission of such offence. Counsel for the respondent contended that if the interpretation put by the Trial Magistrate upon Section 43 as

amended is correct the enactment imposes an unreasonable restriction upon the fundamental right of the owner of the vehicle declared by Article 19 (1) (e) of the Constitution, and is on that account void. Counsel urged that a statute which imposes upon a person who has himself not committed any offence or infraction of the law liability to forfeit his valuable property must be regarded as unreasonable. It was urged that if a vehicle is stolen and then used for commission of a forest offence, or is borrowed by some person for a legitimate purpose and then used without the consent or knowledge of the owner for committing an offence under the Forest Act, or where with a view to involve the owner of the vehicle into a forest offence, forest produce is surreptitiously introduced into the vehicle, and the vehicle is liable to be forfeited, the provision making it obligatory to impose the penalty of forfeiture of the vehicle must be deemed to impose an unreasonable restriction on the owner of the vehicle and is *ultra vires* on that account. It is not necessary for the purpose of this case to express any opinion on that part of the case. Assuming that the statute which enjoins the Magistrate to confiscate the vehicle used in the commission of the forest offence, even when it is used without the knowledge or consent of the owner, is valid, in our judgment, Section 47 of the Act enables the Court of Session and the High Court to make an appropriate order with regard to the vehicle which is just. That section provides:

"Any person claiming to be interested in property seized under Section 41, may, within one month from the date of any order passed under Section 43, 44 or 45, present an appeal therefrom which may be disposed of in the manner provided by Sec. 419, Code of Criminal Procedure." The reference to Section 419 is to the Code of Criminal Procedure of 1872 in force when the Andhra Pradesh Forest Act 5 of 1882 was enacted. Section 419 of the Code of 1872 is now substituted by Section 520 of the Code of Criminal Procedure, 1898, and by Section 520 power is conferred, *inter alia*, upon the Court of Appeal to direct that any order passed under Sections 517, 518 or 519 by the Court subordinate thereto be stayed pending consideration by the Court of Appeal, and that Court may modify, alter or annul such order and make any further order that may be just. Section 43 of the Andhra Pradesh Forest Act does

not restrict the power of the Appellate Court to pass any appropriate order as may be just regarding disposal of the property. The Court of Session in the present case has on the finding recorded by the Magistrate and confirmed by it passed an order which is essentially a just order, and that has been confirmed by the High Court.

5. The Legislature had originally conferred a discretion both upon the Magistrate and the Court of Appeal to pass appropriate order with regard to the disposal of property used in the commission of the offence as may be just. The Legislature has thereafter amended Section 43 by Act 11 of 1963 and made it obligatory upon the Magistrate to confiscate the property or the vehicle used in the commission of such offence. No such restriction has, however, been placed upon the power of the appellate Court and we will not be justified, having regard to the clear expression of the legislative intent, that the power is to be limited in the manner provided by Section 43. There is no warrant for implying that the power conferred by Section 47 of the Act upon the Appellate Court is subject to some unexpressed limitation.

6. The High Court was, therefore, right in holding that the motor lorry, belonging to the respondent, on the finding recorded by the Magistrate, was not liable to be confiscated.

7. The appeal therefore fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 720
(V 57 C 146)

(From: Bombay)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Security and Finance (P) Ltd. and another, Appellants v. Dattatraya Raghav Agge and others, Respondents.

Criminal Appeal No. 49 of 1967, D/- 8-11-1968.

Contempt of Courts Act (1952), S. 3
— Interference with due course of justice
— Authority having jurisdiction holding enquiry in good faith — Parallel enquiry imminent or pending—No contempt
— Filing of civil suit during pendency

*(Misc. Civil Appln. No. 13 of 1963, D/- 14-8-1964 Bom — at Nag.)

CN/CN/C148/68/BNP/A

of arbitration proceeding — Continuance of proceeding even after receipt of notice — No contempt — Civil Appeal No. 13 of 1963, D/- 14-8-1964 (Bom — at Nag.) Reversed — Arbitration Act (1940), Section 35.

An authority holding an inquiry in good faith in exercise of the powers vested in it by a statute is not guilty of contempt of Court, merely because a parallel inquiry is imminent or pending before a Court. To constitute the offence of contempt of Court, there must be involved some act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority or something calculated to obstruct or interfere with the due course of justice or the lawful process of the Court. (Para 5)

Where reference to arbitrator is made by a party in terms of the arbitration clause long before the institution of suit in Civil Court by another party to the dispute and even after the notice of institution of civil suit the proceedings before the arbitrator are continued, that does not constitute contempt of Court. Even assuming that the suit is competent and not barred by Section 32 and that the conditions prescribed by Section 35 namely, (1) that such legal proceedings must be upon the whole and not merely part of the subject-matter of the reference, and (2) that a notice of such a legal proceeding must be given to the arbitrator, are satisfied, the only effect is that the further proceedings before the arbitrator after the receipt of the notice are rendered invalid and there is no prohibition under Section 35 requiring the arbitrator not to carry on the arbitration proceedings after the receipt of the notice. Even assuming the continuance of arbitration proceedings to be improper, there is no contempt as the action of the parties to proceedings is in no way calculated to obstruct the course of justice or to prejudice the trial of the civil suit. Civil Appeal No. 13 of 1963, D/- 14-8-1963 (Bom.—at Nag.). Reversed; AIR 1953 SC 185 & AIR 1968 SC 1050, Foll.

(Paras 4, 5, 6)
Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1050 (V 55)=
Civil Appeal No. 1597 of 1967,
D/- 8-3-1968, Tukaram Caokar
v. S. N. Shukla 5
(1953) AIR 1953 SC 185 (V 40)=
1953 SCR 581= 1953 Cri LJ 911,
Rizwan-ul-Hasan v. State of Uttar
Pradesh 6

{1951} 1951 AC 482= 95 SJ 333,
Arthur Reginald Perera v. The
King

{1931} AIR 1931 Cal 257 (V 18)=
ILR 58 Cal 884= 32 Cri LJ 675,
Anantalal Singh v. Alfred Henry
Watson

{1900} 1900-2 QB 36= 69 LJQB
502, Reg v. Gray

Mr. Mohan Behari Lal, Advocate, for
Appellants; M/s. V. K. Sanghi and Ganpat
Rai, Advocates, for Respondents Nos. 1
and 2.

The Judgment of the Court was deliv-
ered by

RAMASWAMI, J.— This appeal is
brought by certificate from the judgment
of the Bombay High Court Nagpur Bench
dated August 14, 1964 by which the ap-
pellants were convicted for contempt of
Court of Civil Judge, Junior Division,
Nagpur and sentenced to pay a fine of
Rs. 200/- each. By the same judgment
respondent No. 3, Sri Ram Nath Vig was
also convicted for contempt and sentenc-
ed to pay a fine of Rs. 100/-.

2. It appears that a hire-purchase
agreement was entered into between the
appellants and respondent No. 1, on or
about August 12, 1959. Under that
agreement a motor truck was made avail-
able to respondent No. 1 for doing trans-
port business. The hire-purchase agree-
ment contained an arbitration clause for
settlement of disputes arising between
the parties. It appears that subsequently
disputes did arise between the parties and
a reference was made to an arbitrator
to settle the disputes. Respondent No. 3
Sri Ram Nath Vig who is a practising
lawyer in Delhi was the person named
as arbitrator in the arbitration agree-
ment itself and the dispute was submitt-
ed to him on or about June 25, 1962 at
the instance of the appellants. There-
after the arbitrator gave notice of the
reference and invited statements of the
parties. He fixed the hearing of the
arbitration matter before him on July 17,
1962. The case of respondent No. 1 is
that he did not receive notice of this
date from the arbitrator and therefore he
did not appear on the date fixed. The arbi-
trator adjourned the hearing of the re-
ference to another date, namely, August
29, 1962. The contention of respondent
No. 1 is that he was not given intima-
tion of this date also but this point is
controverted by the respondents. Res-
pondents Nos. 1 and 2 filed a Civil Suit
in the Court of Civil Judge, Senior Divi-

sion, Nagpur on August 30, 1962. In this
suit they claimed a declaration that the
hire-purchase agreement was brought
about by fraud and was not binding on
them on various grounds. The suit was
registered and the Court ordered sum-
mons to be issued to the two appellants.
Meanwhile, the arbitrator postponed the
hearing of the reference to September 15,
1962 and it is alleged that he issued fresh
notices to the parties on September 1,
1962. The hearing was again adjourned
to October 23, 1962 and it is said that
respondent No. 3 made an award on
October 24, 1962. It has been found by
the High Court that on October 18, 1962
a notice was issued by respondent No. 1
to the appellants and the arbitrator with
a copy of the plaint. This notice was re-
ceived by the appellants on October 22,
1962. In spite of this notice, evidence
was recorded by the arbitrator on Octo-
ber 23, 1962 and he made the award on
the next day directing respondent No. 1
to pay Rs. 20,400/-. The allegation of
the arbitrator is that he received the
notice sent on October 18, 1962 on the
next day of the award i.e., on October
25, 1962. It appears that in the civil suit
filed by respondents 1 and 2 which was
registered as Civil Suit No. 657 of 1962
on the file of the Civil Judge, Junior Divi-
sion, the first date of hearing was fixed
on October 15, 1962. On that date the
appellants filed an application under Sec-
tion 34 of the Arbitration Act for stay-
ing the proceedings before the Court. No
progress was made in the suit which was
adjourned to November 6, 1962 and again
to November 28, 1962 at the instance of
the appellants. Finally on November 28,
1962 the arbitrator informed respondent
No. 1 that he had made the award. On
these facts respondents 1 and 2 filed an
application under Section 3 of the Con-
tempt of Courts Act for action being
taken against the two appellants, res-
pondent No. 3 and one more person. Ac-
cording to respondents 1 and 2 the ap-
pellants and respondent No. 3 had com-
mitted contempt of Court in proceedings
with the arbitration reference in spite of
notice under Section 35 of the Arbitra-
tion Act being given and in spite of the
knowledge of the suit which was filed by
respondents 1 and 2. The application
was contested by the appellants as well
as the arbitrator. The case of the ap-
pellants was that the suit itself was not
sustainable and they were unaware that
participation in the arbitration proceed-
ings after receipt of notice was precluded

by law and that they honestly and bona fide believed that they were not expected to take any action after the receipt of the notice without direction from the arbitrator. It was for the arbitrator to take a decision in the matter and if the arbitrator decided to proceed with the arbitration, they only obeyed the orders of the arbitrator and therefore had not committed any contempt. The defence of respondent No. 3 was that in completing the arbitration and giving his award he was only performing his duty. He denied that it was necessary for him to await the result of the stay application alleged to have been made by respondent No. 1 in the Nagpur Court as he was of the view that the subject-matter in the Nagpur Court was not the whole subject-matter under arbitration. Respondent No. 3 denied that he had any bias or that he conducted the arbitration proceedings in order to defeat the object of the suit and to place an impediment in the conduct of the suit. The High Court rejected the contention of the appellants and of respondent No. 3 and held that the action of the appellants in participating in the arbitration proceedings and the conduct of respondent No. 3 constituted contempt of Court as the conduct of respondent No. 3 and of the appellants had a tendency to bring into contempt the proceedings before the Civil Court.

3. It is necessary at this stage to set out the relevant provisions of the Arbitration Act (X of 1940). Sections 32, 33, 34 and 35 are to the following effect:

"32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

"33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence, also, and it may pass such orders for discovery and particulars as it may do in a suit."

"34. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings, and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

"35. (1) No reference nor award shall be rendered invalid by reason only of commencement of legal proceedings upon the subject-matter of the reference but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire all further proceedings, in a pending reference shall, unless a stay of proceedings is granted under S. 34, be invalid.

(2) In this section the expression 'parties to the reference' includes any persons claiming under any of the parties and litigating under the same title."

4. In our opinion, the High Court was in error in holding that in the circumstances of this case the appellants and respondent No. 3 were guilty of contempt of Court. It is not disputed that there was an arbitration clause in the agreement between the appellants and respondent No. 1 and in terms of the arbitration clause respondents 1 and 2 had a right to refer the dispute to the arbitrator. It is also not disputed that a reference to the arbitrator was made by respondents 1 and 2 long before the institution of the civil suit. It is also apparent that in view of the admitted existence of the hire purchase agreement containing an arbitration clause the remedy of respondent No. 1 was to move the Civil Court under Section 33 of the Arbitration Act challenging the existence or validity of

the arbitration agreement and to have its effect determined. It was contended on behalf of the appellants that a separate suit was barred under Section 32 of the Arbitration Act. We do not wish to express any opinion on this point in the present case. Even on the assumption that the suit filed by respondents Nos. 1 and 2 in the Nagpur Court is competent, the question arises whether the arbitrator was bound to stay the proceedings before him after he got notice from respondents 1 and 2 of the institution of the civil suit. Section 35 of the Arbitration Act does not expressly prohibit the arbitrator from continuing the hearing of the reference but the only effect of Section 35 is that "all further proceedings in a pending reference shall, unless a stay of proceedings is granted under Section 34, be invalid". For this consequence to follow, however, two important and distinct conditions must be satisfied, namely, (1) that such legal proceedings must be upon the whole and not merely part of the subject-matter of the reference, and (2) that a notice of such a legal proceeding must be given to the arbitrator. We do not wish to express any opinion as to whether these conditions were satisfied in this case. But even on the assumption that these conditions were satisfied the only effect is that the further proceedings before the arbitrator after the receipt of the notice are rendered invalid and there is no prohibition under Section 35 requiring the arbitrator not to carry on the arbitration proceedings after the receipt of the notice.

5. It is well established that an authority holding an inquiry in good faith in exercise of the powers vested in it by a statute is not guilty of contempt of Court, merely because a parallel inquiry is imminent or pending before a Court. To constitute the offence of contempt of Court, there must be involved some 'act done or writing published calculated to bring a court or a Judge of the Court into contempt or to lower his authority' or 'something calculated to obstruct or interfere with the due course of justice or the lawful process of the court' — (See *Reg v. Cray*, (1900) 2 QB 36 and *Arthur Reginald Perers v. The King*, 1951 AC 482). In *Tukaram Gaokar v. S. N. Shukla*, Civil Appeal No. 1597 of 1967, D/- 8-3-1968 = (reported in AIR 1968 SC 1050), it was held by this Court that the initiation and continuance of proceedings for imposition of penalty on the appellant for his alleged complicity in the smuggling

of gold under Section 112 (b) of the Customs Act, 1962 did not amount to contempt of Court though his trial in a Criminal Court for offences under Section 135 (b) of that Act and other similar offences was imminent and identical issues would arise in the proceedings before the customs authorities and in the trial before Criminal Court.

6. In *Riswan-ul-Hasan v. State of Uttar Pradesh* 1953 SCR 581 at p. 588 = (AIR 1953 SC 185 at p. 187) this Court stated:

"As observed by Rankin C. J., in *Anantalal Singha v. Alfred Henry Watson*, (1931) ILR 58 Cal 884 at p. 895 = (AIR 1931 Cal 257 at p. 261), the jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice and that the purpose of the Court's action is a practical purpose and it is reasonably clear on the authorities that the Court will not exercise its jurisdiction upon a mere question of propriety."

It follows therefore that even if the action of the appellants and respondent No. 1 in this case is assumed to be improper it will not justify the finding that they were guilty of contempt of Court when their action was in no way calculated to obstruct the course of justice or to prejudice the trial of the Civil Suit.

7. For these reasons we hold that this appeal should be allowed and the judgment of the High Court of Bombay, Nagpur Bench, dated August 14, 1964 should be set aside and the conviction and sentences imposed on the appellants should be quashed. The arbitrator, respondent No. 3 has not filed an appeal but in view of our finding with regard to the appellants it is necessary that the conviction of respondent No. 3 and the sentence imposed upon him should also be quashed. The fines, if already paid by respondent No. 3 and the appellants should be refunded.

Appeal allowed.

AIR 1970 SUPREME COURT 724
(V 57 C 147)

(From: Assam and Nagaland)*

**J. C. SHAH, V. RAMASWAMI, G.
K. MITTER, K. S. HECDE AND
A. N. CROVER JJ.**

**M/s. Hardeodas Jagannath, Appellant
v. The State of Assam and others, Res-
pondents.**

Civil Appeals Nos. 2403 and 2404 of
1966, D/- 27-9-1963.

(A) Extra Provincial Jurisdiction Act (1947), Section 6 — Question whether Dominion of India was entitled to exercise extra provincial jurisdiction over the Shillong Administered Areas on April 15, 1948, is not a pure question of fact but relating to a fact of State which is peculiarly within cognizance of Central Government — Halsbury's Laws of England 3rd Edn. Vol. 7, page 285, Ref. — (Words and phrases — Fact of State).

(Para 5)

(B) Sales Tax — Assam Sales Tax Act (17 of 1947), Preamble — Act was validly extended to Shillong Administered Areas by Central Government by Notification of April 15, 1948 — Reply of Central Government is conclusive under S. 6 (2), Extra Provincial Jurisdiction Act — Extra Provincial Jurisdiction Act (1947), Sections 3, 4, 6 (2).

Under Section 6 (2) of the Extra Provincial Jurisdiction Act of 1947 the answers of the Central Government to the questions forwarded by the Supreme Court shall be treated as conclusive evidence of the matter therein contained.

Held, after considering the answers of Central Government to the questions referred by the Supreme Court, that the Union Government was entitled to exercise extra provincial jurisdiction over Shillong Administered Area on April 15, 1948. The reason is that prior to that date British Government had exercised that jurisdiction under the Indian (Foreign Jurisdiction) Order in Council, 1902 as amended by the Indian (Foreign Jurisdiction) Order in Council 1937. On the withdrawal of British rule the jurisdiction over the territory of Myllem State continued to be

exercised with the consent of the ruler by the Dominion of India and the jurisdiction was retained thereafter by virtue of the Instrument of Accession signed by the Siem of Myllem and the agreement annexed thereto. The jurisdiction exercised by the British Government over the Shillong Administered Area was quite extensive and in exercise of that jurisdiction a number of Acts — Central and Provincial — were extended to the Shillong Administered Area, for example, the Indian Income Tax Act and the Assam Municipal Act with the consent of the Siem of Myllem where necessary. On the withdrawal of the British rule the Dominion of India acquired the same jurisdiction which included the extension of the Assam Sales Tax Act 17 of 1947 to the Shillong Administered Area, including Bara Bazar which also included Mawkhar a part of erstwhile Myllem State. (Para 6)

(C) Sales Tax — Assam Sales Tax Act (17 of 1947), Section 30 (as amended) — Amendment requiring deposit of assessed tax and penalty as condition for filing appeal — Amendment coming into force on 1-4-1958 — Assessment for period ending on dates prior to 1-4-1958 completed after this date — Amended section applies.

Where the assessments relating to periods ending on September 30, 1950, March 31, 1957 and September 30, 1957 were completed after the amendment of Section 30 had come into force with effect from April 1, 1958, and the appeals against the assessments were filed after the amendment, the appeals are governed by the amended section and the Assistant Commissioner can ask the appellants to comply with the provisions of the amended section, namely depositing of assessed taxes and penalty, before dealing with the appeals. In such a case it cannot be said that the amending Act has been given retrospective effect.

(Para 8)

(D) Sales Tax — Assam Sales Tax Act (17 of 1947), Section 30 — "Otherwise directed" — Section does not give power to appellate authority to permit assessee to furnish security in lieu of cash amount of tax.

The expression 'otherwise directed' in Section 30 only means that the appellate authority can ask the assessee to deposit a portion of the amount and not the whole but the section gives no power to the appellate authority to permit the asses-

* (Civil Rules Nos. 90 of 1960 and 382 of 1961, D/- 4-4-1963—Assam and Nagaland.)

see to furnish security in lieu of cash amount of tax. (Para 9)

Mr. D. N. Mukherjee, Advocate, for Appellant; M/s. Naunit Lal and B. P. Singh Advocates, for Respondents.

The following Judgment of the Court was delivered by:

RAMASWAMI, J. — These appeals are brought by certificate from the judgment of the High Court of Assam and Nagaland dated April 4, 1963 in Civil Rule No. 90 of 1960 and Civil Rule No. 382 of 1961, whereby the High Court dismissed the petitions under Articles 226 and 227 of the Constitution filed by the appellant.

2. Messrs. Hardeo Das Jagan Nath (hereinafter called the 'appellant') is a partnership firm carrying on business at Mawkhair Shillong in the District of United Khasi and Jaintia Hills. By a notification issued under Rule 6 of the Assam Sales Tax Rules 1947, the Commissioner of Taxes, Assam fixed May 20, 1948 as the date by which the dealers of Shillong administered area had to make applications for registration under the Assam Sales Tax Act, 1947 (17 of 1947), hereinafter called the 'Act'. By notification dated April 15, 1948, the Government of India had extended the provisions of the Act with slight modifications to the administered area in Shillong under Section 4 of the Extra Provincial Jurisdiction Act 1947. The appellant got itself registered under the Act. Up to the half yearly return periods ending September 30, 1957, the appellant was assessed to sales-tax and the tax was realised by the Sales Tax Authorities. On March 6, 1950 the Superintendent of Taxes, Shillong, respondent No. 4 raided the business premises of the appellant and seized the account books etc. The appellant filed a petition under Art. 226 of the Constitution in the High Court. By its order dated June 3, 1960, the High Court directed the Deputy Commissioner of Taxes, Assam to return the seized books and documents within three weeks of the date of the order to the appellant. As directed by the High Court, the documents were returned to the appellant but on the basis of the information received from the account books the Superintendent of Taxes issued notices dated April 4, 1950 under Section 19A of the Act for reassessment of the appellant in respect of the half yearly return periods ending on September 30, 1956, March 31, 1957 and September 30, 1957. Thereafter,

ex parte reassessment was made for the return period ending September 30, 1956 by an order dated July 8, 1959 and for return periods ending March 31, 1957 and September 30, 1957 by orders dated July 24, 1959 and tax amounting to Rupees 1,22,933/- was levied for these three periods. A further sum of Rs. 47,504.70 was levied in respect of the return period ending March 31, 1958, by an ex parte assessment order dated March 23, 1959. For the other return period ending September 30, 1958, a sum of Rs. 49,427.90 was levied by an ex parte assessment order dated April 8, 1959. For these two return periods a penalty of Rs. 1,000/- in respect of each return was also levied by two separate orders dated June 27, 1959. Thus the total amount of sales-tax and penalty amounting to Rs. 2,19,865.60 in respect of the five return periods was levied. The appellant paid Rs. 20,074.68 at the time of original assessments in respect of the periods ending on September 30, 1956, March 31, 1957 and September 30, 1957.

3. The appellant thereafter filed appeals against all the seven ex parte orders before the Assistant Commissioner of Taxes, Assam. Along with the memoranda of appeals for the periods ending March 31, 1958 and September 30, 1958, two separate applications were made by the appellant alleging that it was not necessary to pay the assessed tax since the provisions of Section 30 of the Act as amended did not apply to the case and it was prayed that appeals should be admitted without payment of the assessed tax. The contention of the appellant was rejected by the Assistant Commissioner though he reduced the amount of deposit for the periods ending March 31, 1958 and September 30, 1958. The appellant moved the Commissioner of Taxes in revision, but the order of the Assistant Commissioner was affirmed by the Commissioner of Taxes though he reduced the amount further. On the application of the appellant the matter was referred to the High Court which held that the amended Section 30 of the Act was *intra vires*. In the meantime, the appellant also applied in respect of the appeals relating to the periods ending September 30, 1956, March 31, 1957 and September 30, 1957 as well as the penalty appeals of periods ending on March 31, 1958 and September 30, 1958 and prayed for admission of these appeals without payment of the assessed tax. In this case also the amount was reduced by the Assistant Commis-

sioner of Taxes but the matter was kept pending till the disposal of the reference by the High Court. On May 21, 1960, the appellant filed separate petitions before the Assistant Commissioner praying that as the financial condition of the appellant was not good the appellant may be allowed to furnish reasonable security in lieu of cash and the appeal may be admitted on such security. By his order dated May 23, 1960 the Assistant Commissioner of Taxes fixed June 8, 1960 for payment of the amount required for admission of the appeals, failing which the appeals were ordered to be dismissed. The appellant then moved the Commissioner praying that in view of his financial difficulty he should be allowed to furnish reasonable security in lieu of cash to be paid. The application was rejected by the Commissioner on June 21, 1960. Thereafter all the five appeals were rejected by a common order dated June 22, 1960 and the two appeals against the imposition of penalty were also summarily rejected by an order dated June 22, 1960. The appellant was further asked to show cause why penalty should not have been imposed in respect of the periods ending September 30, 1956, March 31, 1957 and September 30, 1957. The appellant filed a petition to the High Court under Article 226 of the Constitution, being Civil Rule No. 90 of 1960 praying for a writ to quash the order of the Commissioner dismissing the appeals in respect of the five periods and for further reliefs. The appellant also filed another petition under Article 226, being Civil Rule No. 382 of 1961 asking for similar reliefs with regard to the periods ending March 31, 1959, September 30, 1959, March 31, 1960, September 30, 1960 and March 31, 1961. The writ petitions were dismissed by the High Court by a common judgment dated April 4, 1963.

4. The first question to be considered in these appeals is whether the provisions of the Act were validly extended to the Shillong Administered Areas. By a notification dated April 15, 1948 the Central Government extended the provisions of the Act to the Shillong Administered Areas including Barahazar in exercise of powers conferred by Section 4 of the Extra Provincial Jurisdiction Act, 1947. It was argued on behalf of the appellant that on April 15, 1948 when the notification was issued the Extra Provincial Jurisdiction Act, 1947 (Act XLVII of 1947) was not applicable to the Shillong Administered Areas as the

instrument of accession by which the administration of the State of Myllem was transferred to the Central Government was accepted by the Governor-General of India on August 17, 1948. The preamble to the Extra Provincial Jurisdiction Act, 1947 (hereinafter called the Act of 1947) provides:

"Whereas by treaty, agreement, grant, usage, sufferance and other lawful means, the Central Government has, and may hereafter acquire, jurisdiction in and in relation to areas outside the Provinces of India, It is hereby enacted as follows.—"

The expression "extra provincial jurisdiction" has been defined under Section 2 of the Act of 1947 as meaning

"any jurisdiction which by treaty, agreement, grant, usage, sufferance or other lawful means the Central Government has for the time being in or in relation to any area outside the Provinces".

Section 3 states:

"3. (1) It shall be lawful for the Central Government to exercise extra provincial jurisdiction in such manner as it thinks fit.

(2) The Central Government may delegate any such jurisdiction as aforesaid to any officer or authority in such manner and to such extent as it thinks fit."

Section 4 provides as follows:

"4 (1) The Central Government may, by notification in the official Gazette, make such orders, as may seem to it expedient for the effective exercise of any extra provincial jurisdiction of the Central Government .

(2) Without prejudice to the generality of the powers conferred by sub-section (1), any order made under that sub-section may provide—

(a) for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force in any Province or otherwise;

(b) for determining the persons who are to exercise jurisdiction, either generally or in particular cases or classes of cases, and the powers to be exercised by them;

(c) for determining the Courts, Judges, Magistrates and authorities by whom, and for regulating the manner in which any jurisdiction auxiliary or incidental to or consequential on the jurisdiction exercised under this Act is to be exercised within any Province; and

(d) for regulating the amount, collection and application of fees."

Section 5 is to the following effect:

"Every act and thing done, whether before or after the commencement of this Act, in pursuance of any extra provincial jurisdiction of the Central Government in an area outside the Provinces shall be as valid as if it had been done according to the local law then in force in that area."

5. The argument was stressed on behalf of the appellant that the extra provincial jurisdiction could only be exercised by the Central Government if by treaty, agreement, grant, usage, sufferance or other lawful means the Central Government has for the time being in or in relation to any area outside the provinces exercised such jurisdiction. It was contended that after the declaration of independence on August 15, 1947 the paramountcy lapsed and the State of Myllem became an independent State and the Central Government could not exercise any extra provincial jurisdiction till the instrument of accession was signed by the Governor-General. It was pointed out that the notification by which the Act applied to Shillong Administered Areas was issued after the lapse of paramountcy and before the instrument of accession was signed by the Governor-General. It was therefore argued that the notification dated April 15, 1948 was not validly issued and the provisions of the Act were not operative in the Shillong Administered Areas. It was said that before the State of Myllem became an independent State on August 15, 1947 there was no treaty, grant, usage or arrangement whereby the British Crown enjoyed any rights to levy taxes on the sale of goods within the Myllem State or any right to extend to that area any such Act without the express consent or approval of the ruler of that State. The opposite view-point was put forward on behalf of the respondents. It was said that before August 15, 1947 the relations of the Crown Representative with Khasi Hills States were conducted through the Governor of Assam. In practice the administration of the Hill States was in great measure assimilated to that of the Province of Assam partly by the application of the British Indian Laws under the Indian (Foreign Jurisdiction) Order in Council and partly by administrative measures. It was argued that by virtue of the instrument of accession all previous existing arrangements between Khasi Hills States and the Government of India in the Assam Province were continued and the Central Govern-

ment could therefore exercise extra-provincial jurisdiction by usage. To put it differently, the argument of the respondents was that though the instrument of accession was accepted by the Governor-General on August 17, 1948, it recognised the fact that there was a certain existing arrangement regulating relations between the Government of India and the Chiefs of the Khasi Hills States. The Central Government therefore exercised extra provincial jurisdiction by agreement or usage and it cannot therefore be said that the notification of the Central Government dated April 15, 1948 was invalid.

6. When the appeals were originally heard we considered that the material on the record was not sufficient to enable us to determine the disputed question, namely whether the Dominion of India was entitled to exercise extra provincial jurisdiction over the Shillong Administered Areas on April 15, 1948 which was the material date. The question at issue is not purely a question of fact but a question relating to a "fact of State" which is peculiarly within the cognizance of the Central Government (For expression "Fact of State" see Halsbury's Laws of England, 3rd Edn. Vol. 7, p. 285). In view of the insufficiency of material we thought it proper to avail ourselves of the procedure indicated by Section 6 of the Act of 1947 which enacts:

"6. (1) If in any proceeding, civil or criminal, in a Court established in India or by the authority of the Central Government outside India, any question arises as to the existence or extent of any foreign jurisdiction of the Central Government, the Secretary to the Government of India in the appropriate department shall, on the application of the Court send to the Court the decision of the Central Government on the question, and that decision shall for the purposes of the proceeding be final.

(2) The Court shall send to the said Secretary, in a document under the seal of the Court or signed by a judge of the Court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be returned to the Court by the Secretary and those answers shall on production thereof be conclusive evidence of the matters therein contained."

By an order of this Court dated September 21, 1967 the following two questions were forwarded to the Union of India under the seal of this Court for submission of their answers:

"(1) Whether the Dominion of India exercised extra provincial jurisdiction over the Shillong Administered Area including Bara Bazar, which also included Mawkhlar, a part of the erstwhile Myllem State, on April 15, 1948;

(2) Whether the Dominion of India had extra provincial jurisdiction on April 15, 1948 to extend the Assam Sales Tax Act, 1947 (Act 17 of 1947) to the Shillong Administered Area including Bara Bazar under Section 4 of Extra Provincial Jurisdiction Act (Act 47 of 1947)."

In compliance of that order the Union of India have submitted their answers on January 12, 1968 in the following terms:

"Ministry of Home Affairs."

Replies to the questions mentioned in the order dated September 21, 1967 passed by the Supreme Court of India in Civil Appeals Nos. 2403 and 2404/1966.

(1) The British Government in India had by treaty, grant, usage, sufferance and other means acquired jurisdiction over certain territories of the erstwhile State of Myllem. The jurisdiction was exercised under the Indian (Foreign Jurisdiction) Order-in-Council, 1902 as amended by the Indian (Foreign Jurisdiction) Order-in-Council, 1937. Mawkhlar was a part of the territories of Myllem jurisdiction over which had been agreed to be given by the Siem of Myllem to the British Government. It was included in those parts of Shillong which came, in course of time, to be called the Shillong Administered Area. It has been reported that on actual survey the small area known as Bara Bazar area comes partly under Mawkhlar proper and partly under South East Mawkhlar and Garikhana. Bara Bazar area was thus a part of the area belonging to the erstwhile Myllem State in which the British Government in India exercised jurisdiction under the Indian (Foreign Jurisdiction) Order-in-Council. On the withdrawal of British Rule the jurisdiction over the territories of the erstwhile Myllem State which had been included in the Shillong Administered Area continued to be exercised with the consent of the Siem and the jurisdiction which was until then exercised in those areas by the British Government in India was assumed by the Dominion of India and it was retained thereafter by virtue of the instrument of accession signed by the Siem of Myllem and the agreement annexed thereto. The Dominion of India exercised extra provincial jurisdiction over the Shillong Administered Area

including the Bara Bazar which also included Mawkhlar a part of the Myllem State on April 15, 1948.

(2) The jurisdiction exercised by the British Government in India over the Shillong Administered Area was quite extensive. In exercise of that jurisdiction that Government had extended, with appropriate reservations a number of Acts — Central as well as Provincial — to the Shillong Administered Area e. g., the Indian Income-tax Act and the Assam Municipal Act with the consent of the Siem of Myllem where necessary. On the withdrawal of British rule the Dominion of India acquired the same jurisdiction over the Shillong Administered Area by virtue of the instrument of accession signed by the Siem of Myllem and the agreement annexed thereto. The Dominion of India therefore had on April 15, 1948 extra provincial jurisdiction in terms of the Extra-Provincial Jurisdiction Act, 1947 (Act 47 of 1947) to extend the Assam Sales Tax Act, 1947 (Act 17 of 1947) to the Shillong Administered Area including Bara Bazar. The Assam Sales Tax Act was actually extended to the Shillong Administered Area including Bara Bazar, after obtaining the consent of the Siem of Myllem, in the Ministry of States Notification No. 186-IB dated the 15th April, 1948.

Sd. L. P. Singh,
Secretary to the Govt. of India.
New Delhi,
January 12, 1968."

It is clear from the letter of the Union Government that it was entitled to exercise extra provincial jurisdiction over Shillong Administered Area on April 15, 1948. The reason is that prior to the date British Government had exercised that jurisdiction under the Indian (Foreign Jurisdiction) Order-in-Council, 1902 as amended by the Indian (Foreign Jurisdiction) Order-in-Council 1937. On the withdrawal of British rule the jurisdiction over the territory of Myllem State continued to be exercised with the consent of the ruler by the Dominion of India and the jurisdiction was retained thereafter by virtue of the instrument of accession signed by the Siem of Myllem and the agreement annexed thereto. It is also manifest that the jurisdiction exercised by the British Government over the Shillong Administered Area was quite extensive and in exercise of that jurisdiction a number of Acts — Central & Provincial — were extended to the Shillong

Administered Area, for example, the Indian Income-tax Act and the Assam Municipal Act with the consent of the Siem of Myllem where necessary. On the withdrawal of the British rule the Dominion of India acquired the same jurisdiction which included the extension of the Act to the Shillong Administered Area. Under Section 6 (2) of the Act of 1947 the answers of the Central Government to the questions forwarded by this Court shall be treated as conclusive evidence of the matter therein contained. We accordingly hold that the argument of the appellant on this aspect of the case should be rejected.

7. It was then contended on behalf of the appellant that Section 30 of the Act after the amendment was not applicable and the Assistant Commissioner of Taxes had no authority to ask the appellant to deposit the amount of tax assessed before hearing the appeal. Section 30 of the Act, as it originally stood, was to the following effect:

"30. (1) Any dealer objecting to an order of assessment or penalty passed under this Act may, within thirty days from the date of the service of such order, appeal to the prescribed authority, against such assessment or penalty;

Provided that no appeal shall be entertained by the said authority unless he is satisfied that such amount of tax as the appellant may admit to be due from him has been paid;

Provided further that the authority before whom the appeal is filed may admit it after the expiration of thirty days, if such authority is satisfied that for reasons beyond the control of the appellant or for any other sufficient cause it could not be filed within time.

....."

After the amending Act of 1958 the section reads as follows:

"30. (1) Any dealer objecting to an order of assessment or penalty passed under this Act may, within thirty days from the date of the service of such order, appeal to the prescribed authority, against such assessment or penalty;

Provided that no appeal shall be entertained by the said authority unless he is satisfied that the amount of tax assessed or the penalty levied, if not otherwise directed by him, has been paid;

Provided further that the authority before whom the appeal is filed may admit it after the expiration of thirty days, if such authority is satisfied that for reasons

beyond the control of the appellant or for any other sufficient cause it could not be filed within time.

....."

8. It was contended that the amendment came into force with effect from April 1, 1958 and it cannot be given retrospective effect so as to apply to assessment periods ending on September 30, 1956, March 31, 1957 and September 30, 1957. We are unable to accept this argument as correct because the assessments for these three periods were completed after the amending Act came into force i. e., after April 1, 1958. The appeals against the assessments were also filed after the amendment. It is therefore not correct to say that the amending Act has been given a retrospective effect and the Assistant Commissioner of Taxes was therefore right in asking the appellant to comply with the provisions of the amended Section 30 of the Act before dealing with the appeals.

9. It was lastly contended on behalf of the appellant that the Sales Tax Authorities were not right in holding that there was no provision under the Act by which security can be accepted in lieu of cash payment. Reliance was placed upon the phrase "otherwise directed" in the amended Section 30 of the Act. In our opinion, there is no substance in this argument. The expression "otherwise directed" only means that the appellate authority can ask the assessee to deposit a portion of the amount and not the whole but the section gives no power to the appellate authority to permit the assessee to furnish security in lieu of cash amount of tax. We accordingly reject the argument of the appellant on this point.

10. For the reasons expressed we hold that the High Court was right in dismissing the writ petitions and these appeals must be dismissed with costs — there will be one set of hearing fees.

Appeals dismissed.

AIR 1970 SUPREME COURT 729
(V 57 C 148)

(From: Allahabad)*

S. M. SIKRI AND K. S. HEGDE, JJ.

B. C. Mohindra, Appellant v. The Municipal Board, Saharanpur, Respondent.

Civil Appeal No. 1036 of 1966, D/- 20-11-1968.

* (F. A. No. 268 of 1953, D/- 15-3-1965—All.)

CN/CN/G177/68/LGC/P

Municipalities — U. P. Municipalities Act (2 of 1916), Section 97 — Contract in writing — Auction sale of a Theka — Auction held before Municipal Board and a resolution confirming auction passed on that day — List of bidder bearing signature of highest bidder and of Chairman and Executive Officer of Board — Contract, held was in compliance with Section 97 — Contract need not be contained in one document signed by both parties — List of bids and resolution constituted a contract in writing within meaning of Section 97 — AIR 1963 SC 1685, Foll. (Para 11)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 1685 (V 50) =

(1964) 3 SCR 164, Union of India

v. Rallia Ram

11

(1951) AIR 1951 All 736 (V 38) =

1951 All WR (HC) 560 (FB),

Municipal Board Gonda v.

Bachu

4

Mr C. B. Agarwala, Senior Advocate (Mr. K. P. Gupta, Advocate with him), for Appellant, M/s. R. K. Carg, D. K. Agrawal and M. V. Goswami, Advocates, for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.: This is an appeal by special leave, and while granting it this Court confined it only to the point arising under Section 97 of the U. P. Municipalities Act, 1916—hereinafter referred to as the Act.

2. The facts relevant to the point are as follows: The Municipal Board, Saharanpur, respondent before us and hereinafter referred to as the plaintiff, brought a suit for the recovery of Rs. 12,044/-/9 and future interest upto date of realisation from B. C. Mohindra, appellant before us and hereinafter referred to as the defendant. In brief, the case of the plaintiff was that there was an auction on March 29, 1950, of the theka for collecting tahbazari dues of the mandi in Mazahir Gang alias Ganj Jadid, Saharanpur, for one year from April 1, 1950 to March 31, 1951, subject to the conditions of sale entered in the amended sale proclamation. The defendant bid Rs. 40,000 subject to the confirmation by the Board. The Board did not confirm the auction sale, and on April 8, 1950 the tahbazari was re-auctioned. The defendant bid Rs. 53,025. At the time of the auction sale a meeting of the Board was also held in which the auction aforesaid was confirmed under Resolution No. 26 dated April 8, 1950,

in the presence of the defendant, and only the condition relating to the payment of auction money was amended to provide for payment in four instalments. The defendant had to deposit 1/4th of the bid on April 8, 1950. He failed to deposit this instalment on April 8, 1950, but on April 10, 1950, he deposited the instalment and took charge of the mandi aforesaid and began to collect tahbazari dues. The defendant was asked to execute and complete an agreement in favour of the plaintiff according to the conditions and the rules but he continued to put off the matter. As the defendant failed to deposit the amount of the second instalment and execute the agreement, the plaintiff cancelled the theka of the defendant and began to collect tahbazari dues through its own staff and re-auctioned the theka on July 3, 1950. After taking into account the money received from the re-auction on July 3, 1950, and the money deposited by the defendant, according to the plaintiff there was a shortage of Rs. 12,044/-/9.

3. The defendant did not dispute the fact that an auction was held and that he made the last bid of Rs. 53,025/- which was accepted. He also admitted that he had deposited Rs. 13,256/4/-. But he alleged that the plaintiff had committed various breaches of the contract in contravention of the rules, contract and the bye-laws as the result of which the defendant suffered a loss of Rs. 9,685/-.

4. The Trial Court framed various issues arising out of the pleadings but no issue was raised regarding non-compliance with Section 97 of the Act. It appears that an argument was raised before the Trial Court regarding Section 97. The Trial Court observed:

"On the basis of this decision 1951 All WR (HC) 560 = (AIR 1951 All 736) (FB) it was urged on behalf of the defendant that it was necessary in the present case that a written contract should have been obtained by the plaintiff under Section 97 of the Municipalities Act.....In a public auction, the various bidders give their bids which may be called offers and the moment the auctioneer knocks the hammer down at a particular bid, that bid is to be taken as accepted between the parties. It is the knock of the hammer which concludes the contract. The list of bidders is the only evidence of the contract showing that out of various offers, the highest bid was accepted. In this particular case, the

list of bidders bears the signature of the defendant and of the Chairman of the plaintiff Board, thus reducing the contract into writing, vide Ex. 17.

The contract in this case is therefore, a written contract evidenced from paper Ex. 17.....According to the provision of Section 97 of the Municipalities Act, such a contract should have been only in writing and this condition was fulfilled by drawing up the list of bidders and obtaining the signature of the highest bidder in whose favour the auction was concluded on such a list."

The Trial Court decreed the suit.

5. The defendant appealed to the High Court, and the High Court (Srivastava and Jagdish Sahai, JJ.) by its order dated October 5, 1961, remanded the case on two issues:

(1) Whether the agreement relied upon by the plaintiff was in accordance with Sections 96 and 97 of the U. P. Municipalities Act of 1916? If not, what is the effect?

(2) Whether Section 65 of the Indian Contract Act applied? If so, what compensation, if any, could be recovered by the plaintiff from the defendant on account of any advantage the latter may have received under the agreement?

6. While passing the order of remand the High Court observed:

"While hearing arguments in this appeal we discovered that a very important point was apparently missed both by the parties and by the learned Civil Judge. We feel that the case cannot be properly decided without having findings of the learned Civil Judge on that point. The point involves two questions."

"We are in agreement with the contention of the learned counsel for the plaintiff that there was no justification in remanding the case. The Trial Court had dealt with the question of Section 97 of the Act and this apparently escaped the notice of the High Court.

7. Be that as it may, the Trial Court in a very careful and reasoned order, dated August 24, 1962, held that on the facts Sections 96 and 97 of the Act had been fully complied with.

8. The High Court (Jagdish Sahai and Broom, JJ.) came to the conclusion that Section 97 of the Act did not apply to the facts of the case. The High Court observed,

"The suit, therefore is one for the failure to execute the contract deed and to pay the amounts which have become due

from him by way of damages. Section 97 of the Act deals with contracts which have been executed. It is for this reason that we have come to the conclusion that the provisions of Section 97 of the Act are not attracted to the present case."

9. Section 97 of the Act reads as follows:

"Execution of Contracts: (1) Every contract made by or on behalf of a Board whereof the value of the amount exceeds Rs. 250 shall be in writing; Provided that unless the contract has been duly executed in writing, no work including collection of materials in connection with the said contract shall be commenced or undertaken.

(2) Every such contract shall be signed (a) by the President or Vice-President and by the Executive Officer or a Secretary or

(b) by any person or persons empowered under sub-section (2) or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the Board."

10. It seems to us that on the facts of the case it is clearly proved that there was a contract in writing within the meaning of proviso to Section 97 (1) and the provisions of sub-section (2). We agree with the conclusion of the Trial Court in this respect. The list of bids, Ex. 17, at the auction sale held on April 8, 1950 is signed by the defendant the Chairman and the Executive Officer. This auction was held before the Board and Resolution No. 26 dated April 8, 1950, was passed on that day, which reads as follows:

"Auction of the tehbazari contract of Mandi Mazahar Gunj for the year 1950-51 (Boards reso. No. 431 dated 30-3-50).

"Auction held before the Board. Terms of auction were announced. During the auction, at the request of the bidders, the Board unanimously passed the following amendment in the terms of auction:—

"One-fourth of the auction money will be deposited at the fall of hammer and the remaining amount in three equal instalments at the interval of two months each i. e.

1st instalment today	8-4-50.
2nd instalment on	8-6-50
3rd instalment on	8-8-50
4th instalment on	8-10-50"

"Auction sanctioned to the highest bidder Shri B. C. Mohindra for Rs. 53,025/-

w. e. f. 9-4-50 to 31-3-51. Chairman Finance Committee to please deliver the possession and to decide the disputes, if any."

The original proceedings book was produced before the Trial Court and it was proved by Ram Swarup, clerk. He proved that after the entire proceedings were over, it was signed before him by Shri Madho Prashad, Executive Officer of the Municipal Board, and Shri Jamshed Ali Khan, the Chairman.

11. In our opinion the list of bids and the Resolution No. 26 dated April 8, 1950 Ex. 18, constituted a contract in writing within the meaning of Section 97 of the Act. It was held by this Court in *Union of India v. Rallia Ram*, (1964) 3 SCR 164 at p. 173 = (AIR 1963 SC 1635 at p. 1690) that for the purposes of S. 175 (3) of the Government of India Act, 1935, a valid contract could be spelt out of correspondence. It seems to us that similarly it is not necessary for the purpose of complying with Section 97 of the Act that the contract should be contained in one document signed by both the parties.

12. In view of our conclusion it is not necessary to consider what would have been the rights of the plaintiff if there had been no such contract in writing.

13. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 732 (V 57 C 149)

(From: AIR 1968 Madh Pra 163)

J. C. SHAH, V. RAMASWAMI AND
A. N. CROVER, JJ.

The Commissioner of Sales Tax Madhya Pradesh, Indore, Appellant v. Madhya Pradesh Electricity Board, Jabalpur, Respondent and Vice Versa. The National Newsprint and Paper Mills Ltd., Interveners (In Civil Appeals Nos. 1153 to 1160 of 1968).

Civil Appeal Nos. 1153 to 1160 and 1161 to 1168 of 1968, D/- 26-11-1968.

(A) Sales Tax — Madhya Pradesh General Sales Tax Act (2 of 1959), Section 2 (d) and (g) — 'Dealer' and 'Goods' — Electric energy is goods for purposes of Sales Tax — Statutory body like Electricity Board is 'dealer' in respect of its principal activity of sale and supply of

electricity — AIR 1968 Madh Pra 163, Reversed.

The Electricity Board, a statutory body constituted under Section 5 of the Electricity Supply Act, 1948, is a 'dealer' within the meaning of Section 2(c), C. P. and Berar Sales Tax Act, 1947 and Section 2 (d) of M. P. Sales Act, 1958, in respect of its principal activities of generation, distribution, sale and supply of electrical energy. AIR 1968 Madh Pra 163, Reversed. (Paras 9 and 13)

Whether electric energy is "goods" for purposes of Sales Tax has to be determined with reference to the definition of that term in Section 2 (d) of C. P. Act (21 of 1947) and Section 2 (g) of M. P. Act (2 of 1959) and no assistance can be derived from entries 53 and 54 of List II in Sch. 7 of the Constitution.

(Para 9)

The definition in terms is very wide according to which "goods" means all kinds of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property. Therefore, electric energy was intended to be covered by the definition of "Goods" in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of Sales Tax by making a provision for it in the Schedule to the two Acts. AIR 1964 Mad 477 and (1968) 22 STC 325 (Pun), Approved; 18 Am Jur 407 and AIR 1946 All 502 and 1911 AC 105, Rel. on. (Para 9)

(B) Constitution of India, Article 136 — New plea — Objection as to proper execution of contract and its admissibility in evidence neither raised before Sales Tax Tribunal nor before High Court — Objection not allowed by Supreme Court. (Para 11)

(C) Sales Tax — M. P. General Sales Tax Act (2 of 1959), Section 2 (n) — Sale of goods and works contract distinguish-

ed — Electricity Board supplying steam to Nepa Mills on actual cost basis — Arrangement is works contract and not sale and as such not liable to tax — AIR 1968 Madh Pra 163, Affirmed.

There is a distinction between a contract of sale of goods and a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel the contract is one for work and labour. In business transactions the works contracts are frequently not recorded in writing meeting out all the covenants and conditions thereof and the terms and incidents of the contracts have to be gathered from the evidence and attendant circumstances. The question in each case is one about the true agreement between the parties and the terms of agreement must be deduced from a review of all the attendant circumstances. AIR 1965 SC 1396, Rel. on. (Para 12)

Held that the arrangement between the assessee Electricity Board and the Nepa Mills with respect to the supply of steam to the Mills on actual cost basis with no profit motive in return for free supply of water was in the nature of works contract and not sale and as such the Assessee Board was not liable to pay sales tax on its turnover on that account. AIR 1968 Madh Pra 163, Affirmed.

(Note:— The decision of the High Court on three other questions referred to it was also affirmed as not pressed.)

(Para 13)

Cases Referred: Chronological Paras

- (1968) 22 STC 325 = ILR (1969)
 1 Punj 575, Malerkotla Power Supply Co. v. Excise and Taxation Officer, Sangrur 7
 (1965) AIR 1965 SC 1396 (V 52) = 16 STC 240, Govt. of Andhra Pradesh v. Guntur Tobacco Ltd. 12
 (1964) AIR 1964 Mad 477 (V 51) = 14 STC 600, Kumbakonam Electric Supply Corporation Ltd. v. Joint Commercial Tax Officer, Esplanade Division, Madras 7
 (1946) AIR 1946 All 502 (V 33) = ILR (1946) All 476, Nainital Hotel Co. Ltd. v. Municipal Board, Nainital 7
 (1936) AIR 1936 Cal 753 (V 23) = 41 Cal WN 225, Rash Behari v. Emperor 8

(1911) 1911 AC 105 = 80 LJ PC 59, Eric Country Natural Gas and Fuel Co. Ltd. Carroll 7

(1909) 1909-2 KB 604 = 78 LJ KB 1158, County of Durham Electrical etc. Co. v. Inland Revenue Commrs. 9

18 Am Jur 407 7

Mr. I. N. Shroff, Advocate for Appellant (In C. As. Nos. 1153 to 1160 of 1968) and the Respondent (In C. As. Nos. 1161 to 1168 of 1968) Mr. S. T. Desai, Senior Advocate, (Mr. B. L. Neema and Mrs. Anjali Varma, Advocates and M/s. J. B. Dadachanji and Co., Advocates with him), for Appellant (In C. As. Nos. 1161 to 1168 of 1968) and the Respondent (In C. As. Nos. 1153 to 1160 of 1968); Mr. N. D. Karkhanis, Senior Advocate (Mr. A. G. Ratnaparkhi, Advocate with him), for Intervener.

The following Judgment of the Court was delivered by

GROVER, J.: This judgment will dispose of two sets of cross appeals Nos. 1153-1160 and 1161-1168/68 which are from a common judgment of the Madhya Pradesh High Court and have been entertained by special leave.

2. The relevant assessment years for the purpose of levy of sales tax are from April 1, 1957 to March 31, 1958 and April 1, 1964 to March 31, 1965. For the assessment years prior to April 1, 1959 the enactment in force was the C. P. and Berar Sales Tax Act, 1947 (No. XXI of 1947) and for the subsequent two years it is the Madhya Pradesh General Sales Tax Act (Act No. 2 of 1959), which would be applicable. The material facts may be shortly stated. The assessee—Madhya Pradesh Electricity Board—hereinafter called the "Electricity Board" is a body constituted under Section 5 of the Electricity Supply Act 1948. Under Sec. 18 of that Act it was the general duty of the Electricity Board to promote co-ordinated development of the generation, supply and distribution of electric energy within the State of Madhya Pradesh in the most efficient and economical manner. In the assessment years in question the Electricity Board sold, supplied and distributed electric energy to various consumers. It also sold coal-ash—a waste product and supplied steam to Nepa Mills of Burhanpur. It further supplied specification and tender forms on payment to persons desirous of submitting tenders for the works undertaken by the Electricity Board. It purchased articles like

Citti, Murran, sand etc., from unregistered dealers. It is common ground that under the provisions of Act XXI of 1947 and II of 1959 read with the Schedules contained therein sale of electricity is exempt from sales tax. For the purpose of determining the gross turnover, however, the sale of electric energy is to be taken into account.

3. The Assistant Commissioner of Sales Tax assessed the Electricity Board to tax on its turnover of sale of coal-ash and specification and tender forms and the supply of steam to Nepa Mills. The Board was further assessed to purchase tax on Citti, Murran etc., purchased from unregistered dealers. In appeal the Deputy Commissioner, Sales Tax, upheld the assessment orders. On second appeal the Sales Tax, Tribunal which was the Board of Revenue, Madhya Pradesh, held that the Electricity Board was not a "dealer" within the meaning of that term as defined in the two Acts and that the coal-ash was not produced for the purpose of sale with the result that sales of coal-ash could not be subjected to tax. As regards the supply of steam to Nepa Mills the Tribunal, on examining the terms of the agreement under which the Electricity Board supplied the steam, came to the conclusion that such supply was an isolated transaction and that such activity had been undertaken on no profit no loss basis could not be assessed to sales tax. The specification and tender forms were held not to be marketable goods involving any profit element and for that reason could not be taxed. As regards the purchase tax the tribunal held that as the Electricity Board was not a dealer in respect of the sale and supply of electric energy no purchase tax could be imposed on goods purchased by it and consumed "in furtherance of and in aid of the business activity of generating, supplying and distributing electricity."

4. Both the Electricity Board and the Commissioner of Sales Tax, Madhya Pradesh, filed applications requiring the Tribunal to refer to the High Court certain questions of law arising out of its common order. The tribunal drew up a common statement of case and referred five questions of law. On the first question the High Court held that the Electricity Board could not be held to be a "dealer" as defined in Section 2 (c) of Act XXI of 1947 or Section 2 (d) of Act II of 1959 in respect of its activity of generation, distribution, sale and supply

of electric energy. On the second question it was held that as the Electricity Board regularly and continuously produced coal-ash as a subsidiary product and sold it regularly it was a "dealer" in regard to the sales of coal-ash and the sale transactions relating to this product were liable to be assessed to sales tax. The third question was answered in favour of the Electricity Board. It was found that steam was not being supplied to the Nepa Mills with profit motive although it fell within the definition of "goods" given in the two Acts. As regards the specification and tender forms the High Court was of the view that the Electricity Board was not carrying on any business of selling such forms and therefore no sales tax could be levied in respect of them. The fifth question was answered by holding that as the Electricity Board was not a "dealer" in respect of sale and supply of electric energy it was not entitled to purchase any taxable goods for consumption or use for producing such energy without paying sales tax to the selling dealer under S. 4 (6) of Act XXI of 1947 and Section 7 of Act II of 1959 and therefore this was no liability to pay purchase tax.

5. Mr. Sbroff, who has argued the appeals of the Commissioner of sales tax, has not quite properly and rightly pressed the matter relating to imposition of sales tax on supply of specification and tender forms. Mr. S. T. Desai, who has appeared for the Electricity Board, after a certain amount of argument, has submitted that he had nothing much to say on the question relating to coal-ash except that it should be held to be exempt from payment of sales tax because electric energy is exempt from such tax as stated before. As regards the fifth question relating to the imposition of purchase tax Mr. Desai has not pressed for any decision being given by us. Arguments which have been addressed by both sides have therefore centered on questions Nos. 1 and 3 which are as follows:-

"(1) On the facts and circumstances of the case whether or not the Madhya Pradesh Electricity Board is a dealer within the meaning of Section 2 (c) of the G. P. and Berar Sales Tax Act, and Section 2 (d) of the Madhya Pradesh General Sales Tax Act, 1958, in respect of its activity of generation, distribution, sale and supply of electrical energy?"

(2)

(3) On the facts and circumstances of the case, whether or not steam is saleable goods and if they are saleable goods is the turnover representing the supply thereof liable to be assessed to sales tax in the hands of the assessee?"

It is somewhat curious that both sides are almost agreed that the decision of the High Court on the first question is not correct. Since enunciation of the true position is involved we proceed to give our opinion in the matter. The definition of a "dealer" as given in the two Acts substantially is that any person who carries on the business of buying, selling, supplying or distributing the goods is a "dealer" and "goods" are defined by Section 2 (d) of Act XXI of 1947 as meaning all kinds of moveable property other than actionable claims and includes all materials, articles and commodities whether or not to be used in the construction, fitting out, improvement or repair of immovable property. The definition contained in Section 2 (g) of Act II of 1959 is almost in similar terms except that there are certain additions with which we are not concerned. Reference may be made, at this stage, to the definition of "movable property" which has not been defined in the two Acts given in Section 2 (24) of the Madhya Pradesh General Clauses Act. It has been defined to mean "property of every description, except immovable property": Section 2 (18) of that Act says that "immovable property" includes "land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth."

6. The High Court went into a discussion from the point of view of mechanics relating to transmission of electric energy. It was of the view that electricity could not be regarded as an article or matter which could be possessed or moved or delivered. It relied on certain decisions and referred to Entries Nos. 53 and 54 in List II of Seventh Schedule to the Constitution and held that electricity did not fall within the meaning of "goods" in the two Acts and therefore the Electricity Board could not be held to be a "dealer" in respect of its activity of generation, distribution, sale and supply of electric energy.

7. Mr. I. N. Shroff has relied on certain decisions in which the same point was involved as in the present case, namely, whether electricity is "goods" for the purpose of imposition of sales tax. In Kumbakonam Electric Supply Corpo-

ration Ltd. v. Joint Commercial Tax Officer, Esplanade Division, Madras, 14 STC 600 = (AIR 1964 Mad 477) the Madras High Court was called upon to decide whether electricity is "goods" for the purposes of the Madras General Sales Tax Act 1959 and the Central Sales Tax Act 1956. After referring to the definition of "goods" as given in the Sale of Goods Act 1930, it was observed that under that definition goods must be property and it must be movable. According to the learned Madras Judge any kind of property which is movable would fall within the definition of "goods" provided it was transmissible or transferable from hand to hand or capable of delivery which need not necessarily be in a tangible or a physical sense. Reference was also made to the definition given in the General Clauses Act which was quite wide and it was held that if electricity was property and it was movable it would be "goods". The learned Judge found little difference between electricity and gas or water which would be property and could be subjected to a particular process, bottled up and sold for consumption. It was observed that electricity was capable of sale as property as it was sold, purchased and consumed everywhere. A "dealer" was defined by the Central Sales Tax Act practically in the same way as in the Madras General Sales Tax Act and it meant a person who carried on business of buying and selling goods. In the opinion of the learned Judge the concept of dealer, goods and sale comprehended all kinds of movable property. He further relied on certain decisions which have been cited before and which will be presently noticed. A similar view was expressed by Tek Chand J. of the Punjab and Haryana High Court in Malerkotla Power Supply Co. v. Excise and Taxation Officer, Sangrur, (1968) 22 STC 325 (Punj). It was held that electric energy fell within the definition of "goods" in both the Punjab Sales Tax Act 1948 and the Central Sales Tax Act 1956. According to the learned Judge electric energy has the commonly accepted attributes of movable property. It can be stored and transmitted. It is also capable of theft. It may not be tangible in the sense that it cannot be touched without considerable danger of destruction or injury but it was perceptible both as an illuminant and a fuel and also in other energy-giving forms. Electric energy may not be property in the sense of the term "movable property" as used in the Pun-

jab and Central General Clauses Acts in contradistinction to "immovable property" but it must fall within the ambit of "goods" even if in a sense it was intangible or invisible. As pointed out in the Madras case the statement contained in 18 Am. Jur. 407 recognises that electricity is property capable of sale and it may be the subject of larceny. In *Naimital Hotel v. Municipal Board*, AIR 1946 All 502 it was held that for the purpose of Article 52 of the Indian Limitation Act electricity was property and goods. In *Eric Country Natural Gas and Fuel Co. Ltd. v. Carroll* 1911 AC 105, a question arose as to the measure of damages for a breach of contract to supply gas. Lord Atkinson delivering the judgment of the Privy Council applied the same rule which is applicable where the contract is one for sale of goods. In other words gas was treated to be "goods".

8. The High Court in the present case, appears to have relied on *Rash Behari v. Emperor*, AIR 1936 Cal 753 in which approval was accorded to the statement in Pollock and Mulla's commentary on Sale of Goods Act 1930 that it was doubtful whether that Act was applicable to such "goods" as gas, water and electricity. The context in which this matter is discussed in the Calcutta case is altogether different and distinguishable and what was being decided there was the scope and ambit of Section 39 of the Electricity Act 1910. As regards the Entries in List II of the Seventh Schedule to the Constitution, the relevant ones may be produced:

"53. Taxes on the consumption or sale of electricity.

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I."

9. The reasoning which prevailed with the High Court was that a well-defined distinction existed between the sale or purchase of "goods" and consumption or sale of electricity otherwise there was no necessity of having Entry No. 53. But under Entry 53 taxes can be levied not only on sale of electricity but also on its consumption which could not probably have been done under Entry 54. It is difficult to derive much assistance from the aforesaid entries. What has essentially to be seen is whether electric energy is "goods" within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which "goods" means all kinds

of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable property" when considered with reference to "goods" as defined for the purposes of sale tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption and use which, if done dishonestly, should attract punishment under Sec. 39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property. Even in *Benjamin on Sale*, 8th Edn., reference has been made at page 171 to *County of Durham Electrical, etc., Co. v. Inland Revenue Commrs.*, (1909) 2 KB 604 in which electric energy was assumed to be "goods". If there can be sale and purchase of electric energy like any other movable object we see no difficulty in holding that electric energy was intended to be covered by the definition of "goods" in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of sales tax by making a provision for it in the Schedules to the two Acts. It cannot be denied that the Electricity Board carried on principally the business of selling, supplying or distributing electric energy. It would therefore clearly fall within the meaning of the expression "dealer" in the two Acts.

10. As regards steam there has been a good deal of argument on the question whether it is liable to be assessed to sales tax in the hands of the Electric Board. According to Mr. Shroff the Electricity Board carried on the business of selling steam to the Nepa Mills and that this has lasted for a number of years. It has been submitted that simply because the Electricity Board does not have any profit motive in supplying steam it cannot escape payment of sales tax because the steam is nevertheless being sold as "goods". The High Court was of the view that the water which the Nepa Mills supplied free to the Electricity Board became the property of the Board and in return for this free supply the Board agreed to give steam to Nepa Mills at a rate based solely on the coal consumed

in producing steam. The mills had also agreed to reimburse the Electricity Board for the loss sustained on account of the mills not taking the "full demand of steam". According to the High Court there was no contract for the sale of steam as such and it was only for the labour and cost involved in its supply to the mills. The High Court relied on the findings of the Tribunal on this point and held that the turnover in respect of steam was not taxable. The tribunal in its order dated June 16, 1966 referred to certain conditions of working arrangement which were reduced to writing but which had not been properly executed as a contract which showed that the mills were supplying water free and the Electricity Board was making a pro rata charge of conversion of water into steam. It seems to us that the High Court was right in coming to the conclusion, on the finding of the tribunal, that the real arrangement was for supplying steam on actual cost basis and in that sense it was more akin to a labour contract than to sale.

11. Mr. Shroff has argued that the document which was relied upon by the tribunal could not be looked at as it was neither admissible in evidence nor had it been properly executed as a contract between the Electricity Board and the mills and it happened to be a mere draft of an agreement which was proposed to be entered into. It is too late for Mr. Shroff to take these objections because these should have been raised before the Tribunal and the High Court.

12. It is stated in Halsbury's Laws of England, III Edn. Vol. 34, page 6 that "a contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. It has been laid down by this court in Govt. of Andhra Pradesh v. Guntur Tobaccos Ltd., 16 STC 240 = (AIR 1965 SC 1396), that in business transactions the works contracts are frequently not recorded in writing meeting out all the covenants and conditions thereof, and the terms and incidents of the contracts have to be gathered from the evidence and attendant circumstances. The ques-

tion in each case is one about the true agreement between the parties and the terms of the agreement must be deduced from a review of all the attendant circumstances. On the findings of the tribunal and the High Court we are of the opinion that the arrangement relating to supply of steam in return for the water supplied by the mills on payment of actual cost was not one of sale but was more in the nature of a works contract.

13. In the result the answer of the High Court to the first question is discharged and it is held that the Electricity Board is a "dealer" within the meaning of the relevant provisions of the two Acts in respect of its activities of generation, distribution, sale and supply of electric energy. The answers to the second, third and fourth questions are affirmed. The answer given by the High Court to the fifth question is discharged. It is unnecessary to express any opinion on that question because Mr. Desai has not pressed for any decision being given by us and has accepted the liability in respect of the purchase tax as determined by the assessing authorities for the assessment orders in question. The appeals are allowed to the extent indicated above. In view of all the circumstances the parties are left to bear their own costs.

Appeal partly allowed.

AIR 1970 SUPREME COURT 737 (V 57 C 150)

(From: Industrial Tribunal, Delhi)*

J. M. SHELAT AND V. BHARGAVA, JJ.

Workmen of Indian Express Newspaper Private Ltd., Appellants v. The Management of Indian Express Newspaper Private Ltd., Respondent.

Civil Appeal No. 1733 of 1967, D/-26-11-1968.

Industrial Disputes Act (1947), Section 2 (k) — Individual dispute in establishment espoused by outside Union having 25 per cent workmen of concerned establishment as members — Individual dispute held was transformed into 'industrial dispute'.

A dispute relating to two workmen in a newspaper establishment in Delhi arose

* (Reference I. D. No. 241 of 1961, D/-10-4-1967—Industrial Tribunal, Delhi.)

CN/CN/G193/68/VBB/A

in July 1959. Thereafter the dispute was espoused by the Delhi Union of Journalists, an outside Union, whose membership was open to the members of the newspaper establishment concerned. The dispute was referred to the Industrial Tribunal in August 1961. The question arose whether the dispute was an industrial dispute (and not an individual dispute) as the Delhi Union of Journalists not being exclusively a Union of the workmen employed in the newspaper establishment concerned, had espoused the said cause. It was found that about 25 per cent of the working journalists of the newspaper establishment concerned at least were members of the Delhi Union of Journalists. It was clear from the evidence that at the material time there was no union of working journalists employed by the newspaper establishment concerned:

Held that the Delhi Union of Journalists could be said to have a representative character qua the working journalists employed in the newspaper establishment concerned, and the dispute was transformed into an "industrial dispute": AIR 1966 SC 182 and AIR 1963 SC 318, Rel. on; AIR 1957 SC 104 and AIR 1957 SC 532, Ref. (Para 8)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 182 (V 53) =

(1965) 3 SCR 394, Workmen v.

M/s. Dharampal Premchand 7, 8

(1963) AIR 1963 SC 318 (V 50) =

(1962) 3 SCR 893, Bombay Union

of Journalists v. The 'Hindu'

Bombay 6, 7, 8

(1957) AIR 1957 SC 104 (V 44) =

1956 SCR 936, Central Provinces

Transport Services Ltd. v. Raghu-

nath Gopal Patwardhan 7

(1957) AIR 1957 SC 532 (V 44) =

1957 SCR 754, Newspapers Ltd.

v. State Industrial Tribunal,

U. P. 7

M/s. M. K. Ramamurthi, Mrs. Shya-

mala Pappu, Mr. Vineet Kumar and Mr.

Madan Mohan, Advocates, for Appellants;

M/s. S. V. Gupta, Senior Advocate, (M/s.

Lalit Bhasin, S. K. Mehta and K. L.

Mehta, Advocates, with him), for Respon-

dent.

The Judgment of the Court was delivered by

SHELAT, J.: Two workmen, Gulab Singh and Satya Pal, were appointed by the respondent company in December 1956 and February, 1955 respectively under the designation of copy-holders.

It was alleged that they were entrusted with the duties of proof-readers and therefore they claimed that they should be treated as such. In July, 1959, the management issued an order in which the two workmen were described as copy-holders. It was alleged that in spite of this order the management continued to give the workmen the work of proof-readers. A dispute whether the two workmen should be treated as proof-readers having arisen and having been espoused by the Delhi Union of Journalists, the Delhi Administration, by a notification dated August 2, 1961 referred it to the Industrial Tribunal, Delhi.

2. The management contended that the said dispute was an individual dispute and not an Industrial dispute and that being so it was wrongly referred to the Tribunal and the Tribunal had no jurisdiction to adjudicate it. The Tribunal raised the preliminary issue, namely, whether the dispute relating to the said two workmen was an industrial dispute. The Tribunal held that it was not an industrial dispute but was only an individual dispute of the two workmen and therefore it had no jurisdiction to adjudicate the said reference. The workmen obtained special leave from this Court and that is how this appeal has come up before us for disposal.

3. Apart from the oral evidence, the appellants, relied on two documents, Ex. WW1/A, which purported to be the minutes of a meeting held on November 15, 1960 of 17 working journalists and Ex. WB/2, purporting to be the minutes of a meeting of the executive committee of the Delhi Union of Journalists held on December 1, 1960. The Union maintained that these two resolutions were proof of espousal of the dispute, the first by an appreciable number of the co-workers of the two aggrieved workmen and the second by the union and therefore the dispute though originally an individual dispute was converted into an industrial dispute. The Tribunal rejected Ex. WW1/A, namely, the minutes of the alleged meeting of the 17 working journalists in the employ of the respondent company as unreliable. The Tribunal next considered whether, even assuming that the said 17 working journalists espoused the cause of the two workmen that espousal transformed the dispute into question into an industrial dispute, in other words, whether they constituted an appreciable number sufficient to change

the dispute into an industrial dispute. At the material time the Branch office of the respondent company at Delhi consisted in all of 388 employees, out of whom 140 were working in the Press. The working journalists numbered 131, out of whom 63 were outstation correspondents and the remaining 68 were working journalists performing their duties in Delhi and New Delhi. The Tribunal held that though the said 63 working journalists were outstation journalists they nevertheless belonged to the staff of the respondent company's Delhi Branch, and therefore, could not be excluded from consideration. The question which the Tribunal posed to itself was whether 17 out of the said 131 working journalists could be said to be an appreciable number. According to the Tribunal, even if those 63 outstation correspondents were excluded and only 68 working journalists were considered, 17 of them would not constitute an appreciable number sufficient to convert the said dispute into an industrial dispute. It also held that mere passing of a resolution without anything done to follow it up was not sufficient to constitute espousal. There was no evidence that after passing the said alleged resolution on November 15, 1960 anything further was done. On these facts the Tribunal did not consider the aforesaid resolution, assuming that it was passed, as constituting espousal.

4. As regards the resolution dated December 1, 1960 the minutes of the meeting of the executive committee of the Delhi Union of Journalists were produced before the Tribunal. The minutes stated that the meeting after considering the representation made to it by the employees of the Indian Express decided to take up the case of the two workmen and authorised the office bearers of the union to initiate the necessary proceedings. The Tribunal found that the union initiated a fresh dispute before the Conciliation Officer and that there was no pending case initiated earlier i. e., before December 1, 1960 by another union as alleged by the appellants which could have been continued by the union. A copy of the statement of claim filed by the union before the Conciliation Officer was also produced before the Tribunal. There was evidence that 31 working journalists employed in the respondent company had become the members of the Delhi Union of Journalists. But they had joined the union after the said order of July 1959. The Tribunal's view was

that the said 31 working journalists having joined the Delhi Union of Journalists after the cause of action had arisen in July 1959 the said resolution of the Unions' executive committee would not constitute espousal as there would be no nexus between the dispute and the union, and therefore the resolution dated December 1, 1960 did not have the effect of converting the said dispute into an industrial dispute.

5. Mr. Ramamurti, for the appellants contended that the resolution dated December 1, 1960 coupled with the fact that the union initiated conciliation proceedings in respect of the demand of the said two workmen was sufficient to transform the dispute into an industrial dispute. On the other hand, Mr. Gupte, appearing for the company, contended that a dispute which is *prima facie* an individual dispute may assume the character of an industrial dispute if it is taken up or espoused by an appreciable body of the workmen of the establishment. Espousal by a union is regarded as sufficient, for, that means that it is an espousal by an appreciable number of workmen in that establishment. If such a dispute is espoused by an outside union, the workmen of the establishment, appreciable in number, must be members of such a union. On these contentions, the question for our determination is whether the Delhi Union of Journalists can be said to have espoused the dispute of the two workmen; if so, whether it did it in time, and whether the union not being exclusively a union of the workmen employed in the respondent company, could espouse the said cause.

6. The resolution dated December 1, 1960 passed by the executive committee of the union was not disbelieved by the Tribunal. That, coupled with the fact that the union authorities initiated the conciliation proceeding, must mean that the union had espoused the cause of the two workmen. The dispute arose in July 1959 when the management refused to treat the two workmen as proof-readers. Thereafter the executive committee, after considering a representation made to it by the employees of the respondent company, as the resolution reads, passed the said resolution authorising the office bearers of the union to initiate proceedings in the matter of the said dispute and the secretary accordingly initiated proceedings before the conciliation officer. In these circumstances, it is not possible to appreciate how the espousal by the union

can be said to be beyond time as such espousal can only take place after and not before the dispute arose, or as counsel put it, the cause of action arose. In *Bombay Union of Journalists v. The 'Hindu', Bombay*, (1962) 3 SCR 893 = (AIR 1963 SC 318) this Court in clear terms laid down that the test of an industrial dispute is whether at the date of the reference the dispute was taken up and supported by a union, or by an appreciable number of workmen. There being no doubt of the union having taken up the cause of the two workmen before the reference the first two parts of the question must be answered in the affirmative.

7. The next question is whether the cause of a workman in a particular establishment in an industry can be sponsored by a union which is not of workmen of that establishment but is one of which membership is open to workmen of other establishments in that industry. In *Central Provinces Transport Services Ltd. v. Raghunath Copal Patwardhan*, 1956 SCR 956 = (AIR 1957 SC 104) this Court noted that decided cases in India disclosed their views as to the meaning of an industrial dispute. (1) a dispute between an employer and a single workman cannot be an industrial dispute, (2) it can be an industrial dispute and (3) it cannot per se be an industrial dispute but may become one if taken up by a trade union or a number of workmen. After discussing the scope of industrial dispute as defined in Section 2 (k) of the Act it observed that the preponderance of judicial opinion was clearly in favour of the last of the three views and that there was considerable reason behind it. In *The Newspapers Ltd. v. State Industrial Tribunal, U. P.*, 1957 SCR 754 = (AIR 1957 SC 532) the third respondent was employed as a lino typist by the appellant company. On an allegation of incompetence he was dismissed from service. His case was not taken up by any union of workers of the appellant company, nor by any of the unions of workmen employed in similar or allied trades. But the U. P. Working Journalists Union, Lucknow, with which the third respondent had no concern, took the matter to the Conciliation Board. On a reference being made to the Industrial Tribunal by the Government the legality of that reference was challenged by the appellant company on the ground that the said dispute could not be treated as an industrial dispute under the U. P. Indus-

trial Disputes Act 1947 which defined by Section 2 an industrial dispute as having the same meaning assigned to it in Section 2 (k) of the Central Act. This Court upheld the contention observing that the notification referring the said dispute proceeded on an assumption that a dispute existed between the employer and "his workmen", that Tajammul Hussain, the workman concerned, could not be described as "workmen", nor could the U. P. Working Journalists Union be called "his workmen" nor was there any evidence to show that a dispute had got transformed into an industrial dispute. The question whether the union sponsoring a dispute must be the union of workmen in the establishment in which the workman concerned is employed or not had not so far arisen. It seems such a question arose for the first time in the case of (1962) 3 SCR 893 = (AIR 1963 SC 318) (supra). The decision in that case laid down (1) that the Industrial Disputes Act excluded its application to an individual dispute as distinguished from a dispute involving a group of workmen unless such a dispute is made a common cause by a body or a considerable section of workmen and (2) the members of a union who are not workmen of the employer against whom the dispute is sought to be raised cannot by their support convert an individual dispute into an industrial dispute. Persons who seek to support the cause must themselves be directly and substantially interested in the dispute and persons who are not the employees of the same employer cannot be regarded as so interested. The Court held that the dispute there being *prima facie* an individual dispute it was necessary in order to convert it into an industrial dispute that it should be taken up by a union of the employees or by an appreciable number of employees of *Hindu, Bombay*. The *Bombay Union of Journalists* not being a union of the employees of the *Hindu, Bombay*, but a union of all employees in the industry of journalism in *Bombay*, its support of the cause of the workman concerned would not convert the individual dispute into an industrial dispute. The members of such a union cannot be said to be persons substantially and directly interested in the dispute between the workman concerned and his employer, the *Hindu Bombay*. But in *Workmen v. M/s. Dharampal Premchand*, (1965) 3 SCR 394 = (AIR 1966 SC 182) this Court, after reviewing the previous decisions, distinguished the case of *Hindu, Bombay* and

held that notwithstanding the width of the words used in Section 2 (k) of the Act a dispute raised by an individual workman cannot become an industrial dispute unless it is supported either by his union or in the absence of a union by a number of workmen, that a union may validly raise a dispute though it may be a minority union of the workmen employed in an establishment, that if there was no union of workmen in an establishment a group of employees can raise the dispute which becomes an industrial dispute even though it is a dispute relating to an individual workman, and lastly, that where the workmen of an establishment have no union of their own and some or all of them have joined a union of another establishment belonging to the same industry, if such a union takes up the cause of the workman working in an establishment which has no union of its own, the dispute would become an industrial dispute if such a union can claim a representative character in a way that its support would make the dispute an industrial dispute.

8. The evidence of the union secretary was that in 1959-60, 31 working journalists of the respondent company were members of the Delhi Union of Journalists. It was nobody's case that these 31 members did not continue to be the members of that union in 1960-61 also. If the number of working journalists in the respondent company were to be taken as 68, membership of the union by as many as 31 working journalists would certainly confer on the union a representative character. Even if the number of working journalists were to be taken as 131, it would not be unreasonable to say that 31 i.e., about 25 per cent of them would, by becoming the members of the union, give a representative character to the union. It is clear from the evidence that at the material time there was no union of working journalists employed by the respondent company. Therefore, in accordance with the decision in (1965) 3 SCR 394 = (AIR 1966 SC 182) (supra), the union can be said to have a representative character qua the working journalists employed in the respondent company. There can be no doubt that the union had taken up the cause of the two workmen by its executive committee passing the said resolution and its office bearers having followed up that resolution by taking the matter before the conciliation officer. Though the grievance of the two workmen arose in July 1959 when the

management declined to accept them as proof-readers the union has sponsored their cause before the date of reference as laid down in the case of Hindu, Bombay, (1962) 3 SCR 893 = (AIR 1963 SC 318). That being the position it cannot be gainsaid that the dispute was transformed into an industrial dispute as it was sponsored by a union which possessed a representative character vis-a-vis the working journalists in the employ of the respondent company.

9. We must, therefore, hold that the Tribunal's view that the dispute was not an industrial dispute was incorrect. The award, therefore, will have to be set aside and the appeal of the workmen allowed. There will be no order as to costs.

Appeal allowed.

AIR 1970 SUPREME COURT 741
(V 57 C 151)

(From: Andhra Pradesh)*

M. HIDAYATULLAH, C. J. AND
G. K. MITTER, J.

Goka Ramalingam, Appellant v. Boddu Abraham and another, Respondents.

Civil Appeal No. 61 of 1968, D/- 27-11-1968.

Representation of the People Act (1951), Section 116-A — Election petition — Case fought on the original plea and issue that the respondent was converted to Christianity—Register of converted Christians maintained by church and marked as exhibit containing entries showing conversion of father and mother of respondent to Christianity — Application to appellate court for amendment of plea of conversion of respondent into one of conversion of his parents to Christianity — Held Court could not allow petition because it changed the nature of the case requiring fresh evidence and was filed beyond limitation for election petition — Plea was belated as petitioner had notice of it when he had inspected the register — The Appellate Court could not also allow the petitioner to change his front and narrow the field by taking the plea that the respondent was not a Hindu on the date he filed his nomination paper and was not competent to stand for Reserved

*(Election Petn. No. 3 of 1967, D/- 21-8-1967 — Andh Pra.)

CN/CN/G218/68/DHZ/A

seat — Plea should have been taken in the first instance. (Paras 4, 5)

Mr. P. Ram Reddy, Senior Advocate, (Mr. A. V. V. Nair, Advocate, with him), for Appellant; M/s. R. K. Garg, D. P. Singh and S. C. Agarwal, Advocates of M/s. Ramamurthi and Co. and Mr. Asif Ansari, Advocate, for Respondent No. 1.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.— This appeal arises from the decision of the Andhra Pradesh High Court dated August 21, 1967 by which an election petition filed by the present appellant Goka Ramalingam to question the election of the answering respondent Boddu Abraham was dismissed. The matter concerns the Cherial (Scheduled Caste) constituency in the election to the Andhra Pradesh Legislative Assembly held in February 1967. Three candidates had offered themselves for election. Two of them we have already named, the third is one Devadanam. The answering respondent obtained 15000 and odd, appellant-election petitioner 12000 and odd and Devadanam 7000 and odd votes. The election petition was based only on one issue, namely, that the respondents who had stood for a scheduled caste Reserved seat had "converted themselves into Christianity long time back and they continue to profess the said religion Christianity even today." Under the Constitution (Scheduled Castes) Order, 1950, it is provided as follows:

"(2) Subject to the provisions of this Order, the castes, races or tribes or parts of, or groups within, castes or tribes, specified in Parts I to XIII of the Schedule to this Order shall, in relation to the States to which those parts respectively relate, be deemed to be Scheduled Castes so far as regards members thereof resident in the localities specified in relation to them in those parts of that Schedule.

(3) Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste." It would therefore appear that if the answering respondent and Devadanam were not members of a named scheduled caste (in this case the Madiga caste) they were not eligible to stand for election for the Reserved Seat. The case as put forward in the High Court was that these two candidates had themselves got converted into Christianity a long time ago and that they did not therefore profess Hindu

religion although in the plea it is stated affirmatively that they profess Christian religion. The case went to trial on this plea and the issues framed were as follows:

"1. Whether the respondents who admittedly once belonged to "Madiga" community embraced Christianity and professed the religion of Christianity at the time of election and hence respondent No. 1 was not qualified to be chosen to fill the seat in the Assembly of the State as per Section 5 (a) read with Rule 3 of the Constitution (Scheduled Castes) Order, 1950 (C. O. 19 dated 10-8-50)?

2. Whether the nomination papers of both the respondents were improperly received and as a result thereof the result of the election has been materially affected?

3. What is the effect of admission of respondent 2 in his W. S. as to his status on this election petition?" Evidence was led to prove that the answering respondent was converted to Christianity. This evidence was not accepted by the High Court. As regards the other respondent, he went out of the fight admitting that he was a Christian and nothing more need be said of him.

2. It appears that while this case was going on the learned Judge was informed that a Register of all converted Christians was maintained by the church. He accordingly sent for the Register and marked it as Ex. C-1. In the judgment the learned Judge gives his order: pertaining to this action. It reads as follows:

"I may mention here that since it came out in the evidence of R. W. 2 that the names of all converts to Christianity within the jurisdiction of Hanumakonda Baptist Mission would be entered in the General Record of the Field Association, Houmakonda, and that register was filed as an exhibit in a suit pending in the District Court at Warangal, I summoned it and marked it as Ex. G-1. I gave opportunity for the lawyers appearing on both sides to inspect the register and make their submissions. The entries relating to Dharmasangaram village are to be found in pages 50 to 51 and 182. It is true that the name of the 1st respondent is not found in this Record; but since this register does not appear to be an exhaustive and complete record of all the Christians in that area, I do not propose to rely on the entries in this register for any purpose."

3. This Register was inspected by the parties. They went into it with a view

to finding out whether the answering respondent and his wife Chinna Mariamma has been converted or not. There was no entry showing that they had been so converted. It appears, however, that the Register did contain two entries showing the conversion of Boddu Kumaraiah and China Buchamma who are now said to be the father and mother of answering respondent. An affidavit has also been filed from the Pastor of the Church in which it is stated that these entries refer to the parents of the answering respondent. Even though the Register was in Court and was open to inspection of the parties, care was not taken to discover these two names, with the result that the case was fought on the original plea and issue that the answering respondent was converted to Christianity. That apparently was not a fact, because if he was born of Christian parents he did not need conversion. That fact, however, is only alleged now before us and has not been subjected to proof.

4. The question therefore is whether in view of this fresh evidence, we should allow this appeal. On a proper consideration of the entire matter we are of opinion that we cannot. An application was made to us asking for amendment of the plea of conversion of the answering respondent into one of conversion of his parents to Christianity. We have been unable to allow that petition, because it changes the nature of the case requiring fresh evidence to be taken and is filed also beyond the period of limitation prescribed for filing of election petitions. That it does change the entire nature of the case is obvious, because instead of the plea that the answering respondent was converted to Christianity, it is now sought to be substituted a plea that the parents were converted to Christianity. We should have understood such an application being made in the Court of trial when the Register was produced, because that might have been a matter not within the knowledge of the election petitioner till the register was produced. But after the Register had been produced and it lay in the Court for nearly an year and had been inspected by the answering respondent, it does not lie in his mouth to say that he had no notice of the true facts. He had notice of them because he had the register with him and the names of the alleged parents of the answering respondent are clearly mentioned therein. In fact the register seems to be a well-kept document written extremely

legibly and there was no danger of any name having been overlooked. Therefore we must consider this as a belated plea and reject it on the two grounds already mentioned by us.

5. Once the application for Amendment is out of the way, the question is whether the appeal of the election petitioner can be otherwise sustained. Mr. Ram Reddy contended that under cl. (3) of the Presidential Order, it is sufficient to prove that if a person professes religion other than Hinduism or Sikhism it disentitles him to contest for a reserved seat. He says that for whatever reason the answering respondent be regarded as a Christian today or at any rate at the time he filed his nomination paper, he would be incompetent to stand for the election from the reserved seat if he professed a religion other than Hinduism or Sikhism. In other words, he wants to extract from the plea and the issue a very much narrower field for enquiry, namely, that the answering respondent was not a Hindu on that date. This would have been a proper plea to take in the first instance. It is because of clumsy blundering that the petitioner undertook a much greater burden than the law required him to take. He should have pleaded only that the returned candidate was a Christian on the date he filed his nomination paper and therefore was not a Hindu and was not competent to stand for the Reserved Seat. Instead he proceeded to demonstrate through his plea and his evidence that the returned candidate was himself converted to Christianity and failed. In this view of the matter we do not think that we should allow him to change his front and narrow the field of enquiry to one which he should have adopted in the first instance. Not having done so, we think that it is too late for him to change his case now. For these reasons, we are constrained to dismiss the appeal. We may say that it is an odd situation, because probably a Christian occupies a Reserved Seat, but this is the result of the vagaries of litigation which has to be carried on according to rules. The rules do not permit us to give relief where the party himself is at fault in making a wrong plea and in not making the right plea in time. But in the circumstances of the case, we think that the parties should be directed to bear their costs throughout.

Appeal dismissed.

AIR 1970 SUPREME COURT 744
(V 57 C 152)

(From: Punjab)*

J. C. SHAH AND K. S. HECDE, JJ.

State of Punjab, Appellant v. Sant Singh
Kanwarjit Singh, Respondent.Civil Appeal No. 2159 of 1966, D/- 4-
12-1969.

Sales Tax — Punjab General Sales Tax Act (46 of 1948), Section 11 — Quarterly returns submitted by dealer — Assessment proceedings can be started on that basis even before expiry of the relevant financial year. L. P. A. No. 262 of 1965, D/- 20-10-1965 (Punji), Reversed; AIR 1967 Punj 464 (FB), Approved. (Para 8) Cases Referred: Chronological Paras (1967) AIR 1967 Punj 464 (V 54)=

ILR (1967) 1 Punj 115 (FB), Om Parkash Rajinder Kumar v. K. K. Opal

(1964) 1964-15 STC 837 (Punji), Mansa Ram Sushil Kumar v. Assessing Authority, Ludhiana

(1962) AIR 1962 SC 743 (V 49)= 1962 Supp. (1) SCR 913, M/s, Mathra Parshad & Sons v. State of Punjab

M/s. V. C. Mahajan and R. N. Sachthey Advocates, for Appellant, M/s. Sobhag Mal Jain and B. P. Maheshwari, Advocates, for Respondent.

The following Judgment of the Court was delivered by

SHAH, J.:—Sant Singh Kanwarjit Singh—hereinafter called the assessee—is registered as a dealer under the Punjab General Sales Tax Act 1948. The assessee filed returns of the turnover of its business for the quarters ending 30th June, 1962 and 30th September, 1962, but without appending thereto the list of sales to registered dealers as required by R. 30 framed under the Act. The Sales-tax Officer proceeded to make "ex parte assessments" for the two quarters.

2. The assessee then moved a petition in the High Court of Punjab for a writ quashing the orders of assessment. A single Judge following the Judgment of the Punjab High Court in Mansa Ram Sushil Kumar v. Assessing Authority, Ludhiana, 1964-15 STC 837 (Punji), quashed the orders of assessment. An appeal by the State of Punjab was summarily dismissed by a Division Bench of the High Court.

* (L. P. A. No. 262 of 1965 (D/- 20-10-1965—Punji.)

BN/CN/A115/70/MLD/M

3. The scheme of levy and assessment of tax under the Act may be briefly noticed. Every dealer whose gross turnover during the year preceding commencement to the Act exceeded the taxable turnover is liable to pay tax on all sales effected after the quarter after the commencement of the Act. Tax is to be levied on the taxable turnover at such rates as the State Government may direct. Tax is payable under the Act in the manner provided and at such intervals as may be prescribed. Section 10 (1). A registered dealer furnishing a return has to pay the amount of tax due according to the return into the Government Treasury.

4. The assessing authority may without requiring the presence of the registered dealer or production by him of any evidence hold that the returns furnished are correct and complete, and proceed to assess the amount of tax due from the dealer on the basis of these returns; if the assessing authority is not satisfied with the return he may require the registered dealer to remain present in person or by pleader and to produce evidence on which he may rely upon in support of the return. The Assessing authority may after hearing the evidence as the dealer may produce and such other evidence the Assessing authority may require, assess the amount of tax due from the dealer.

5. The scheme is plain. A registered dealer must file return of the turnover in the manner prescribed and at such intervals as may be prescribed. The dealer while submitting the return has also to pay tax according to the return. The Assessing Officer may accept the return or he may call upon the tax payer to explain the turnover, and support it by evidence.

6. Under the Act sales-tax is an yearly tax, but the provisions relating to assessment contemplate assessments for periods shorter than a complete year, and for that purpose the tax payers are required by the Act to submit periodical returns of their turnover and to pay tax due thereon.

7. In (1964) 15 STC 837 (Punji) a Division Bench of the Punjab High Court held that the tax imposed under the Punjab Sales Tax Act may be assessed only at the end of the year and not during the pendency of the year as and when the return is filed, and in the absence of machinery in the Act for making assessment for a period shorter than the year of assessment, the order of assessment of

tax for a quarter before the expiry of the assessment year is illegal. In reaching that conclusion the High Court relied upon the Judgment of this Court in *M/s. Mathra Parshad & Sons v. State of Punjab*, (1962) Suppl (1) SCR 913= (AIR 1962 SC 745). But in *Mathura Parshad's case*, (1962) Suppl (1) SCR 913= (AIR 1962 SC 745) this Court considered whether an exemption granted by the State Government during the course of the year was applicable to the whole or only a part of the year of assessment. This Court held (Mr. Justice Kapur dissenting) that the exemption operated for the entire financial year. The Court observed that the tax was an yearly tax levied on the taxable turnover of a dealer for the year; it was collected in some cases quarterly, some cases yearly and proceeded to hold that whenever the exemption came in, in the year for which the tax was payable, it exempted sales throughout the year unless notification fixed the date of commencement of the tax. In our judgment the principle of that case has no bearing on the question arising in this case. The Court in *Mathra Parshad's case*, 1962 Suppl (1) SCR 913= (AIR 1962 SC 745) merely emphasised that the tax was an annual tax but that did not imply that assessment of tax quarterly was illegal. Adjustment may possibly have to be made when the assessment of the final quarter is made, but the taxing authorities are not debarred from determining and assessing the quarterly turnover of tax. *Mansa Ram's case*, (1964) 15 STC 857 (Punj) has since been overruled by a Full Bench of the Punjab High Court in *Om Parkash Rajinder Kumar v. K. K. Opal*, ILR (1967) 1 Punj 115 = (AIR 1967 Punj 464) (FB). The Court in that case held that Sales tax may be assessed under Section 11 of the Act on the basis of quarterly returns submitted by the dealer pursuant to the notice served on him under Section 10 (3) before the close of the relevant financial year.

8. In our judgment the High Court was right in holding in *Om Parkash's Rajinder Kumar's case*, ILR (1967) 1 Punj 115= (AIR 1967 Punj 464 FB) that the assessment proceeding under the Punjab General Sales-tax Act may be started even before the expiry of the year where provision is made for submission of periodical returns, and that such assessments are not provisional.

9. The appeal is allowed and the order passed by the High Court set aside and

the petition is dismissed. There will be no order as to cost throughout.

Appeal allowed..

AIR 1970 SUPREME COURT 745 (V 57 C 153)

(From: 1961 MPLJ 102)

J. C. SHAH AND K. S. HEGDE, JJ.

Commissioner of Income-tax M. P., Appellant v. Binodiram Balchand, Indore, Respondent.

Civil Appeal No. 27 of 1969, D/- 16-12-1969.

Part B States (Taxation Concessions) Order (1950), Para 12, Para 6 Cls. (i) to (3) and Explanation to Para 3 (v) — Company registered under Part B State — Accrual of part of dividend income from non-taxable territory — Income Tax and Super Tax is payable on concessional rates mentioned in Schedule. 1961 MPLJ 102, Affirmed. (Paras 12, 13)

Cases Referred: Chronological Paras (1969) Civil Appeal No. 19 of 1969,

D/- 16-12-1969= (1970) 1 SCWR

171, Commr. of Income-tax

Madhya Pradesh v. Kanchanbai 3.

M/s. S. K. Aiyar and B. D. Sharma, Advocates, for Appellant; Mr. M. C. Chagla, Senior Advocate, (M/s. Rameshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain and Co. and Miss Swaranjit Sodhi, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.:— In this appeal by certificate brought by the Commissioner of Income-tax, Nagpur, two questions arise for consideration. They are:

(1) What is the "previous year" in respect of the source of income, viz., managing agency and selling agency and financing of the Binod Mills Limited, Ujjain, for the purpose of assessment for the assessment year 1950-51 — whether the year ended 31-3-1950 or the year ended Diwali, 1949? and (2) Whether for the purpose of bringing to tax the dividend income of the assessee for the assessment year 1950-51 and having regard to the provisions of Part B States (Taxation Concessions) Order, 1950 (in short 'Order'), the dividend income say of Rs. 34,468/- (gross Rs. 50,137/-) as well as the dividend income of Rs. 2,28,392/-

should be subjected to tax at the concessional rates mentioned in the Schedule to the 'Order' as held by the High Court.

2. The assessee is a Hindu Undivided Family with its Head Office at Indore and branches at several other places in some of the former B States including the State of Madhya Bharat. It derived its income from several sources such as property, businesses, managing agency commission, shares in partnership firms etc. The assessee's family at one time was carrying on business at Bombay and was assessed in the status of non-resident Hindu Undivided Family. Its business in Bombay was, however, closed down sometime in 1945 and no assessment was made on it for the years 1948-49 and 1949-50. Till the assessment year 1947-48, the "previous year" adopted by the assessee was the appropriate Diwali year. For the assessment year 1950-51, the assessee claimed that in respect of its income by way of commission from the managing and selling agency of the Binod Mills Ltd., Ujjain, its "previous year" was one ending on March 31, 1950 and on that basis it contended that the commission accrued to it during the calendar year 1948 could not be brought to tax. This contention was not accepted by the Income-tax Officer, the Appellate Assistant Commissioner and the Appellate Tribunal. They took the view that the case of the assessee is covered by the proviso to Section 2 (11) (i) (a) of the Income-tax Act, 1922 (in short "the Act"). According to their view, the assessee had "once been assessed". Therefore it was not open to it to vary its "previous year". In view of that finding, the assessee was assessed on the basis that the Diwali year beginning from 2nd November, 1948 and ending on October 21, 1949 is the relevant account year. In that account year, the assessee derived net dividend income of Rs. 2,62,860/- from the Binod Mills Ltd., Ujjain. Out of this income Rs. 34,468/- were attributable to the profits that accrued or that could be deemed to have been accrued to the Binod Mills in Part A State. But the remaining amount of Rs. 2,28,392/- was held to be attributable to profits which accrued in Part B State viz., Madhya Bharat. As the dividend income attributable to profits accruing in Part A State was subject to tax under the Act, the Income-tax Officer grossed up the net dividend of Rs. 34,468/- to Rs. 50,137/- under Section 16 (2) of the Act. This income was subjected to income-tax and super-tax at the rates prescribed by the

Finance Act, 1950, rejecting the claim of the assessee for concession in regard to this income under the 'Order'. The balance of Rs. 2,28,392/- was not subjected to any income-tax in view of the provisions contained in paragraph 12 of the 'Order'. It was, however, subjected to super-tax at the concessional rates mentioned in the 'Order'. The Tribunal rejected the contention of the assessee that the dividend income of Rs. 2,28,392/- was not subject to super-tax under paragraph 12 of the 'Order' and that the amount of Rs. 2,62,860/- should not have been apportioned as the Income-tax Officer had done as neither income-tax nor super-tax was leviable on those profits and in any case, super-tax was payable on the entire dividend income, only at the concessional 'rates'. On a reference made under Section 66 (1) of the Act, the High Court held that the "previous year" in respect of the managing agency and selling agency sources of income is the financial year ending March 31, 1950. With regard to the other question, the High Court held that the income-tax payable on the entire dividend income included in the total income after exclusion of the non-taxable dividend under paragraph 12 of the 'Order' would be at the concessional rates prescribed in the 'Order' and further that the assessee is liable to pay super-tax at the concessional rates mentioned in that 'Order' on the entire dividend income. Hence this appeal.

3. So far as the first question is concerned viz., whether the assessee was entitled to take the financial year as the relevant previous year, the same is concluded by our decision in Commr. of Income-tax, Madhya Pradesh v. Kanchanbai, (Civil Appeal No. 19 of 1969 (SC)) just now delivered. For the reasons mentioned therein the decision of the High Court on this point is confirmed.

4. This takes us to the second question namely whether the dividend income of the assessee should have been assessed both for the purpose of income-tax as well as super-tax at the rates prescribed in the Schedule to the 'Order'.

5. The High Court's finding that the dividend income accrued or received by the assessee in Madhya Bharat is subject to super-tax as well as its finding that a part of dividend income is subject to income-tax had not been appealed against. Hence it is not necessary to go into that question. Therefore the question that re-

mains for examination is whether the High Court was right in holding that the income-tax and super-tax leviable on the dividend income is at the concessional rates mentioned in the 'Order'.

6. It may be noted that in Madhya Bharat till April 1, 1950, there was no State law relating to the charge of income-tax and super-tax. Paragraph 3 (v) of the 'Order' defines the expression "State rate of tax". The explanation to that definition says "Where there was no State law relating to charge of income-tax and super-tax, the rates of income-tax and super-tax in force in that State immediately before the appointed day (in the present case 1st day of April, 1950), shall, for the purposes of this clause, be deemed to be the rates specified in the Schedule". Paragraph 4 (i) says that the provisions of paragraphs 5, 6, sub-paragraph (1) of paragraph 11, 12 and 13 of this 'Order' shall apply.....

"(iii) in the case of any other assessee who is not resident in the previous year in the taxable territories or in the taxable territories other than Part B States, to so much of the income, profits and gains included in his total income as accrue or arise in any Part B State and are not deemed to accrue or arise, or are not received or deemed to be received within the meaning of clause (a) of sub-section (1) of Section 4 of the Act, in the taxable territories other than the Part B States."

7. The assessee in the relevant "previous year" was a resident of Madhya Bharat. His income with which we are concerned in this appeal exclusively accrued or arose in Madhya Bharat. Therefore the assessee is entitled to the benefit of paragraphs 5, 6, sub-paragraph (1) of paragraph 11, 12 and 13 of the 'Order'.

8. Paragraph 5 deals with the income of a "previous year" chargeable in the Part B State in 1949-50. The assessee's case does not fall within its scope. Paragraph 6 deals with income of a "previous year" which does not fall under paragraph 5. That paragraph to the extent it is material for our present purpose reads:

"The income, profits and gains of any previous year ending after the 31st day of March, 1949, which does not fall within paragraph 5 of this order shall be assessed under the Act for the year ending on the 31st day of March, 1951 or on the 31st day of March, 1952, as the case

may be, and the tax payable thereon shall be determined as hereunder:

In respect of so much of the income, profits and gains included in the total income as accrue or arise in any State other than the States of Patiala and East Punjab States Union and Travancore Cochin —

(i) the tax shall be computed (a) at the Indian rate of tax and (b) at the State rate of tax in force immediately before the appointed day;

(ii) where the amount of tax computed under sub-clause (a) of clause (i) is less than or is equal to the amount of tax computed under sub-clause (b) of clause (i), the amount of the first mentioned tax shall be the tax payable;

(iii) where the amount of tax computed under sub-clause (a) of clause (i) exceeds the tax computed under sub-clause (b) of clause (i) the excess shall be allowed as a rebate from the first mentioned tax and the amount of the first mentioned tax as so reduced shall be the tax payable."

9. The provisos to that paragraph are not relevant for our present purpose.

10. In view of clauses 1 to 3 of paragraph 6 read with explanation to paragraph 3 (v), the tax payable by the assessee, income-tax as well as super-tax has to be computed on the basis of the formulae given in paragraph 6. In other words, the assessment will have to be made at the concessional rate mentioned in the Schedule to the 'Order'.

11. Paragraph 12 of the Order deals with dividends. It reads:

"Where the total income of an assessee chargeable to tax for the assessment for the year ending on the 31st day of March, 1951, includes any income from dividends paid by a company registered in a State in which there was no State law relating to the charge of income-tax and super-tax and the dividend is paid out of profits which were not liable to be taxed, in whole or in part, either in the State or in the taxable territories, no income-tax shall be payable by the assessee on such proportion of the dividend as the non-taxable profits of the company arising in the State bear to the total income of the company."

12. The income with which we are concerned in this case is dividend income. It was paid by a company registered in a 'B' State in which there was no State law relating to the charge of income-tax and super-tax. The department does not

dispute that the dividend income of Rs. 2,28,392/- is only subject to super-tax and no income-tax is leviable thereon. In other words it does not contest the finding that that dividend income falls within the scope of paragraph 12 of the 'Order'. Once that is conceded, as has been done, then there can be no doubt, in view of paragraph 6 of the 'Order' that on that amount super-tax has to be levied only at the concessional rate prescribed in the Schedule to the 'Order'.

13. Reading paragraphs 3 (v), 6 and 12 together, the position that emerges is that the assessee is liable to pay income-tax on Rs 50,137/- at the rates mentioned in the Schedule to the 'Order' and further he is also liable to pay super-tax on the entire dividend income at the rates mentioned in the Schedule to that 'order'.

14. For the reasons mentioned above, the view taken by the High Court is correct. Hence this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 748 (V 57 C 154)

(From: Kerala)*

J. C. SHAH, C. K. MITTER, K. S. HECDE AND A. N. CROVER, JJ.

The Union of India and others, Appellants v. K. Rajappa Menon, Respondent,
Civil Appeal No. 1064 of 1966, D/- 7-10-1968.

(A) Railway Servants Conduct and Disciplinary Rules, Rule 1713 — Finding on charge — No obligation on disciplinary authority to write order like judicial tribunal — Writ Appeal No. 205 of 1964, D/- 4-8-1965 (Ker.), Reversed.

Rule 1713 does not lay down any particular form or manner in which the disciplinary authority should record its finding on each charge. All that the Rule requires is that the record of the enquiry should be considered and the disciplinary authority should proceed to give its findings on each charge. This does not and cannot mean that it is obligatory on the disciplinary authority to discuss the evidence and the facts and circumstances established at the departmental enquiry

*(Writ Appeal No. 205 of 1964, D/- 4-8-1965 — Kerala.)

in details and write as if it were an order or a judgment of a judicial tribunal.

(Para 5)

Where the disciplinary authority after giving consideration to the record of the proceedings of the departmental inquiry agreed with the findings of the Enquiry Officer that all the charges mentioned in the charge-sheet had been established, it meant that he was affirming the findings on each charge and that fulfils the requirement of the Rule. The Rule after all has to be read not in a pedantic manner but in a practical and reasonable way. Writ Appeal No. 205 of 1964, D/- 4-8-1965 (Ker.), Reversed.

(Para 5)

(B) Constitution of India, Art. 311 (2) — Reasonable opportunity — Second show cause notice after tentative determination as to punishment — Not invalid.

The procedure which is to be followed under Article 311 (2) of the Constitution of affording a reasonable opportunity includes the giving of two notices, one at the enquiry stage and the other when the competent authority as a result of the enquiry tentatively determines to inflict a particular punishment. It is quite obvious that unless the disciplinary or the competent authority arrives at some tentative decision it will not be in a position to determine what particular punishment to inflict and a second show cause notice cannot be issued without such a tentative determination. AIR 1958 SC 300, Foll.

(Para 6)

Cases Referred: Chronological Paras (1958) AIR 1958 SC 300 (V 45)= 1958 SCR 1050, Khemchand v.

Union of India

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Mr. B. Sen, Senior Advocate, (Mr. S. P. Nayar, Advocate, with him), for Appellant No. 1; Mr. A. S. Nambiar and Miss Lily Thomas, Advocates, for Respondent.

The Judgment of the Court was delivered by

CROVER, J.:— This is an appeal by special leave from the judgment of the Kerala High Court in which the only point which arises for decision is whether Rule 1713 of the Conduct and Disciplinary Rules, hereinafter called the Rules, for railway servants was correctly applied and the dismissal of the respondent, who at the material time, was an Assistant Station Master was rightly set aside for non-compliance with that Rule.

2. The facts lie within a narrow compass. In July 1963 the respondent, who

was working as an Assistant Station Master at Chalakudy Railway Station was served with a statement containing charges relating to certain matters after an inspection report had been submitted to the authorities concerned. After the reply of the respondent had been received a departmental enquiry was held and the Enquiring Officer submitted a report finding all the four charges which had been preferred against the respondent proved. A show cause notice was then served in September 1963 giving the finding of the Enquiring Officer (Assistant Commercial Superintendent) and it was stated that it had been tentatively decided by the Chief Commercial Superintendent that respondent should be dismissed from service. This notice was served after the Chief Commercial Superintendent had recorded the following order (Exh. R. 8):

"The employee, in his reply dated 3-8-1963 to this charge-sheet, has not accepted the charges contained in the same. An enquiry, therefore was arranged. It was held by the Assistant Commercial Superintendent of Olavakkot from 22-8-63 to 29-8-1963. I have seen the enquiry proceedings. I find that the procedure has been followed correctly; that the accused has been given every reasonable opportunity for his defence and I agree with the findings of the Enquiry Officer that all the charges mentioned in the charge-sheet have been established. Since these are serious charges, it is tentatively decided to impose the penalty of dismissal from service on Shri K. Rajappa Menon, Assistant Station Master Chalakudi. He should, therefore, be asked to show cause why he should not be dismissed from service accordingly."

He was given a week for showing cause why the proposed penalty should not be inflicted on him. After the explanation of the respondent had been received his dismissal was ordered by the Chief Commercial Superintendent.

3. The respondent filed a petition under Article 226 of the Constitution in the High Court and a number of points were raised before the learned single Judge. The only point which prevailed with him was that the Chief Commercial Superintendent had not recorded an order as required by Rule 1713. He examined the other contention raised on behalf of the respondent before him that at the stage of the second show cause notice the Chief Commercial Superintendent had finally made up his mind which he could

not or ought not to have done until the reply or the explanation of the respondent had been received and considered by him. In view of a Full Bench decision of the Kerala High Court he did not rest his decision on the second point but decided in favour of the respondent on the first point holding that the Chief Commercial Superintendent had not given findings on each of the charges. In his opinion the rule contemplated that the evidence which had been adduced at the enquiry in relation to each charge should be examined and considered by the punishing authority and he should give his own assessment and finding relating to each individual charge which was not done in the present case. The Division Bench on appeal by the present appellant affirmed the judgment of the learned Single Judge.

4. Now Rule 1713 provides that if the disciplinary authority is not the Enquiring Authority it shall consider the record of the enquiry and record its findings on each charge. The argument which prevailed with the High Court was that the order embodied Exh. R8 did not comply with the aforesaid rule because findings relating to each charge were not given after a proper discussion and analysis of the evidence produced at the departmental enquiry. In other words, the Chief Commercial Superintendent was bound to pass a detailed order expressing his views about each charge and that a general agreement with the findings of the Enquiry Officer did not satisfy the requirements of Rule 1713.

5. We are altogether unable to agree with the view expressed by the High Court. Rule 1713 does not lay down any particular form or manner in which the disciplinary authority should record its findings on each charge. All that the Rule requires is that the record of the enquiry should be considered and the disciplinary authority should proceed to give its findings on each charge. This does not and cannot mean that it is obligatory on the disciplinary authority to discuss the evidence and the facts and circumstances established at the departmental enquiry in details and write as if it were an order or a judgment of a judicial tribunal. The rule certainly requires the disciplinary authority to give consideration to the record of the proceedings, which as expressly stated in Exh. R. 8, was done by the

Chief Commercial Superintendent. When he agreed with the findings of the Enquiry Officer that all the charges mentioned in the charge-sheet had been established it meant that he was affirming the findings on each charge and that would certainly fulfil the requirement of the Rule. The Rule after all has to be read not in a pedantic manner but in a practical and reasonable way and so read it is difficult to escape from the conclusion that the Chief Commercial Superintendent had substantially complied with the requirements of the Rule. The interference by the High Court, therefore, on the ground that there had been non-compliance with R. 1713 was not justified.

6. Learned counsel for the respondent has sought to raise the second point which the High Court had declined to decide, namely, that the disciplinary authority was not entitled to have finally made up its mind before the explanation to the second show cause notice had been received by it and at a stage prior to the issuance of the notice. Such a contention is wholly untenable in view of the decisions of this Court. It has been made quite clear in *Khem Chand v. The Union of India* 1958 SCR 1080 = (AIR 1958 SC 800) that the procedure which is to be followed under Art. 311 (2) of the Constitution of affording a reasonable opportunity includes the giving of two notices, one at the enquiry stage and the other when the competent authority as a result of the enquiry tentatively determines to inflict a particular punishment. It is quite obvious that unless the disciplinary or the competent authority arrives at some tentative decision it will not be in a position to determine what particular punishment to inflict and a second show cause notice cannot be issued without such a tentative determination.

7. The appeal is consequently allowed and the judgment of the High Court is hereby set aside. The petition filed by the respondent under Article 226 shall stand dismissed. No order as to costs.

Appeal allowed.

AIR 1970 SUPREME COURT 750
(V 57 C 155)

(From: Bombay)*

J. C. SHAH, V. RAMASWAMI AND
A. N. CROVER, JJ.

Dattatraya, Appellant v. Shaikh Mahabooob Shaikh Ali and another, Respondents.

Civil Appeal No. 329 of 1966, D/- 24-10-1968.

Civil P. C. (1908), Order 20, Rule 14 — Preliminary decree for pre-emption — Preliminary obtaining stay order from High Court — It has effect of staying deposit of purchase price — Dismissal of appeal gives fresh starting point for payment. A. F. A. D. No. 30 of 1962, D/- 14-10-1963 (Bom), Reversed.

A decree framed under O. 20, R. 14 requires reciprocal rights and obligations between the parties. The rule says that on payment into Court of the purchase money the defendant shall deliver possession of the property to the plaintiff. The decree-holder therefore deposits the purchase-money with the expectation that in return the possession of the property would be delivered to him. It is therefore clear that a decree in terms of O. 20, R. 14 imposes obligations on both sides and they are so conditioned that performance by one is conditional on performance by the other. To put it differently, the obligations are reciprocal and are inter-linked, so that they cannot be separated. If the defendants by obtaining the stay order from the High Court relieve themselves of the obligation to deliver possession of the properties the plaintiff decree-holder must also be deemed thereby to be relieved of the necessity of depositing the money so long as the stay order continues. (Para 3)

Further, the effect of the order of the High Court dismissing the appeal is to give by necessary implication a fresh starting point for depositing the amount from the date of the High Court's decree. AIR 1914 Bom 132 & AIR 1949 Pat 514, Foll.; A. F. A. D. No. 30 of 1962, D/- 14-10-1963 (Bom), Reversed. (Para 4)

Cases Referred: Chronological Paras
(1949) AIR 1949 Pat 514 (V 36)=
ILR 28 Pat 371, Sita v. Ramnath 4

* (A. F. A. D. No. 30 of 1962, D/- 14-10-1963 — Bom.)

(1914) AIR 1914 Bom 132 (V 1)=

ILR 39 Bom 175, Satwaji Balajirav v. Sakharlal Atmaramshet

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Mr. D. Narasaraju, Senior Advocate, (Mr. R. V. Pillai, Advocate, with him), for Appellant; M/s. M. S. K. Sastri and M. S. Narasimham, Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by

RAMASWAMI, J.— This appeal is brought, by special leave, on behalf of the plaintiff against the judgment of Bombay High Court dated October 11/14, 1963 in Appeal No. 30 of 1962 from the appellate order of the District Court, Osmanabad whereby the High Court reversed the judgment of the lower courts and declared that the appellant was not entitled to execute the decree for pre-emption and that the respondents were entitled to be put in possession of the properties of which they were dispossessed in the enforcement of the pre-emption decree.

2. The appellant had obtained a decree for possession of certain lands in a pre-emption suit he had brought against the respondents. The decree was made in March, 1945 and the appellant was directed to pay the consideration of Rs. 5,000/- within six months from the date of the decree on which the appellant was to be put in possession of the suit lands. In case of default in depositing the sum within the time the plaintiff's suit was to be deemed to have been dismissed. The respondents preferred an appeal to the District Court against the decree but the District Court confirmed the decree on January 28, 1955. The amount of Rupees 5,000/- was deposited in Court by the appellant on December 20, 1954 within the time granted in the trial Court's decree but it was subsequently withdrawn by him under orders of the Court. While dismissing the appeal of the respondents and confirming the decree for pre-emption, the District Court directed the appellant to deposit the sum of Rs. 5,000/- on or before April 30, 1955 and directed the respondents on such deposit to deliver possession of the properties. There was also a direction in the decree that in case the amount was not paid on the due date the suit shall stand dismissed with cost. The decree was passed in conformity with Order 20, Rule 14 of the Civil Procedure Code. The respondents preferred a Second Appeal to the High Court and pending disposal of the ap-

peal the respondents prayed for stay of the execution decree. On March 23, 1955 the High Court passed the stay order in the following terms:

"Stay of execution of decree of the lower appellate court is granted on condition that the appellant furnishes security to the extent of the amount of costs".

The order was received by the trial court on April 19, 1955. The appellant who was directed under the terms of the lower appellate court's decree to deposit the sum of Rs. 5,000/- on or before April 30, 1955 made default in depositing the amount on that date. He, however, deposited the amount on May 2, 1955. Since the deposit was not made in time according to the lower appellate court's decree an application was filed along with the deposit stating that the amount could not be paid in time as the appellant fell ill. The Second Appeal preferred by the respondents to the High Court was dismissed on October 6, 1960 and pre-emption decree in favour of the appellant was confirmed. Thereafter on February 3, 1961 the appellant filed a Darkhast for possession of the suit properties. Since the application was within a year of the decree of the High Court a warrant for possession was issued by the Executing Court without notice to the respondents and the appellant also obtained possession of a portion of the suit properties under the aforesaid warrant. On February 8, 1961 the respondents filed an application in the Executing Court for restitution of the properties taken possession of by the appellant on the ground that the appellant had defaulted in depositing the purchase money on or before April 30, 1955 as required by the lower appellate Court's decree and the Executing Court was in error in issuing warrant for possession of the suit properties. The application for restitution was contested by the appellant on the ground that the stay order made by the High Court in the Second Appeal prevented him from acting in accordance with the terms of the lower appellate Court's decree and in any case the High Court had dismissed the Second Appeal and the decree-holder would get by necessary implication a fresh starting point for depositing the purchase amount from the date of the High Court's decree. The Executing Court rejected the claim of the respondents for restitution and allowed the execution case of the appellant to proceed. Against this order of the Executing Court the respondents went up in appeal to the

District Court which dismissed the appeal and confirmed the order of the Executing Court. The respondents thereafter took the matter in Second Appeal to the Bombay High Court which differed from the view of the District Court and allowed the appeal. The High Court took the view that there was default on the part of the appellant in depositing the amount and therefore the appellant's suit stood dismissed automatically and the appellant was not therefore entitled to possession in enforcement of the pre-emption decree.

3. The first question arising in this appeal is whether the High Court was right in taking the view that the effect of the stay order dated March 23, 1955 was merely to stay the delivery of possession by the judgment-debtors and not a stay with regard to the deposit of purchase price by the decree-holder. In our opinion, the High Court was in error in taking this view. The decree framed under Order 20, Rule 14, Civil Procedure Code requires reciprocal rights and obligations between the parties. The rule says that on payment into Court of the purchase-money the defendant shall deliver possession of the property to the plaintiff. The decree-holder therefore deposits the purchase-money with the expectation that in return the possession of the property would be delivered to him. It is therefore clear that a decree in terms of O. 20, R. 14, Civil Procedure Code imposes obligations on both sides and they are so conditioned that performance by one is conditional on performance by the other. To put it differently, the obligations are reciprocal and are inter-linked, so that they cannot be separated. If the defendants by obtaining the stay order from the High Court relieve themselves of the obligation to deliver possession of the properties the plaintiff-decree-holder must also be deemed thereby to be relieved of the necessity of depositing the money so long as the stay order continues. We are accordingly of the opinion that the order of the stay dated March 23, 1955 must be construed as an order staying the whole procedure of sale including delivery of possession as well as payment of price. The effect of the stay order therefore in the present case is to enlarge the time for payment till the decision of the appeal.

4. We are further of the opinion that the effect of the order of the High Court dated October 6, 1960 dismissing the Second Appeal was to give by necessary

implication a fresh starting point for depositing the amount from the date of the High Court's decree. The decree of the High Court was dated October 6, 1960 and the appellant could have deposited the amount immediately after this date. But the appellant has deposited the amount on May 2, 1955, long before the date of the High Court's decree and there is no default on the part of the appellant in fulfilling of the terms of the pre-emption decree. In the present case, when the High Court dealt with the Second Appeal filed by the respondents, the time limited by the trial court for making the deposit had expired. It was open to the respondents to press this point in the Second Appeal and for the High Court to decide, that the time having expired, it was not open to the plaintiff to make the deposit and there was nothing before the High Court for decision. It was equally open to the High Court to dismiss the appeal and expressly extend the time for making the deposit. When the High Court refrained from following the first course and confirmed the trial court's decree, what was its intention? Surely it wanted to give the plaintiff an effective decree in his favour. If so, we are justified in holding that the High Court intended to exercise its power of extending the time for making the deposit, and incorporated in its decree the relevant provisions of the trial court's decree. That is to say, this is a case in which we must hold that a fresh starting point is implied in the decree of the High Court in the Second Appeal. The view that we have expressed is borne out by the decision of the Bombay High Court in *Satwaji Balajiray v. Sakharlal Atmaramshet*, 11R 39 Bom 175 = (AIR 1914 Bom 132). In that case, the plaintiff brought a suit to recover possession of property as purchaser from defendants 1 to 6 and to redeem the mortgage of defendant 7. The first court having dismissed the suit, the appellate court, on plaintiff's appeal, passed a decree directing the plaintiff to recover possession on payment to defendants 1 to 6 of a certain sum within six months from the date of its decree and then to redeem defendant 7, and on the plaintiff's failure to pay within six months from the date of the decree he should forfeit his right to recover possession. All parties being dissatisfied with the decree, the plaintiff preferred a second appeal to the High Court and the two sets of defendants filed separate sets of cross objections. The High Court confirmed

the decree and the plaintiff's second appeal and the defendants' cross objections were dismissed. Within six months from the date of the High Court's decree the plaintiff deposited in court the amount payable by him and applied for execution. Defendant 7 contended that the plaintiff not having complied with the terms of the decree of the first appellate court, his right to recover possession in execution was forfeited. The lower courts upheld the defendant's contention and dismissed the darkhast. On second appeal by the plaintiff, the High Court reversed the decree of the lower court and held that the time for executing a decree nisi for possession ran from the date of the High Court's decree confirming the decree of the lower court, for what was to be looked at and interpreted was the decree of the final appellate court. There is also a decision to the similar effect in *Sita v. Ramnath*, ILR 28 Pat 371 = (AIR 1949 Pat 514). For the reasons already given we hold that the decree of the High Court in Second Appeal should be construed in the present case as affording by implication a fresh starting point to the plaintiff for making payment to the Court.

5. For the reasons expressed we hold that this appeal should be allowed, the judgment of the Bombay High Court dated October 11/14, 1963 should be set aside and the application of the first defendant made on February 8, 1961 for restitution under Section 144 of the Civil Procedure Code should be dismissed. In the circumstances of this case we do not propose to make any order as to costs of this appeal.

Appeal allowed.

AIR 1970 SUPREME COURT 753 (V 57 C 156)

(From: Allahabad)*

G. M. SIKRI AND R. S. BACHAWAT, JJ.
The Union of India, Appellant v. Jai Narain Misra, Respondent.

Civil Appeal No. 31 of 1966, D/- 31-10-1968.

(A) Arbitration Act (1940), Section 30 — Vague and uncertain award — Burden of proof.

*(F. A. F. O. No. 260 of 1952, D/- 5-12-1962—All.)

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The Court leans towards the construction that the award is certain. If prima facie the award is good, it is for the defendant to show that it is uncertain. (1854) 24 LJQB 41 (45), Rel. on.

(Para 5)

(Award in the instant case held not vague and/or uncertain and did not suffer from any other infirmity.) (Para 8)

(B) Arbitration Act (1940), Section 30 — Vague and uncertain award — Several money claims — Award of one sum in respect of all — Separate awards of sum admitted and lump sum in respect of remaining claim — Permissible.

The arbitrator is not bound to give an award on each point. He can make his award on the whole case. An arbitrator may award one sum generally in respect of all money claims submitted to him, unless the submission requires him to award separately on some one or more of them. (1866) LR 1 Ex 251, Ref.

The arbitrator can lawfully make an award of a sum admitted to be due and a lump sum in respect of the remaining claim. Where the final award professes to be made of and concerning all the matters referred to him, it must be presumed that in making it the arbitrator has taken into consideration all the claims and counter-claims: (1853) 13 CB 399 and (1867) 2 CP 296, Ref. (Para 6)

(C) Arbitration Act (1940), Section 30 — Award — Setting aside at the instance of party not injured not allowed.

The Court usually declines to set aside an award at the instance of a party who has not suffered any injury by the error: (1912) 15 Cal LJ 110 (113), Ref.

(Para 7)

Cases Referred: Chronological Paras
(1912) 15 Cal LJ 110 = 16 Cal WN

256, Narsingh Narain Singh v. Ajodhya Prasad Singh 7

(1901) ILR 29 Cal 167 = 29 Ind. App 51 (PC), Ghulam Khan v. Mohd. Hassan 6

(1867) 2 CP 296 = 36 LJ CP 168, Jewell v. Christie 6

(1866) LR 1 Ex 251 = 35 LJ Ex 149, Whitworth v. Hulse 6

(1854) 24 LJ QB 41 = 139 ER 360, Mays v. Cannell 5

(1853) 13 CB 399 = 138 ER 1254, Harrison v. Creswick 6

M/s. R. M. Mehta and S. P. Nayar, Advocates, for Appellant; M/s. A. K. Sen and S. V. Gupte, Senior Advocates (Mr. S. S. Shukla Advocate with them), for Respondent.

The Judgment of the Court was delivered by

BACHAWAT, J.: The respondent Jai Narain Misra is a building contractor. On September 2, 1944, he entered into a contract (No. ES. 2944) with the Government of India represented by the Chief Engineer, Central Command, for the construction of additional quarters at T. P. 2 Kanpur. The contract contained an arbitration clause. Disputes between the parties relating to the contract were referred to Col. H. T. Faithful. The arbitrator made his award on May 19, 1947. On November 15, 1947 the respondent made an application for modifying the award and for remitting it to the arbitrator for re-consideration. On January 5, 1948, he filed additional objections. By his order dated May 26, 1952 the Second Civil Judge, Kanpur, dismissed the objections and pronounced judgment according to the award. The respondent filed an appeal against the order under Section 39 of the Arbitration Act, 1940. By an order dated December 5, 1962, the High Court allowed the appeal and set aside the award on the ground that it was vague and uncertain. The present appeal has been filed by the Union of India on the strength of a certificate granted by the High Court.

2. It appears that the respondent submitted 23 items of claim to the arbitrator. By his letter dated May 6, 1947 he added 6 more items of claim. The Union of India made a counter-claim. The arbitrator was thus required to decide 29 disputed items of claims and the counter claim. The award recited that certain differences between the parties in respect of contract No. ES 2944 of 1944 had been referred to the arbitrator for his decision and that a final award was being made of and concerning the matters referred to him. The relevant part of the award was as follows:—

"I award and direct that the following sums be paid by the respondent to the claimant.

(1) Rupees twenty-two thousand two hundred and ninety two annas five being the amount due to the claimant as calculated by the respondent,

(2) Rupees six thousand being the amount of security deposit paid by the claimant and now in possession of the respondent.

(3) Rupees seventy nine thousand three hundred and thirty nine.

The total amount to be paid by the respondent to the claimant is therefore one lakh seven thousand six hundred and thirty one annas five.

Each party to the dispute shall bear its own costs, including the cost of the stamp duty on this award."

3. The High Court held that the award suffered from a patent ambiguity for the following reasons. It was not clear why the arbitrator awarded the first item of Rs. 22,292/5/- and the 3rd item of Rs. 79,339/- separately. The arbitrator found only the first item of Rs. 22,292/5/- to be due to the respondent; it was not clear whether he intended also to award the 3rd item of Rupees 79,339/- to the respondent. As the dispute consisted of 29 items of claims and a counter-claim, the arbitrator should have made an award in respect of all the items separately or in combination or should have made a lump award in respect of all the items. We are unable to accept this line of reasoning.

4. The award on the face of it professes to be of and concerning all matters submitted to the arbitrator. In respect of all such matters the arbitrator awarded a sum of Rs. 1,07,631/5/- to the respondent. This amount was made up of three sums separately mentioned in the award. It was not the case of the respondent in the Trial Court that the award was uncertain or not intelligible. The objection was taken for the first time before the High Court. On the record there is nothing to show that the award was not intelligible to the parties.

5. The Court leans towards the construction that the award is certain. *Prima facie* the award is good, and it is for the defendant to show that it is uncertain. Per Jervis, C. J. in *Mays v. Cannell*, (1854) 24 LJ QB 41 at p. 45. There is no ambiguity about the first and the third items of the award. The uncontradicted evidence of S. Choudhary, the witness for the Government is "Item No. 1 of the award is that which was calculated by us in the government bill. Item No. 3 is in respect of the remaining claim of the plaintiff." Item No. 1 thus represents the sum admitted by the government to be due to the respondent, and item No. 3 represents the additional sum found by the arbitrator to be due to him.

6. The arbitrator is not bound to give an award on each point. He can make his award on the whole case, See *Ghulam*

Khan v. Mohammad Hassan, (1901) ILR 29 Cal 167 at p. 186 (PC). An arbitrator may award one sum generally in respect of all money claims submitted to him, unless the submission requires him to award separately on some one or more of them, see *Whitworth v. Hulse*, (1866) LR 1 Ex 251. The arbitrator can lawfully make an award of a sum admitted to be due and a lump sum in respect of the remaining claim. As the final award in favour of the respondent professes to be made of and concerning all the matters referred to him, it must be presumed that in making it the arbitrator has taken into consideration all the claims and counter claims, see *Harrison v. Creswick*, (1853) 13 CB 399, *Jewell v. Christie*, (1867) 2 CP 296. We hold that the award is a final and certain determination of all the disputes referred.

7. The arbitrator made an award in respect of the second item under some misapprehension. The security deposit of Rs. 6000 had been returned to the respondent and there was no dispute about it before the arbitrator. In the circumstances, the arbitrator had no authority to award Rs. 6000 to the respondent on account of the security deposit. This part of the award is clearly separable and may be struck out. Moreover, the award of Rs. 6000 is to the advantage of the respondent; and the Court usually declines to set aside an award at the instance of a party who has not suffered any injury by the error, see *Narsingh Narain Singh v. Ajodhya Prasad Singh*, (1912) 15 Cal LJ 110 at p. 113. We find also that the award of Rs. 6000 is now of no consequence. After the award was made, the respondent received a sum of Rs. 100594/7/- in full settlement of the award, presumably after giving the government credit for the sum of Rs. 6000 already received by him.

8. We therefore hold that there is no ground for setting aside the award. The award is not vague and/or uncertain and does not suffer from any other infirmity.

9. Mr. Mehta also contended that (1) the appeal before the High Court was not maintainable under Sections 17 and 39 of the Arbitration Act, 1940 and (2) the respondent having received payments in full settlement of the award was estopped from challenging it. We do not find it necessary to decide these points in view of our conclusion that the award is not liable to be set aside.

10. The appeal is allowed with costs in this Court, and the High Court. The order of the High Court is set aside and the order and decree passed by the Second Civil Judge, Kanpur, is restored.

Appeal allowed.

AIR 1970 SUPREME COURT 755

(V 57 C 157)

(From: Gujarat)*

J. C. SHAH, V. RAMASWAMI, G. K. MITTER, K. S. HEGDE AND A. N. GROVER, JJ.

Hansraj Gordhandas, Petitioner v. H. H. Dave, Assistant Collector of Central Excise and Customs, Surat and others, Respondents.

1. M/s. Shree Agency 2. M/s. Lokesh Tolaram 3. Prakash Cotton Mills, Private Ltd., Interveners.

Civil Appeal No. 1649 of 1965, D/- 27-9-1968.

(A) Central Excises and Salt Act (1944), Section 2 (d), First Schedule, Item 19 — Central Excise Rules (1944), Rule 8 (1) — Notifications issued in pursuance of — Exemption from excise duty under, for cotton fabrics produced on power-looms owned by Co-operative Societies — Dealer getting cotton fabrics manufactured through such Society — Dealer is entitled to exemption.

From the notifications issued in pursuance of Rule 8 (1) granting exemption from excise duty on cotton fabrics, it is clear that for claiming exemption, the cotton fabrics must be produced on power looms owned by Co-operative Society. It is not necessary that the cotton fabrics should be produced by Co-operative Society 'for itself'. A dealer who, under an agreement, gets the cotton fabrics manufactured through the Society is covered by the language of the notifications and as such is entitled to exemption from excise duty for those goods. Spl. C. A. No. 1054 of 1963, D/- 31-7-1964 (Guj.), Reversed.

(Para 5)

(B) Civil P. C. (1908), Pre. — Taxation Statutes — Notification under — Interpretation of.

The operation of the notifications has to be judged not by the object which

* (Spl. Civil Appln. No. 1054 of 1963, D/- 31-7-1964—Guj.)

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the rule-making authority had in mind but by the words which it has employed to effectuate the legislative intent. It is well established that in a taxing statute there is no room for any intendment. The entire matter is governed wholly by the language of the notification. If the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. (1897) AC 22 and (1846) 6 Moo PC 1, Rel. on.

(Para 5)

Cases Referred: Chronological Paras

(1897) 1897 AC 22 = 68 LJ Ch 35,

Salomon v. Salomon and Co. 5

(1846) 6 Moo PC 1 = 13 ER 582,

Crawford v. Spooner 5

M/s. Soli Sorabjee, D. M. Damodar and B. Datta, Advocates and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., for Appellant; Dr. V. A. Seyid Muhamed, Senior Advocate, (Mr. S. P. Nayar, Advocate, with him), for Respondents; M/s. P. R. Mridul and Janendra Lal, Advocates and Mr. B. R. Agarwala, Advocate of M/s. Cagrat and Co., for Intervener No. 1; Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., for Interveners Nos. 2 and 3.

The Judgment of the Court was delivered by

RAMASWAMI, J.: This appeal is brought by certificate from the judgment of the High Court of Gujarat dated July 31, 1964 in Special Civil Application No. 1034 of 1963.

2. The appellant is the sole proprietor of Messrs. Gordhandas and Co. carrying on business as a dealer in textiles in Bombay. Under an agreement between the appellant on the one hand and the Candevi Vanat Udhoog Sahkari Mandli Ltd. (hereinafter referred to as the 'Society') the Society manufactured cotton fabrics during the period between June 1959, and September 1959 and from October 1, 1959 to January 31, 1961 for the appellant on certain terms and conditions which were later reduced to writing on October 12, 1959. Under these terms, the Society agreed to carry out weaving work on behalf of the appellant on payment of weaving charges fixed at 19 nP per yard which included expenses the Society would have to incur in transporting yarn from Bombay and Cotton fabrics woven by the Society to Bombay. The appellant was to supply yarn to be delivered at Bombay to the Society and the

Society was to make its own arrangement to bring the yarn to its factory at Candevi. Clause II provided that the yarn supplied by the appellant remaining either in stock or in process or in the form of readymade pieces would be in the absolute ownership of the appellant and the Society, as the bailee of the yarn, undertook to take such care of it as it would normally take if the yarn belonged to it. The Society also undertook to have the yarn insured against fire, theft and all other risks including transit risks and further undertook to reimburse the appellant in case it failed to do so. The terms of the agreement though recorded on October 12, 1959 were to be deemed to be effective as from April 21, 1959 and the agreement was terminable by either party by giving one month's notice.

3. The Society was a co-operative society carrying on its work at Candevi and was registered on or before May 31, 1961 and consisted of members who owned powerlooms. The Society started the weaving work for the appellant some time in May or June 1959 and supplied to the appellant between June 1, 1959 and January 3, 1961 cotton fabrics measuring 3,19,460 yards. The Society had obtained L-4 licence as required by the Central Excises and Salt Act, 1944 (hereinafter referred to as the 'Act'). By letters dated August 29, 1959 and October 27, 1961 the Excise Department had granted exemption from excise duty payable on cotton fabrics manufactured by the Society under the notification issued by the Central Government. On November 10, 1961 the excise authorities issued a notice to the appellant demanding a sum of Rs. 1,59,263.44 payable as excise duty. It was alleged that the duty was payable by the appellant as it had got the goods manufactured through the Society and had got them removed from the Society's factory at Candevi without payment of duty. On January 10, 1962 the Superintendent of Central Excise, Bulsar sent another notice to show cause why penalty should not be imposed upon the appellant for contravention of Rule 9 and why duty should not be charged for the cotton fabrics so removed by the appellant. The appellant showed cause and on November 26, 1962 the Assistant Collector of Central Excise and Customs, Surat held that the appellant was liable to pay excise duty to the extent of Rs. 2,20,574.74, being the total amount of basic duty and a penalty of Rs. 350 was levied for contravention of Rule 9. The

appellant preferred an appeal to the Collector of Central Excise Baroda but the appeal was dismissed. Thereafter the appellant moved the High Court of Gujarat for grant of a writ under Article 226 of the Constitution. The High Court dismissed the writ petition by its judgment dated July 31, 1964, but gave a direction that the respondent was to work out the excise duty on the footing that the appellant was entitled to exemption from duty altogether in respect of goods supplied for the period from June 1, 1959 to September 30, 1959. As regards the two other periods i. e., October 1, 1959 to April 30, 1960 and from May 1, 1960 to January 31, 1961, the High Court dismissed the writ petition and directed the respondent to charge duty at the rate of 29.3 nP. per square meter.

4. Clause (d) of Section 2 of the Act defines "excisable goods" as meaning goods specified in the First Schedule as being subject to a duty of excise. Item 19 in the First Schedule provides for excise duty at different rates depending upon the variety of cotton fabrics. Section 3 which is the charging section, provides for the levy and collection of duties specified in the First Schedule on all excisable goods which are produced or manufactured in India. Rule 8 authorises the Central Government to exempt any excisable goods from the whole or any part of duty payable on such goods. Clause (1) of Rule 9 provides that no excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed. Clause (2) of that rule provides that if any excisable goods are in contravention of sub-rule (1), deposited in, or removed from any place specified therein, producer or manufacturer thereof shall pay the duty leviable on such goods upon written demand made by the proper officer and shall also be liable to a penalty which may extend to two thousand rupees and such goods shall be liable to confiscation. In pursuance of the power under Rule 8, the Central Government issued notifications from time to time granting exemptions on cotton fabrics, though such goods were excisable goods under tariff item 19. The first relevant notification

is dated January 5, 1957. By this notification certain classes of cotton fabrics were made exempt from payment of excise duty. Of the items exempted the seventh item is as follows:

"Cotton fabrics manufactured by or on behalf of the same person in one or more factories commonly known as powerlooms (without spinning plants) in which less than 5 power-looms in all are installed;" The next relevant notification is notification No. 74/59 dated July 31, 1959 which reads as follows:

"G. S. R. 899 —In pursuance of sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, as in force in India and as applied to the State of Pondicherry, the Central Government hereby exempted cotton fabrics produced by any co-operative society formed of owners of cotton power-looms, which is registered or which may be registered on or before the 31st March, 1961 under any law relating to co-operative societies from the whole of the duty leviable thereon, subject to the following conditions:—

(a) that every member of the co-operative society has been exempt from excise duty for these years immediately preceding the date of his joining such society;

(b) that the total number of cotton power-looms owned by the co-operative society is not more than four times the number of members forming such society;

(c) that a certificate is produced by each member of the co-operative society from the State Government concerned or such officer as may be nominated by the State Government that he is a bona fide member of the society and that the number of cotton power-looms in his ownership and actually operated by him does not exceed four and did not exceed four at any time during the three years immediately preceding the date of his joining the society, and that he would have been exempt from excise duty even if he had not joined the co-operative society;

The Central Government issued another notification dated April 30, 1960 by which the earlier notification dated July 31, 1959 was superseded. By this notification the Central Government exempted cotton fabrics produced on power-looms owned by any co-operative society or owned by or allotted to the members of the society from the whole of the duty leviable thereon subject to the four conditions therein set out. The notification

dated April 30, 1960 is to the following effect:

"In pursuance of sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, as in force in India and as applied to the State of Pondicherry, and in supersession of the Notification of the Government of India Ministry of Finance (Department of Revenue) No. 74/59 Central Excises, Dated the 31st July 1959, the Central Government hereby exempts cotton fabrics produced on power-looms owned by any co-operative society or owned by or allotted to the members of the society, which is regd. or which may be regd. on or before the 31st March, 1961 under any law relating to co-operative societies, from the whole of the duty leviable thereon subject to the following conditions.—

(a) that every member of the co-operative society who has been a manufacturer of cotton fabrics on power-looms, has been exempt from excise duty for three years immediately preceding the date of his joining such society.

(b) that the total number of cotton power-looms owned by the co-operative society or owned by or allotted to its members is not more than four times the number of members forming such society.

(c) that each member of the co-operative society produces a certificate from the State Government concerned or such officer as may be nominated by the State Government that he is a bona fide member of the society and that the number of cotton powerlooms owned by or allotted to him and actually operated by him does not exceed four and did not exceed four at any time during the three years immediately preceding the date of his joining the society and that he would have been exempt from excise duty even if he had not joined the co-operative society and

5. The main contention on behalf of the appellant is that the case fell within the language of two notifications dated July 31, 1959 and April 30, 1960 and the appellant was entitled to exemption from payment of excise duty on the cotton fabrics. The argument was stressed that the exemption applied to all cotton fabrics which were produced on powerlooms owned by the Co-operative Society or on powerlooms allotted to its members and it was not a relevant consideration as to who produced or manufactured such fabrics, whether it was the Society itself or its members or even outsiders. It was conceded by the appellant that it was the owner of the cotton fabrics. But even

upon that assumption the claim of the appellant is that it was entitled to exemption from excise duty as it was covered by the language of the two notifications already referred to. In our opinion the argument of the appellant is well founded and must be accepted as correct. The notification dated July 31, 1959 grants exemption to "cotton fabrics produced by any Co-operative Society formed of owners of cotton powerlooms which is registered or which may be registered on or before March 31, 1961 "subject to four conditions set out in the notification. In the next notification dated April 30, 1960 exemption was granted to "cotton fabrics produced on powerlooms owned by any co-operative society or owned by or allotted to the members of the society, which is registered or which may be registered on or before March 31, 1961" subject to the conditions specified in the notification. It was contended on behalf of the appellant that under the contract between the appellant and the Society there was no relationship of master and servant but the appellant supplied raw material and the contractor i. e., the Society produced the goods. But even on the assumption that the appellant had manufactured the goods by employing hired labour and was therefore a manufacturer, still the appellant was entitled to exemption from excise duty since the case fell within the language of the two notifications dated July 31, 1959 and April 30, 1960, and the cotton fabrics were produced on powerlooms owned by the co-operative society and there is nothing in the notifications to suggest that the cotton fabrics should be produced by the Co-operative Society "for itself" and not for a third party before it was entitled to claim exemption from excise duty. It was contended on behalf of the respondent that the object of granting exemption was to encourage the formation of co-operative societies which not only produced cotton fabrics but which also consisted of members, not only owning but having actually operated not more than four powerlooms during the three years immediately preceding their having joined the society. The policy was that instead of each such member operating his looms on his own, he should combine with others by forming a society which, through the co-operative effort should produce cloth. The intention was that the goods produced for which exemption could be claimed must be goods produced on its own behalf by the society. We

are unable to accept the contention put forward on behalf of the respondents as correct. On a true construction of the language of the notifications dated 31, 1959 and April 30, 1960 it is clear that all that is required for claiming exemption is that the cotton fabrics must be produced on power-looms owned by the co-operative society. There is no further requirement under the two notifications that the cotton fabrics must be produced by the Co-operative Society on the power-looms "for itself". It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different but that is not the case here. In this connection we may refer to the observations of Lord Watson in *Salomon v. Salomon and Co.*, 1897 AC 22 at p. 38:

"Intention of the legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

It is an application of this principle that a statutory notification may not be extended so as to meet a *casus omissus*. As appears in the judgment of the Privy Council in *Crawford v. Spooner*, (1846) 6 Moo PC 1 (9):

".....we cannot aid the legislature's defective phrasing of the Act, we cannot add, and mend, and, by construction, make up deficiencies which are left there." Learned Counsel for the respondents is possibly right in his submission that the object behind the two notifications is to encourage the actual manufacturers of handloom cloth to switch over to power-looms by constituting themselves into Co-operative Societies. But the operation of the notifications has to be judged not

by the object which the rule-making authority had in mind but by the words which it has employed to effectuate the legislative intent. Applying this principle we are of opinion that the case of the appellant is covered by the language of the two notifications dated July 31, 1959 and April 30, 1960 and the appellant is entitled to exemption from excise duty for the cotton fabrics produced for the period between October 1, 1959 to April 30, 1960 and from May 1, 1960 to January 3, 1961. It follows therefore that the appellant is entitled to the grant of a writ in the nature of certiorari to quash the order of the Assistant Collector of Central Excise of Baroda dated November 26, 1962 and the appellate order of the Collector of Central Excise dated November 12, 1963.

6. For the reasons expressed we hold that the judgment of the High Court of Gujarat dated July 31, 1964 should be set aside and that Special Civil Application No. 1054 of 1963 should be allowed and that a writ in the nature of certiorari should be granted to quash the order of the Assistant Collector of Excise and Customs dated November 26, 1962 and the order of the Collector of Excise dated November 12, 1963. This appeal is accordingly allowed with costs.

Appeal allowed.

AIR 1970 SUPREME COURT 759
(V 57 C 158)

(From: AIR 1968 Pat 385)

S. M. SIKRI AND R. S. BACHAWAT, JJ.

Mst. Dhani Devi, Appellant (In both the Appeals) v. Sant Bihari Sharma and others, Respondents (In both the Appeals).

Civil Appeals Nos. 1264 and 1265 of 1968, D/- 18-10-1968.

Motor Vehicles Act (1939), Sections 57, 57 (8), 58, 64, 64A — Application for grant of permit for vehicles — Death of applicant — Regional Transport Authority can substitute person succeeding to possession of deceased's vehicles — AIR 1968 Pat 385, Reversed; AIR 1957 All 471, Overruled.

In the case of death of the applicant before the final disposal of his application for the grant of a permit in respect of his vehicles the Regional Transport Authority has power to substitute the person succeeding to the possession of the

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vehicles in place of the deceased applicant and to allow the successor to prosecute the application. As the relief sought for in the application is dependent upon and related to the possession of the vehicles, the application is capable of being revived at the instance of the person succeeding to the possession of the vehicles. AIR 1968 Pat 385, Reversed; AIR 1957 All 471, Overruled. (Para 3)

Where the successor is allowed to prosecute the application, the Regional Transport Authority may have to take into consideration many matters personal to the successor, such as his experience, the facilities at his disposal for operating the services and his adverse record, if any. The matters personal to the deceased applicant can no longer be taken into account. The rival applicants should, if necessary be given suitable opportunity to file objections against the grant of the permit to the successor. Section 57 does not deal with the situation arising on the death of an applicant nor has it prescribed any time for the making of an application for substitution of the successor or for the filing of objections against the grant of the permit to him. In the absence of any statute or statutory rule the Regional Transport Authority may devise any reasonable procedure for dealing with the situation. (Para 4)

The Regional Transport Authority may similarly deal with the situation arising on the death of an applicant for the variation of the permit under Section 57 (8) or the renewal of the permit under Section 58. Likewise in the case of the death of an applicant during the pendency of an appeal under Section 64, or a revision petition under Section 64A the appellate or the revisional authority has power if it thinks fit to substitute the successor in place of the deceased applicant in the records of the proceedings. (Para 5)

Cases Referred: Chronological Paras

- (1964) AIR 1964 Mad 356 (V 51) =
ILR (1963) Mad 627, Kuppuswami v. Ramachandran 6
(1963) Civil Appeal No. 794 of 1963,
D/- 20-2-1963 (SC), Hanuman
Transport Co. v. Meenakshi 6
(1963) AIR 1963 Mad 292 (V 50) =
ILR (1964) 1 Mad 71, Marutha-
vanan v. Balasubramaniam 6
(1963) AIR 1963 Mys 278 (V 50) =
1963 Mys LJ (Supp) 180, Meena-
kshi v. Mysore S. T. A. Tribunal 6

- (1961) 1961 AC 901 = (1961) 2 All
ER 721, Director of Public
Works v. Ho Po Sang 6
(1957) AIR 1957 All 471 (V 44) =
1957 All LJ 478, Ratan Lal v.
State Transport Authority 6
(1952) AIR 1952 SC 192 (V 39) =
1952 SCR 583, Veerappa Pillai
v. Raman and Raman Ltd. 9

Mr. C. K. Daphtary, Attorney-General for India (M/s. Saptami Jha and B. P. Jha, Advocates with him), for Appellant (In both the Appeals); D. Coburdhan, Advocate, (for No. 1); M/s. B. P. Singh and R. B. Datar, Advocates, (for No. 2), for Respondents (In both the Appeals).

The Judgment of the Court was delivered by

BACHAWAT, J.: Several persons including one Ram Bichar Singh filed applications for the grant of a permanent stage carriage permit for the Chapra-Masrakh-Siwan-Copalganj route before June 15, 1963 the last date appointed for the receipt of the applications by the North Bihar Regional Transport Authority. Ram Bichar Singh died on April 12 1965 before the final disposal of his application. His widow Dhani Devi succeeded to the possession of the transport vehicles left by him and accordingly under Section 61 (2) of the Motor Vehicles Act, 1939, the Regional Transport Authority transferred to her all the permits held by him for other routes. On May 4, 1966, the Regional Transport Authority considered all the applications, allowed Dhani Devi to prosecute the application filed by her husband and directed the grant of the permit to her. Sant Bihari Sharma, Chandra Kirti Singh and other unsuccessful applicants filed appeals against the order under S. 64. At the hearing of the appeals it was contended that the order was without jurisdiction as Dhani Devi had no right to prosecute the application filed by her husband. The State Transport Appellate Authority accepted the contention, set aside the order appealed from and directed the grant of the permit to Sant Bihari Sharma and in case of his failure to comply with certain conditions gave the second preference to Chandrakirti Singh, Dhani Devi, Chandrakirti Singh and another applicant filed revision petitions against the order under Section 64A. The Transport Minister allowed the revision petition of Dhani Devi and restored the order of the Regional Transport Authority. He held that the order of the Regional Transport Autho-

rity was not without jurisdiction. Sant Bihari Sharma and Chandrakirti Singh filed two writ petitions in the Patna High Court challenging the said order. The High Court allowed the petitions, quashed the order for the grant of permit to Dhani Devi and remanded the matter for disposal according to law. The present appeals have been filed by Dhani Devi against the orders passed by the High Court.

2. The sole question in this appeal is whether on the death of an applicant for a stage carriage permit in respect of his transport vehicles the Regional Transport Authority has power to allow the person succeeding to the possession of the vehicles to prosecute the application filed by the deceased applicant. No express provision on the subject is to be found in the Motor Vehicles Act or the Rules framed thereunder. Order 22 of the Code of Civil Procedure does not apply to proceedings under the Motor Vehicles Act. Section 306 of the Indian Succession Act, 1925 has no application as no executor or administrator was appointed to the estate of the deceased Ram Bichar Singh.

3. No transport vehicle can be used save in accordance with a permit issued under Chapter IV of the Motor Vehicles Act. Four types of permits may be issued under Chapter IV, viz., stage carriage permit, (ss. 46 to 48); contract carriage permit (ss. 49 to 51); private carrier's permit (ss. 52 and 53), and public carrier permit, (ss. 54 to 56). A person in possession of a transport vehicle is not entitled to a permit as a matter of right, see *Veerappa Pillai v. Raman and Raman Ltd.*, 1952 SCR 583 at pp. 591, 595 = (AIR 1952 SC 192 at pp. 194, 196). His only right is to make an application for the grant of a permit under Section 45 and to a consideration of the application in accordance with the provisions of the Act. If he dies after obtaining the permit, the Regional Transport Authority has power under Section 61 (2) to transfer the permit to the person succeeding to the possession of the vehicles covered by the permit. We are inclined to think that in the case of death of the applicant before the final disposal of his application for the grant of a permit in respect of his vehicles the Regional Transport Authority has power to substitute the person succeeding to the possession of the vehicles in place of the deceased applicant and to allow the successor to prosecute the application. As the relief sought

for in the application is dependent upon and related to the possession of the vehicles, the application is capable of being revived at the instance of the person succeeding to the possession of the vehicles.

4. Under Section 57 an application for a stage carriage permit or a public carrier's permit must be made within the appointed time and published in the prescribed manner. The representations relating thereto must also be made before the appointed time. In the event of the death of an applicant after the expiry of the time appointed for making the applications, the person succeeding to the possession of the vehicle cannot, having regard to the lapse of time, make another application in his own right. The successor cannot obtain the permit unless he is allowed to prosecute the application filed by his predecessor and we see no reason why he cannot be permitted to do so. Where the successor is allowed to prosecute the application, the Regional Transport Authority may have to take into consideration many matters personal to the successor, such as his experience, the facilities at his disposal for operating the services and his adverse record, if any. The matters personal to the deceased applicant can no longer be taken into account. The rival applicants should, if necessary be given suitable opportunity to file objections against the grant of the permit to the successor. Section 57 does not deal with the situation arising on the death of an applicant nor has it prescribed any time for the making of an application for substitution of the successor or for the filing of objections against the grant of the permit to him. In the absence of any statute or statutory rule, the Regional Transport Authority may devise any reasonable procedure for dealing with the situation. As stated in *American Jurisprudence*, 2nd, Vol. 2 (Administrative Law), Article 340 P. 155 "where the statute does not require any particular method of procedure to be followed by an administrative agency, the agency may adopt any reasonable method to carry out its functions." (see also *Corpus Juris Secundum*, Vol. 73 (Public Administrative Bodies and Procedure, Article 73, p. 399)). The Regional Transport Authority has complete discretion in the matter of allowing or refusing substitution. It is not bound to embark upon prolonged investigation into disputed questions of succession. Nor is it bound to allow substitution if such an order will delay the proceedings unreasonably or

will otherwise be detrimental to the interests of the public generally.

5. Under Section 57 (1) an application for a contract carrier's permit or a private carrier's permit may be made at any time, and therefore the Regional Transport Authority can more readily allow the successor to prosecute the application filed by his predecessor. The Regional Transport Authority may similarly deal with the situation arising on the death of an applicant for the variation of the permit under Section 57 (8) or the renewal of the permit under Section 58. Likewise in the case of the death of an applicant during the pendency of an appeal under Section 64, or a revision petition under Section 64A the appellate or the revisional authority has power if it thinks fit to substitute the successor in place of the deceased applicant in the records of the proceedings.

6. We may now refer to the relevant decisions on the subject under consideration. In *Ratanlal v. State Transport Authority*, AIR 1957 All 471 one Munna Lal died during the pendency of appeals filed by him against the orders rejecting his application for the grant of a stage carriage permit and directing the issue of the permit to another applicant. The appellate authority refused to order substitution of his son Ratanlal in his place. Ratanlal filed a writ petition challenging the order. The Allahabad High Court dismissed the petition. It held that the right to apply for the grant of a permit was not heritable or transferable and Ratanlal's heir had no right to continue the appeals. In *Meenakshi v. Mysore S. T. A. Tribunal*, AIR 1963 Mys 278 several persons including Gopalasetty applied for the grant of a stage carriage permit. The Regional Transport Authority decided to grant the permit to another applicant. Unsuccessful applicants other than Gopalasetty filed appeals against the order. During the pendency of the appeals Gopalasetty died. The appellate tribunal allowed the appeals and remanded the matter to the Regional Transport Authority for fresh disposal. After the matter went back to the Regional Transport Authority, the widow of Gopalasetty was substituted in his place and was allowed to prosecute the application presented by him. On a consideration of all the applications the Regional Transport Authority granted the permit to the widow of Gopalasetty. The order was set aside by the appellate tribunal on the ground inter alia that the

widow could not continue the application filed by Gopalasetty. On a writ petition filed by the widow, the Mysore High Court set aside the order of the appellate tribunal and restored the order of the Regional Transport Authority. It held that the application presented by Gopalasetty could be prosecuted by his widow. The decision of the Mysore High Court was reversed by this Court on another point in *Hanuman Transport Co. v. Meenakshi*, Civil Appeal No. 794 of 1963, D/- 20-2-1963 (SC). But this Court then declined to express any opinion on the question whether the successor can be permitted to prosecute the application filed by his predecessor. In *Maruthavanam v. Balasubramaniam*, AIR 1963 Mad 292 two partners of a firm filed an appeal from an order rejecting their application for the grant of a permit. During the pendency of the appeal one of the partners died. The Madras High Court held that the appeal could be continued by the surviving partner. In *Kuppuswami v. Ramchandran*, AIR 1964 Mad 356 one Lakshmi applied for a variation of the stage carriage permits held by her. Her application was rejected by the Regional Transport Authority. She filed a revision petition against the order under Section 64A. During the pendency of the revision petition she died. The State Transport Appellate Tribunal permitted the guardian of her minor legal representatives to continue the revision petition, set aside the order of the Regional Transport Authority and granted the variation sought for. Two of the rival operators filed writ petitions challenging the order. The Madras High Court held that the legal representative of Lakshmi could continue the revision petition. For the reasons already given, we are not inclined to agree with the Allahabad decision. In *Director of Public Works v. Ho Po Sang*, 1961 AG 901 the Privy Council held that the right of a crown lessee of premises in Hongkong to get his petition and cross-petition for the grant of a rebuilding certificate pursuant to the proposal of the Director of Public Works to be considered by the Governor-in-Council under Section 3D of the Landlord and Tenant Ordinance (Hongkong), 1947 was not a right or a privilege either accrued or acquired within the meaning of Section 10 of the Interpretation Ordinance of Hong Kong, corresponding to Sec. 38 of the Interpretation Act, 1889 and that on the repeal of the Ordinance, the proceedings could not be continued and the

AIR 1970 SUPREME COURT 763

(V 57 C 159)

(From: Allahabad)*

S. M. SIKRI AND R. S. BACHAWAT, JJ.

Purshottam Das, Appellant v. Smt. Raj Mani Devi, Respondent.

Civil Appeal No. 1449 of 1966, D/- 30-10-1968.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3 (1), 3 (3) and 7-F — When the State Government acting under Section 7-F sets aside order of Commissioner revoking permission, order under section 3 (1) granting permission is revived — Suit for ejectment instituted on 14-10-1961 by landlord after obtaining permission from Rent Control and Eviction Officer under Section 3 (1) — Permission revoked by the Commissioner on 27-3-1962 under Section 3 (3) — Commissioner's Order set aside by State Government under Section 7-F and leave granted to landlord to file suit with effect from 30-6-1963 — Appeal by tenant against decree passed by trial Court on 11-6-1963 — Remand of suit for fresh trial on 4-11-1963 — Suit decreed by trial Court on 2-3-1964 — Held that the landlord had a valid permission to institute the suit on 2-3-1964 and, therefore, the suit was maintainable.

(Paras 3, 4 and 5)

Cases Referred: Chronological Paras (1968) Civil Appeal No. 1617 of 1968,

D/- 9-9-1968 = 1969 SCD 207,

Bhagwan Das v. Paras Nath 2, 4

Mr. M. K. Ramamurthi, Mrs. Shyamala Pappu and Mr. Vineet Kumar, Advocates, for Appellant; Mr. B. C. Misra, Senior Advocate, (M/s. Om Prakash, R. K. Mathur and M. V. Goswami, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

BACHAWAT, J.:— The appellant is the tenant and the respondent is the landlord of House No. 5B, Old 122 Maya Mirganj, Allahabad. The appeal arises out of a suit for ejectment by the landlord against the tenant from the house. On October 11, 1961, the landlord obtained permission to institute the suit from the Rent Control and Eviction Officer under Section 3 (1) of the U. P. (Temp.) Control of Rent and Eviction Act, 1947. On

* (S. A. No. 289 of 1965, D/- 28-4-1966 — All.)

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'Governor could not pass any order under Section 3B. This decision is not relevant, as we are not concerned in the present case with the effect of repeal of the Motor Vehicles Act on a pending application for the grant of a permit.

7. Let us now turn to the facts of the present case. The appellant's husband Ram Bichar Singh made an application for the grant of a stage carriage permit. Upon his death during the pendency of the application, the Regional Transport Authority allowed the appellant to prosecute the application filed by him. She made no formal application for substitution; but no objection was raised on that ground nor was any adjournment asked for by the rival claimants in order to enable them to file objections. Ram Bichar Singh is said to have left behind other heirs also, but no objection was taken on the ground of their non-joinder. The Regional Transport Authority directed the grant of the permit to the appellant. On the materials on the record, the Regional Transport Authority found that the appellant was an experienced and displaced operator. That finding was not challenged in appeal. The only point taken in the appeal was that the application of Ram Bichar Singh had abated and the Regional Transport Authority had no power to allow her to continue the application. The Appellate Authority accepted the contention and set aside the order directing the grant of the permit to the appellant. The Transport Minister rightly set aside the order of the Appellate Authority and held that the Regional Transport Authority has power to permit her to prosecute the application filed by her deceased husband. In our opinion, the High Court was in error in setting aside the order of the Transport Minister.

8. In the result the appeals are allowed, the order of the High Court is set aside and the order of the Transport Minister is restored. There will be no order as to costs.

Appeals allowed.

October 14, 1961 the landlord instituted the present suit for eviction against the tenant. On March 27, 1962 the Commissioner Allahabad Division acting under Section 3 (3) revoked the permission to institute the suit. On March 30, 1963 the State Government acting under Sec. 7F set aside the Commissioner's order and gave leave to the landlord to file the suit with effect from July 30, 1963. On July 11, 1963 the Trial Court decreed the suit. The tenant filed an appeal against the decree. On November 4, 1963 the appellate court set aside the decree and remanded the suit for fresh trial. After the suit went back on remand the Trial Court decreed the suit on March 2, 1964. The Trial Court held that the permission granted by the State Government became effective from July 30, 1963 and as the suit was still pending a decree could be passed in the suit. An appeal against the decree was dismissed on November 28, 1964. A second appeal was dismissed by the High Court on April 28, 1966. The present appeal has been filed by the tenant after obtaining special leave. The sole question in the appeal is whether in the circumstances there was a valid permission to institute the suit under Section 3 (1).

2. In *Bhagwan Das v. Paras Nath*, Civil Appeal No. 1617 of 1963, D/- 9-9-1963 (SC) this Court held that a suit validly instituted after obtaining permission of the Commissioner under Section 3 (3) did not become incompetent if the State Government acting under Section 7F revoked the permission after the institution of the suit. In that case the District Magistrate refused to give permission under Section 3 (1) to institute the suit. The Commissioner acting under Section 3 (3) set aside the order and granted permission to institute the suit. The suit was decreed by the Trial Court on November 2, 1960. The tenant filed an appeal against the decree. During the pendency of the appeal the State Government acting under Section 7F revoked the permission granted by the Commissioner. The Court held that though the order under Section 3 (3) was subject to an order under Section 7F the Government's power under Section 7F to revoke the permission granted by the Commissioner became exhausted once the suit was validly instituted.

3. In support of his contention that the present suit is not maintainable, the appellant relies on the following observations of Hegde, J.:-

"When the Commissioner sets aside the order passed by the District Magistrate granting permission to file a suit for ejecting a tenant, the order of the Commissioner prevails. If he cancels the permission granted by the District Magistrate there is no effective permission left and the suit instituted by the plaintiff without awaiting his decision must be treated as one filed without any valid permission by the District Magistrate."

Having regard to these observations the present suit though validly instituted after obtaining the permission under Section 3 (1) became incompetent when the permission was revoked by the Commissioner under Section 3 (3). But the order under Section 3 (3) itself was set aside by the State Government under Section 7F during the pendency of the suit. The question is what is the effect of this order under Section 7F. Now, Section 3 (4) provides that the order of the Commissioner under Section 3 (3) is subject to an order passed by the State Government under Section 7F. If the State Government acting under Section 7F sets aside the order of the Commissioner revoking the permission, the order under Section 3 (1) granting permission is revived. The result is that there is an effective permission to institute the suit under Section 3 (1) and the suit is validly instituted.

4. In *Bhagwan Das's case*, Civil Appeal No. 1617 of 1963, D/- 9-9-1963 (SC) (Supra) the suit was validly instituted after obtaining permission from the Commissioner under Section 3 (3). The State Government could not render such a suit incompetent by any order under Section 7-F. In the present case the suit was validly instituted after obtaining permission from the Rent Control and Eviction Officer under Section 3 (1). The effect of the order of the Commissioner revoking the permission was that the suit became incompetent. The State Government acting under Section 7-F had power to revise and set aside the Commissioner's order and restore the permission granted under Section 3 (1) so as to make the suit competent.

5. The order of the State Government after stating that in the interest of justice the house should be available to the landlord for his use, set aside the Commissioner's order under Section 3 (3). The result was that the order of the Rent Control and Eviction Officer passed under Section 3 (1) stood restored. The further direction in the order that the landlord "is advised to file a suit for eviction from

the house in dispute against the opposite party in a Civil Court under Section 3 of the Act, which will be applicable four months after the date of the order" really means that the permission under Section 3 (1) would become effective on the expiry of 4 months. The landlord had thus an effective permission to institute the suit under Section 3 (1) on the expiry of four months from March 30, 1963, that is to say, as from July 30, 1963. The decree in the suit was passed on March 2, 1964. On that date the landlord had a valid permission to institute the suit. The suit was therefore maintainable.

6. In the result, the appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 765

(V 57 C 160)

(From: Gujarat)*

G. K. MITTER AND K. S. HEGDE, JJ.

Virji Ram Sutaria, Appellant v. Nathalal Premji Bhanvadia and others, Respondents.

Civil Appeal No. 1180 of 1968, D/- 4-11-1968.

Constitution of India, Article 173 (a), Schedule 3 Form 7A and Pre. — Constitutional provisions — Rule of interpretation — Provisions of Article 173 (a) and Form 7A — Essential requirement of — Filing of nomination for Legislative Assembly — Form of oath in Gujarati — Translation of word "Legislative Assembly" as "Rajya Sabha" — Whether sufficient compliance with Article 173 (a) — (Civil P. C. (1908), Pre. — Interpretation of Statutes).

The real purpose of the provision whether statutory or constitutional has to be considered to find out whether notwithstanding the apparently mandatory form of the words used any deviation therefrom is to be struck down. Non-compliance will not necessarily render a proceeding invalid if by considering its nature, its design and the consequences which follow from its non-observance one is not led to the conclusion that the legislature or the Constitution-makers intended that there should be no departure from the strict words used. (Paras 7, 11)

* (Ele. Petn. No. 2 of 1967, D/- 17/18-1-1968 — Guj.)

The essential requirement of Article 173 read with Form VII-A of Schedule 3 is that the person taking the oath or making the affirmation would bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India. A mere mis-print in the form of the oath or a mere inaccuracy in rendering the expression "Legislative Assembly" in any other Indian Language would not be fatal to the election of candidate, if otherwise valid. (Paras 6, 12)

Where a candidate filed nomination paper for election to fill a seat in Gujarat Legislative Assembly and in the form of oath in Gujarati the word Legislative Assembly was translated as "Rajya Sabha", it could not be said that the oath was not in compliance with the form prescribed in Article 173 (a) of the Constitution. By common parlance in many of the States in Northern India the expression "Rajya Sabha" has come to mean the Legislative Council of a State while the State Legislative Assembly is generally known as Rajya Vidhan Sabha. But there is no authoritative translation of the expression "State Legislative Assembly" in Gujarati. As in the State of Gujarat there is no Legislative Council of the State, but only the State Legislative Assembly, there can be no misapprehension either in the person taking the oath or in the Returning Officer when accepting the nomination paper with the oath in Gujarati form that the candidate was being nominated as a candidate to fill a seat in the Legislative Council of the State and not in the Legislative Assembly. Ele. Petn. No. 2 of 1967, D/- 17/18-1-1968 (Guj), Affirmed. (Case law discussed).

(Paras 5, 7, 12)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 SC 903 (V 56)=
Civil Appeals Nos. 1427 & 1428
of 1968, D/- 30-7-1968, State of
Punjab v. Satpal Dang | 10 |
| (1964) AIR 1964 SC 1027 (V 51)=
(1964) 6 SCR 213, Ch. Subbarao
v. Member Election Tribunal,
Hyderabad | 9 |
| (1964) AIR 1964 SC 1545 (V 51)=
(1964) 3 SCR 573, Murarka Radhey
Shyam v. Roop Singh | 9 |
| (1958) AIR 1958 SC 687 (V 45)=
1959 SCR 583, Kamaraja Nadar
v. Kunju Thevar | 9 |
| (1957) AIR 1957 SC 912 (V 44)=
1958 SCR 533, State of U. P. v.
Manbodhan Lal Srivastava | 10 |

Mrs. Shyamla Pappu, M/s. M. K. Ramamurthi and Vineet Kumar Advocates, for Appellant; Mr. Bishan Narain, Senior Advocate, Mr. D. N. Misra, Advocate, for M/s. J. B. Dadachanji and Co., with him), for Respondent No. 1.

The Judgment of the Court was delivered by

MITTER, J.:— The only question raised in this appeal from a judgment and order of the High Court of Gujarat dismissing an election petition is, whether the returned candidate was not qualified to be chosen to fill a seat of the State Legislative Assembly inasmuch as he did not subscribe to an oath or affirmation according to the form set out for the purpose in the third Schedule to the Constitution as prescribed under Article 173 thereof.

2. The relevant facts may be stated as follows. The notification of the Governor of Gujarat under Section 15 (2) of the Representation of the People Act of 1951 for the purpose of election to the Gujarat State Legislative Assembly was issued on January 13, 1967. Nomination papers were filed by several persons including the returned candidate and the scrutiny thereof was made on January 21, 1967. The poll took place on February 18, 1967 and the result declared on February 27, 1967 showing the returned candidate winning comfortably by a margin exceeding 3800 votes over his nearest rival. One of the grounds taken in the election petition was that immediately after the scrutiny of the nomination papers, the third respondent to the election petition has filed a written objection before the Returning Officer contending that the returned candidate had not taken oath properly and on the same ground he along with respondents 2 and 4 were not qualified to be chosen and their nomination papers should be rejected. This contention was turned down by the Returning Officer and was also negatived by learned Judge who heard the election petition and in this appeal the unsuccessful petitioner has only pressed this ground.

3. The relevant portion of Article 173 of the Constitution reads as follows:—

“A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he.....

(a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to

the form set out for the purpose in the Third Schedule;

(b) and (c) xx xx xx.”
The Third Schedule contains various forms of oath or affirmation. Form VII-A, the relevant form for the present purpose is, as follows:

“Form of oath or affirmation to be made by a candidate for election to the Legislature of State:—

“I, A. B., having been nominated as a candidate to file a seat in the Legislative Assembly (or Legislative Council), swear in the name of God

do _____ that I will

solemnly affirm
bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India.”

4. The returned candidate had filed three nomination papers with three different proposers on January 20, 1967. Each of the three nomination papers clearly mentioned that he was a candidate for election to fill a seat in the Vidhan Sabha for the Gujarat State i. e. Legislative Assembly of the State. The nomination paper of the returned candidate contained a form of oath or affirmation which was both in Gujarati as well as in English. The English form followed word for word Form No. VII as set out in the Third Schedule, to the Constitution and the Gujarati form purported to set out the Gujarati translation of the form of oath or affirmation. The relevant difference for the purpose of this appeal between the two forms lay in this that the words “Legislative Assembly” in the form in English were translated in Gujarati form as “Rajya Sabha” and the appellant’s contention before the High Court and before us rested solely on the use of this word which according to learned counsel went to show that the oath that was taken was for the purposes of filling a seat not in the legislative assembly of the State but in the Legislative Council of the State. At the hearing of the petition before the High Court the returned candidate gave evidence to the effect that he had taken the oath not according to the words in the Gujarati form but according to the translation of the words in the English form rendered by the Returning Officer. The Returning Officer was merely called to produce some documents but he was not put on oath nor was he asked any question to corroborate the testimony of the returned candidate. The High Court did not accept this testimony

and we see no reason to come to any different conclusion.

5. We must therefore proceed on the basis that the returned candidate took the oath according to the words of the Gujarati form. It was argued before us that 'Rajya Sabha' means the Legislative Council of the State and not the Legislative Assembly of the State and consequently the oath taken did not fulfil the requirements of Article 173 (a) of the Constitution. We were not referred to any official translation of the expression "Legislative Assembly" in Gujarati. The word "sabha" means a gathering or a meeting or an assembly of persons for a definite purpose. Giving the word "sabha" the said meaning in the expression 'Rajya Sabha' it would not be possible to hold that the oath was not in compliance with the form prescribed in Article 173 (a) of the Constitution. No doubt by common parlance in many of the States in Northern India the expression 'Rajya Sabha' has come to mean the Legislative Council of a State while the State Legislative Assembly is generally known as Rajya Vidhan Sabha. But in the absence of any authoritative translation of the expression "State Legislative Assembly" in Gujarati we cannot guide ourselves by the popular rendering of the expression. In this connection it is necessary to mention that in the State of Gujarat there is no Legislative Council of the State. The legislature consists of one house only, namely, the State Legislative Assembly. There could therefore be no misapprehension either in the person taking the oath or in the Returning Officer when he was accepting the nomination paper with the oath in Gujarati form that the candidate who afterwards won the election was being nominated as a candidate to fill a seat in the Legislative Council of the State and not in the Legislative Assembly.

6. The High Court held that there was substantial compliance with the requirements of Article 173 (a) of the Constitution in the circumstances surrounding the making and the subscribing of the oath even if the compliance was not literal. We are in full agreement with that view. The essential requirement of Article 173 (a) of the Constitution for our present purpose is that in order to be qualified to be chosen to fill a seat in the Legislature of a State a person (i) must be a citizen of India and (ii) must make and subscribe before a person duly authorised an oath or affirmation according to the form set out for the purpose in

the Third Schedule. Form VII-A contains the following essential requirements:

(1) The person taking the oath or making the affirmation must have been nominated as a candidate to fill a seat in the Legislative Assembly or Legislative Council;

(2) That he will bear true faith and allegiance to the Constitution of India as by law established; and

(3) That he will uphold the sovereignty and integrity of India.

The vital requirements, therefore, are (a) the securing of a nomination, and (b) declaration of bearing true faith and allegiance to the Constitution and a promise to uphold the sovereignty and integrity of India. The securing of a nomination precedes the making of a declaration. The real purpose of the oath is that the person concerned must give an undertaking to bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India. This is brought out by the Statement of Objects and Reasons to the Bill No. 1 of 1963 seeking to amend Articles 19, 84 and 173 of the Constitution. The Statement of Objects and Reasons notes the recommendation of the Committee on National Integration and Regionalism and its view "that every candidate for the membership of a State Legislature or Parliament, and every aspirant to, and incumbent of, public office should pledge himself to uphold the Constitution and to preserve the integrity and sovereignty of the Union and that forms of oath in the Third Schedule to the Constitution should be suitably amended for the purpose". The Bill proposed to give effect to the recommendation by amending Clauses (2), (3) and (4) of Article 19 as also Articles 84 and 173 and the forms of oath in the Third Schedule. The words in the form of oath in Form VII-A.

"I will uphold the sovereignty and integrity of India"

were inserted by the Constitution Fifteenth Amendment Act 1963 giving effect to the view of the said Committee.

7. As the essential requirements of the oath given in the form in the Third Schedule were not deviated from in the Gujarati form used in this case, we cannot hold that the oath subscribed in this case was not in compliance with Article 173 merely because of the popular meaning of the expression 'Rajya Sabha'.

8. The real question is, whether the deviation, if any, from the form of oath in English as contained in the Third Sche-

dule is so vital as to lead to the conclusion that no proper oath was taken by the returned candidate. There have been many instances where this Court has held that a substantial compliance with the statute or with the rules framed thereunder is enough even if there be no literal compliance and in our view, there is no reason to adopt a different line of reasoning in the construction and interpretation of the Constitution. In all such cases, one must consider the real purpose of the provision whether statutory or constitutional to find out whether notwithstanding the apparently mandatory form of the words used any deviation therefrom was to be struck down.

9. One of the questions which came up for consideration in *Kamaraja Nadar v. Kunju Thevar*, 1959 SCR 593= (AIR 1959 SC 687) was whether the election petition ought to have been rejected merely because the deposit provided for under Section 117 of the Representation of the People Act was made in favour of the Election Commission and not in favour of the Secretary to the Election Commission as provided for in the said section. Turning down the argument advanced for rejecting the election petition it was observed:

"What is of the essence of the provision contained in Section 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law....."

In *Murarka Radhey Shyam v. Roop Singh*, (1964) 3 SCR 573=(AIR 1964 SC 1545) one of the points urged against the petitioner was that there was non-compliance with the provisions of Section 81 (3) of the Representation of the People Act because the copy of the election petition served on the appellant was not a true copy of the original filed before the Election Commission. Rejecting the said contention it was said:

"..... the word 'copy' in sub-section (3) of Section 81 does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it." To the similar effect is the judgment in *Ch. Subbarao v. Member. Election Tribu-*

nal, Hyderabad, (1964) 6 SCR 213= (AIR 1964 SC 1027).

10. In *State of U. P. v. Manbodhan Lal Srivastava*, 1958 SCR 533= (AIR 1957 SC 912) one of the contentions urged on behalf of the respondent who was reduced in rank after departmental enquiry, was that the order of the Government was invalid for non-compliance with the provisions of Article 320 (3) (c) of the Constitution which read literally made it obligatory for the Government of India or a Government of a State to consult the Union Public Service Commission or the State Public Service Commission on all disciplinary matters affecting a person in service of the State. In turning down the above it was observed by this Court:

"... the use of the word 'shall' in statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid."

In *State of Punjab v. Sat Pal Dang and State of Punjab v. Dr. Baldev Perakash*, Civil Appeals Nos. 1427 & 1428 of 1968, D/- 30-7-1968= (reported in AIR 1969 SC 903) one of the points canvassed before this Court was, whether the certificate by the Deputy Speaker on a Money Bill was sufficient compliance with Article 199 (4) of the Constitution which provides that:

"There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under Article 193, and when it is presented to the Governor for assent under Article 200, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill."

It was contended that the provisions of the above clause were mandatory and only the Speaker of the Legislative Assembly could sign the Money Bill. It was pointed out by this Court that the Speaker was not present when the Bills were passed and under Article 180 (2) the Deputy Speaker could act as the Speaker when the latter was absent. This Court proceeded to examine the several tests to determine when the provisions of a statute might be treated as mandatory and when not, and emphasis was laid on one of the distinctions, namely, in cases where strict compliance was necessary to be a condition precedent to the validity of the act itself, the neglect to perform it as indicated was fatal.

11. The above cases are sufficient to show that non-compliance with the provisions of a statute or Constitution will not necessarily render a proceeding invalid if by considering its nature, its design and the consequences which follow from its non-observance one is not led to the conclusion that the legislature or the constitution-makers intended that there should be no departure from the strict words used.

12. In this case, as we have already noted, the essential requirement of Article 173 read with Form VII-A was that the person taking the oath or making the affirmation would bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India. The words which precede this portion are merely descriptive of the person and of his nomination as a candidate. It is reasonable to think that a mere misprint in the form of the oath or a mere inaccuracy in rendering the expression "Legislative Assembly" in Gujarati would not be fatal to the election of candidate, if otherwise valid.

13. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 769

(V 57 C 161)

(From: Punjab)*

S. M. SIKRI AND R. S. HEGDE, JJ.

Durga Prasad, Appellant v. The Chief Controller of Imports and Exports and others, Respondents.

Civil Appeal No. 1116 of 1965, D/- 22-11-1968.

Constitution of India, Articles 226 and 227 — Mandamus and Certiorari — Laches — Even where there is an alleged breach of fundamental rights the grant of relief is discretionary — Such discretion has to be exercised judiciously and reasonably.

Where an applicant for an Import licence in 1959 received a licence only for a fraction of the amount for which he had asked for, chooses to wait and comes to a Court in 1964 requesting for a writ of mandamus even if his fundamental rights are involved, the matter is still in the discretion of the High Court, and the

High Court in its discretion can refuse the issue of a writ because of the laches of the applicant. When the exchange position and Government policy with regard to International Trade varies from year to year, it would be odd for the Court to issue a Writ in 1968 for alleged defaults of the Government in the years 1959 or 1962. In such matters it is essential that the person aggrieved should approach the High Court after exhausting his other legal remedies with utmost expedition. Civil Appeal No. 140 of 1964, D/- 22-9-1964 (SC), Rel. on; AIR 1969 SC 329 and AIR 1967 SC 1450, Expl.

(Paras 6, 7)

Cases Referred; Chronological Paras (1969) AIR 1969 SC 329 (V 56)=

Civil Appeals Nos. 825 to 851 of 1968, D/- 22-8-1968, Maharashtra State Road Transport Corporation v. Shri Balwant Regular Motor Service, Amravati

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(1967) AIR 1967 SC 1450 (V 54)= 1968-1 SCJ 364, Moon Mills Ltd.

v. Industrial Court Bombay

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(1964) Civil Appeal No. 140 of 1964,

D/- 22-9-1964 (SC), Smt. Narayani Debi Khaitan v. State of Bihar

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Mr. M. C. Chagla, Senior Advocate, (M/s. Sardar Bahadur, Ajit Prasad Jain, Vishnu B. Saharya and Miss Yougindra Kaushalani, Advocates, with him), for Appellant; Dr. V. A. Seyid Muhammad, Senior Advocate (Mr. S. P. Nayar, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

SIKRI, J.:— The appellant, Durga Prasad, filed a petition under Article 226 of the Constitution against the respondents. The High Court of Punjab, Circuit Bench, Delhi, dismissed the petition in limine. Thereupon the appellant applied for a certificate under Article 133 (1) (a) of the Constitution. The High Court gave this certificate on the ground that the value of the subject-matter directly involved in the petition exceeds Rupees 20,000/-.

2. In our opinion this appeal must fail on the ground that the petition under Article 226 of the Constitution was filed after great delay. The relevant facts are as under. The appellant was carrying on business of export and import, and exported goods of the value of Rupees 8,10,325/-, F. O. B. value, Rupees 8,03,530.45, during the period August 25, 1958 to September 29, 1958. On November 12, 1958, the appellant applied for an import licence for art silk yarn of the

*(Civil Writ No. 498-D of 1964, D/- 26-8-1964 — Punj.)

F. O. B. value of Rs. 8,03,530.45 Np. under the Export Promotion Scheme. The Export Promotion Scheme was discontinued with effect from March 8, 1959. On October 9, 1959, import licence of the value of Rs. 3,27,841/- only was issued to the appellant by the Joint Chief Controller of Imports and Exports, Bombay. His appeal against this order was rejected by the Joint Chief Controller on March 4, 1960. It is alleged by the appellant that he was not given a hearing. The appellant filed a second appeal to the Chief Controller of Imports and Exports, and this was dismissed on April 22, 1961. Here again it is alleged that no hearing was given to the appellant. He filed a representation against the order dated April 22, 1961, and on that representation a supplementary import licence for import of art silk yarn of the value of Rs. 30,000/- was issued to the appellant. This exhausted all the remedies he had under para 85 of the order relating to the Export Promotion Scheme, but he instead of filing a writ chose to wait. The appellant apparently approached the Minister of International Trade by letter dated April 8, 1964 — this is the letter referred to in the letter of the Private Secretary to the Minister of International Trade — and the Private Secretary, vide his letter dated April 18, 1964, wrote to him saying that his letter had been passed on to the Chief Controller of Imports and Exports, New Delhi, and if so desired the appellant may see him in the matter. Apparently the Chief Controller invited him and on June 22, 1964, he was informed that no further licence would be issued to him. On August 24, 1964, the appellant filed the petition above-mentioned in the High Court. No explanation has been given in the petition for the delay in filing the petition and it has not been explained what the appellant was doing between March 5, 1962, when the supplementary licence was issued, and April 8, 1964.

3. It is well settled that the relief under Article 226 is discretionary, and one ground for refusing relief under Article 226 is that the petitioner has filed the petition after delay for which there is no satisfactory explanation.

4. Cajendragadkar, C. J., speaking for the Constitution Bench, in *Smt. Narayan Dehi Khaitan v. State of Bihar*, Civil Appeal No. 140 of 1964, D/- 22-9-1964 (SC), observed:

"It is well settled that under Article 226, the power of the High Court to issue an appropriate writ is discretionary. There can be no doubt that if a citizen moves the High Court under Article 226 and contends that his fundamental rights have been contravened by any executive action, the High Court would naturally like to give relief to him; but even in such a case, if the petitioner has been guilty of laches, and there are other relevant circumstances which indicate that it would be inappropriate for the High Court to exercise its high prerogative jurisdiction in favour of the petitioner, ends of justice may require that the High Court should refuse to issue a writ. There can be little doubt that if it is shown that a party moving the High Court under Article 226 for a writ is, in substance, claiming a relief which under the law of limitation was barred at the time when the writ petition was filed, the High Court would refuse to grant any relief in its writ jurisdiction. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court, in this matter too discretion must be exercised judiciously and reasonably."

5. Relying on the judgment of this Court in *Maharashtra State Road Transport Corporation v. Shri Balwant Regular Motor Service, Amravati*, Civil Appeals Nos. 825 to 851 of 1968, D/- 22-8-1968 = (AIR 1969 SC 329) the learned counsel for the appellant contends that the delay should not debar him from seeking relief because the respondents have not suffered in any manner because of the delay. In this case Ramaswami, J., speaking for the Court, referred to an earlier decision in *Moon Mills v. Industrial Court Bombay*, AIR 1967 SC 1450 at pp. 1453-1454. In that case Ramaswami, J., speaking for the Court, observed:

"It is true that the issue of a writ of certiorari is largely a matter of sound discretion. It is also true that the writ will not be granted if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. The principle is to a great extent, though not identical with, similar to the

exercise of discretion in the Court of Chancery.”

It would be noticed that Ramaswami, J., had first examined the question of delay and came to a finding that in fact there was no delay. Ramaswami, J., observed:

“On behalf of the respondent Mr. B. Sen, however, pointed out that the conduct of the appellant does not entitle it to the grant of a writ, because it has been guilty of acquiescence or delay. It was pointed out that the award of Mr. Bhat was given on April 25, 1958, but an application to the High Court for grant of a writ was made long after on November 16, 1959. We do not think there is any substance in this argument, because the second respondent had made an application, dated August 19, 1958 to the Labour Court for enforcement of the award and the appellant had contested that application by a written statement, dated September 15, 1958. The Labour Court allowed the application on August 4, 1959 and the appellant had preferred an appeal to the Industrial Court on August 31, 1959. The decision of the Industrial Court was given on October 24, 1959 and after the appeal was dismissed the appellant moved the High Court for grant of a writ on November 16, 1959.”

6. The appellant in this case had claimed a mandamus or a direction to the respondents to issue to the appellant import licence for art silk yarn of the value of Rs. 8,03,530.45. It is well known that the exchange position of this country and the policy of the Government regarding International Trade varies from year to year and it would be rather odd for this Court to direct that an import licence be granted in the year 1968 in respect of alleged defaults committed by the Government in 1959 or 1962. In these matters it is essential that persons who are aggrieved by orders of the Government should approach the High Court after exhausting the remedies provided by law, rule or order with utmost expedition.

7. The learned counsel for the appellant contends that this matter involved fundamental rights and this Court at least should not refuse to give relief on the ground of delay. But we are exercising our jurisdiction not under Article 32 but under Article 226, and as observed by Gajendragadkar, C. J., in the passage extracted above, even in the case of alleged breach of fundamental rights the matter

must be left to the discretion of the High Court.

8. In the result the appeal fails. Parties will bear their own costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 771 (V 57 C 162)

(From: Andhra Pradesh)*

J. C. SHAH, A. N. GROVER, JJ.

The State of Andhra Pradesh, Appellant v. Kokkiligada Meeraiah and another, Respondents.

Criminal Appeal No. 207 of 1967, D/- 28-11-1968.

Criminal P. C. (1898), Sections 403 and 107 — Principle of issue estoppel — Applicability — Proceeding under Sec. 107 on basis of specific incident — Rejection of evidence — Subsequent trial in respect of that incident is not barred — Constitution of India, Article 20 (2) — Criminal Revn. Petn. No. 735 of 1965, D/- 17-4-1967 (AP), Reversed.

The rule of issue estoppel prevents relitigation of the issue which has been determined in a criminal trial between the State and the accused. If in respect of an offence arising out of a transaction a trial has taken place and the accused has been acquitted, another trial in respect of the offence alleged to arise out of that transaction or of a related transaction which requires the Court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial is prohibited by the rule of issue estoppel.

(Para 12)

However, the rejection of evidence given in the proceeding to sustain an order for binding over certain persons to keep the peace does not preclude their trial in respect of the specific incident which together with the other incident is sought to be made the basis of the order of binding them over. The primary issue in the binding over proceeding is whether there is any apprehension of the breach of peace or disturbance of public tranquillity which necessitates the passing of the binding over order. There is no trial for any offence in such proceeding and there is no order of conviction or acquittal. The rule of issue estoppel

* (Criminal Revn. Petn. No. 735 of 1965, D/- 17-4-1967—AP.)

cannot be extended so as to prevent evidence which is given in the binding over proceeding being adduced in trial. Criminal Revn. Petn. No. 735 of 1965, D/-17-4-1967 (AP), Reversed. (Para 12)

- Cases Referred: Chronological Paras
- (1968) Cri App. Nos. 15 & 35 of 1967, D/- 16-10-1968 = (1969) 1 SCWR 29, Asstt. Collector of Customs v. R. L. Malwani 10, 13
- (1968) Cri App. No. 185 of 1966, D/- 25-10-1968 = (1969) 2 SCWR 109, Lalta v. State of U. P. 10
- (1965) AIR 1965 SC 87 (V 52) = 1964-7 SCR 123 = 1965 (1) Cri LJ 120, Manipur Administration v. V. Thockchom Bira Singh 3, 10
- (1964) 1964 AC 1254 = 1964-2 WLR 1145, Connelly v. Director of Public Prosecution 11, 12
- (1961) Criminal Appeal No. 141 of 1960, D/- 7-2-1961 (SC), Banwari Godara v. State of Rajasthan 10
- (1956) AIR 1958 SC 415 (V 43) = 1958 Cri LJ 805, Pritam Singh v. State of Punjab 9
- (1950) 1950 AC 458 = 68 TLR (Pt. 2) 254, Samhasivam v. Public Prosecutor, Federation of Malaya 8
- (1948) 832 US 575 = 92 L Ed 180, Seal Form v. United States 10
- 77 CLR 511, King v. Wilkes 12

Mr. P. Ram Reddy Sr. Advocate, (Mr. A. V. V. Nair, Advocate, with him) for Appellant; Mr. G. S. Rama Rao, Advocate, for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.:— K. Meerayya, K. Venkatanarayana — respondents in this appeal — and two others were charged before the Judicial Magistrate, Hind Class, Avanigadda, for offences under Sections 323 and 324, Indian Penal Code for voluntarily causing injuries to Seetharamayya and Veeraraghavayya on June 22, 1964. The Trial Magistrate convicted Meerayya and Venkatanarayana — the first under the offence under Section 324 and the second for the offence under Section 323, Indian Penal Code. In appeal to the Court of Session, Krishna Division, at Machilipatnam, the order was confirmed. The High Court, in exercise of its revisional jurisdiction, set aside the order of conviction and sentence. The State of Andhra Pradesh has appealed to this Court, with special leave.

2. The case raises a question of some importance in the administration of justice. The findings recorded by the Trial

Magistrate and confirmed by the Sessions Judge were that the respondents had committed assault upon Seetharamayya and Veeraraghavayya and that they could in law be properly convicted. But it was urged that there was a bar against prosecution of the two accused Meerayya and Venkatanarayana because of the "principle of issue estoppel". The plea is raised on the ground that the Station House Officer, Kodur Police Station, had instituted proceedings in the Court of the Sub-Divisional Magistrate, Bandat, under Section 107, Code of Criminal Procedure, against 96 persons, amongst whom were the two respondents, and an order under Section 112, Code of Criminal Procedure was made stating that the persons named therein were indulging in acts of violence involving breach of public peace and tranquillity in the village of Salempalam and were endangering peace in the village, and that they had formed themselves into a party and were thereby disturbing the public peace and tranquillity by committing acts of violence, and on that account they were required to show cause why each person named should not execute a bond for keeping the peace for a period of one year in the sum of Rupees 1000/- with two sureties in a like amount each. In the order requiring the parties to show cause four incidents were referred to — the first of which is material. It was recited that on 22-6-1964, eleven persons including the two respondents had beaten Seetharamayya and Veeraraghavayya with crow bars and sticks, and a case in Crime No. 20/64 under Sections 148, 323 and 325, Indian Penal Code had been registered and was being investigated. The Sub-Divisional Magistrate held an inquiry and was of the view that since the evidence led in support of the first incident was not supported by reliable evidence, and there were inherent discrepancies in the testimony of the witnesses and the recitals in the complaint, the first incident was not proved against any of the eleven persons.

3. It was urged that the order of the Sub-Divisional Magistrate holding that the respondents were not concerned in the incident had become final and it was not open to the Judicial Magistrate, Hind Class, Avanigadda, to hold a trial against the respondents in respect of the same incident. The Trial Magistrate rejected the plea, and the Sessions Judge agreed with him. But in the view of the High Court since in the proceeding

under S. 107 of the Code of Criminal Procedure the incident which was made the subject-matter of the complaint against the respondents in the Court of the Judicial Magistrate was one of the incidents relied upon and was held not proved, it was not open to the State to commence or continue a prosecution against the respondents in respect of the same incident. In so holding, the High Court held that on the principle of "issue estoppel" approved by this Court in *Manipur Administration v. Thokchom, Bira Singh*, (1964) 7 SCR 123= (AIR 1965 SC 87), so long as the finding, that the respondents were not concerned in the incident, was not set aside by appropriate proceeding, no prosecution or any allegation legally inconsistent with that finding could be commenced against the respondents.

4. Counsel for the State contended that the rule of issue estoppel is inconsistent with the statutory provisions contained in Section 403 of the Code of Criminal Procedure, and cannot be resorted to in criminal trials and that in any event the rule of issue estoppel had no application, since there was no "previous trial" of the respondents for any offence alleged to arise out of the incident in respect of which they were tried. It was urged that it was not the law even recognised by the Australian Courts where the rule of issue estoppel had its origin that evidence on which a criminal proceeding was held cannot be utilised in any subsequent proceeding between the same parties.

5. The first contention raised by counsel for the State cannot be entertained in view of a large body of authority in this Court. If the matters were *res integra*, the argument that the Courts cannot travel outside the terms of the Code of Criminal Procedure and extend the rule of *autrefois acquit* incorporated in Section 403 of the Code of Criminal Procedure may have required serious consideration.

6. The following important rules emerge from the terms of Section 403 of Code of Criminal Procedure:

(1) An order of conviction or acquittal in respect of any offence constituted by any act against or in favour of a person does not prohibit a trial for any other offence constituted by the same act which he may have committed, if the Court trying the first offence was incompetent to try that other offence.

(2) If in the course of a transaction several offences are committed for which

separate charges could have been made, but if a person is tried in respect of some of those charges, and not all, and is acquitted or convicted, he may be tried for any distinct offence for which at the former trial a separate charge may have been, but was not, made.

(3) If a person is convicted of any offence constituted by any act, and that act together with the consequences which resulted therefrom constitute a different offence, he may again be tried for that different offence arising out of the consequences if the consequences had not happened or were not known to the Court to have happened, at the time when he was convicted.

(4) A person who has once been tried by a court of competent jurisdiction for an offence and has been either convicted or acquitted shall not be tried for the same offence or for any other offence arising out of the same facts, for which a different charge from the one made against him might have been made or for which he might have been convicted under the Code of Criminal Procedure.

7. Section 403 of the Code of Criminal Procedure enacts the rule of *autrefois acquit* and *autrefois convict* applicable to criminal trials. The rule is that so long as an order of acquittal or conviction at a trial held by a Court of competent jurisdiction of a person charged with committing an offence stands, that person cannot again be tried on the same facts for the offence for which he was tried or for any other offence arising therefrom. But the rule of issue estoppel in criminal trials evolved by the High Court of Australia and approved by the Judicial Committee has been applied to criminal trials in India, apart from the terms of Section 403 of the Code of Criminal Procedure.

8. Lord McDermott in *Sambasivam v. Public Prosecutor, Federation of Malaya*, 1950 AC 458 observed at p. 479:

"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *Res judicata pro veritate accipitur*" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted of the first trial on the charge of having am-

munition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the fire-arm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other."

In Sambasivam's case, 1950 AC 458 the appellant was tried for the offence of being in possession of ammunition in violation of Reg. 4 (1) (b) of the Emergency (Criminal Trials) Regulations, 1948. He was acquitted of the charge. Later he was tried for the offence of carrying a fire-arm contrary to Regulation 4 (1) (a) of the Emergency Regulations and was convicted by the Supreme Court of the Federation of Malaya. An appeal was carried to the Judicial Committee and the legality of the conviction was challenged on the grounds, inter alia, that so long as the order of acquittal in respect of the carrying of ammunition stood, the facts proved in support of that charge were in the circumstances of the case clearly relevant to the second charge, and the appellant was entitled to rely upon the acquittal in so far as it was relevant to his defence. The plea so raised was accepted by the Judicial Committee.

9. In Pritam Singh v. The State of Punjab, AIR 1956 SC 415 this Court held that where a person has been tried under Section 19 (f) of the Arms Act and is acquitted because the prosecution has failed to establish the possession of a revolver by the accused as alleged, in a subsequent trial of the offence of murder, where the possession of the revolver was a fact in issue which had to be established the prosecution could not ignore the finding at the previous trial.

10. In several later judgments of this Court the principle of issue estoppel has received approval: 1964-7 SCR 123 = (AIR 1965 SC 87), Banwari Godara v. The State of Rajasthan, Cri. App. No. 141 of 1960, D/- 7-2-1961 (SC), Lalta v. The State of U. P., Cri. App. No. 185 of 1963, D/- 25-10-1968 = (reported in 1969-2 SC WR 109). It was also accepted in the

Assistant Collector of Customs v. R. L. Malwani, Cri. App. Nos. 15 and 35 of 1967, D/- 18-10-1968 = (reported in (1969) 1 SCWR 29). It is too late now to make a departure from the rule accepted by this Court. In the American Courts also the rule of issue estoppel has received approval: Sealform v. United States, (1948) 332 US 575.

11. It is true that in Connelly v. Director of Public Prosecution, 1964 AC 1254 decided by the House of Lords there was some difference of opinion amongst the Law Lords as to the applicability of the rule to criminal trials in the English Courts. Our Criminal jurisprudence is largely founded upon the basic rules of English Law though the procedure is somewhat different. Trials by jury have been practically abolished and the cases are being tried by Judges. Several charges arising out of the same transaction can be tried under the Code of Criminal Procedure together at one trial, and specific issues are always raised and determined by the Courts. Under the English system of administration of criminal law, trials for serious offences are held with the aid of the jury and it is frequently impossible to determine with certitude the specific issues on which the verdict of the jury is founded. In criminal trials under the Code of Criminal Procedure, there is no uncertainty in the determination of issues decided. Difficulties envisaged in Connelly's case, 1964 SC 1254, in the application of the rule of issue estoppel do not therefore arise under our system.

12. But it is necessary to notice the true basis of the rule. Dixon, J., in the King v. Wilkes, 77 CLR 511 observed at pp. 518-519:

".....it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. x x x There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of

affairs arises I see no reason why the ordinary rules of issue estoppel should not apply. Such rules are not to be confused with those of *res judicata*, which in criminal proceedings are expressed in the pleas of *autrefois acquit* and *autrefois convict*. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation."

The rule, does not predicate that evidence given at one trial against the accused cannot again be given in the trial of the accused for a distinct offence. As Lord Morris of Borth-y-Gest observed in *Connelly's case*, 1964 AC 1254 at p. 1325:

"....there is no rule or principle to the effect that evidence which has first been used in support of a charge which is not proved may not be used to support a subsequent and different charge, x x x"

Can it be said in the present case that there has been a trial of the accused on an issue in a prior litigation, and an attempt is made to relitigate the same? It may be recalled that the respondents were not tried at any criminal trial in the previous case. The earlier proceeding was for binding over the respondents and 94 others to keep the peace on the case that it was apprehended that they were likely to commit breach of peace or disturb public tranquillity. The primary issue which the Court was called upon to determine was whether there was any apprehension of the breach of peace or disturbance of public tranquillity which necessitated the passing of the order requiring the respondents and others to give security. It is true that in support of that order the Station House Officer in his report had relied upon four incidents, one of which specifically set out the details which formed the subject-matter of the trial from which the present appeal arises. But there was no trial of the respondents for an offence in the earlier proceeding and there was no order of conviction or acquittal. The rule of issue estoppel cannot in our judgment, be extended so as to prevent evidence which was given in the previous proceed-

ing and which was held not sufficient to sustain the order for being used in support of a charge of an offence which the State seeks to make out. The rule of issue estoppel prevents relitigation of the issue which has been determined in a criminal trial between the State and the accused. If in respect of an offence arising out of transaction a trial has taken place and the accused has been acquitted, another trial in respect of the offence alleged to arise out of that transaction or of a related transaction which requires the Court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial is prohibited by the rule of issue estoppel. In the present case, there was no trial and no acquittal. The rejection of evidence given in the earlier proceeding to sustain an order for binding over the respondents to keep the peace does not preclude the trial of the respondents in respect of the specific incident which together with the other incident was sought to be made the basis of the order of binding over the respondents.

13. This Court in *R. L. Malwani's case*, Cri. App. Nos. 15 and 35 of 1967, D/- 16-10-1968 = (reported in (1969) 1 SCWR 29) declined to apply the rule of issue estoppel to a case arising under the Sea Customs Act in which there was an inquiry held by the Collector of Customs and a criminal prosecution was then filed.

14. In our judgment, the High Court was in error in holding that the respondents could not be tried and convicted of offences under Section 324 and 323 I. P. Code because in the earlier proceeding under Section 107 of the Code of Criminal Procedure, evidence with regard to the incident out of which offences which are the subject-matter of the present appeal was taken, and was regarded as insufficient to sustain the order.

15. The appeal is allowed, and the order passed by the High Court is set aside. As, however, the sentences passed by the learned Trial Magistrate and confirmed by the Court of Session were of short duration and the respondents have been released on bail we do not think that they should be called upon to undergo the remaining sentences. We reduce the sentences of imprisonment to the period already undergone. The appeal is allowed and the order of the Sessions Court is restored subject to

the modification in the sentence of imprisonment.

Appeal allowed.

AIR 1970 SUPREME COURT 776

(V 57 C 163)

(From: Rajasthan)

M. HIDAYATULLAH, C. J., A. N. GROVER, A. N. RAY, P. JAGAN-MOHAN REDDY AND I. D. DUA, JJ.

M. C. Agarwal and another, Petitioners v. State of Rajasthan and others, Respondents.

Writ Petn. No. 33 of 1968, D/- 25-11-1969.

Constitution of India, Articles 32 and 145 — Supreme Court Rules 1966, O. 11, R. 1 — Conduct of petitioners — Refusal to swear affidavit in support of allegations in petition — Effect.

Petitioners seeking declaration that they were duly selected for Rajasthan Higher Judicial Service — Allegations in petition that they were selected as direct recruits (by Selection Committee) under R. 7 of Rajasthan Higher Judicial Service Rules 1955 — Allegations in petition contradicting records maintained by High Court — Petitioners asked to swear affidavit before Court that they were selected or to point out to Court some record in which the fact that they were selected was noted — Petitioners not swearing affidavit but still maintaining that they could do so by argument — Held, that the conduct of the petitioners was unscrupulous and unworthy, as they continued to maintain that they were selected and to insinuate that the record of High Court was not to be trusted. (Para 9)

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.— By this petition, the two petitioners who are advocates and were aspirants for recruitment to the Rajasthan Higher Judicial Service, claim a declaration that they were duly selected by the Selection Committee of the High Court in May 1964 and must therefore be deemed to have been appointed on May 26, 1965, the date on which respondents 3 and 4 (two other candidates) were appointed. They also want that their seniority should be de-

termined in accordance with the ranking made by the Selection Committee and the order of this Court dated March 15, 1967 in Civil Appeal No. 93 of 1966. For this, in the alternative, they seek a declaration that the appointment of respondents 3 and 4 was illegal and void.

2. On November 20, 1963 the High Court of Rajasthan issued a notice inviting applications for direct recruitment to four posts of Civil & Additional Sessions Judges. The applications received were referred by the High Court to a Selection Committee consisting of the Chief Justice, the Administrative Judge and a Judge nominated by the Chief Justice. According to the petitioners the Selection Committee selected four candidates that is to say, the two petitioners and respondents 3 and 4. The Selection Committee at the same time prepared a second list of promotees. The two lists were submitted to the Governor.

3. The fact of the matter, according to the High Court, however, was that the Selection Committee held interviews for selection of direct recruits between April 27 and May 7, 1964. The applications of these two, who were interviewed on April 27, 1964, were rejected the same day. The interviews continued and three applicants were selected for final consideration. Ultimately the Selection Committee on May 8, 1964 selected respondents 3 and 4. The Committee recorded a memorandum which read:

"There were 92 candidates in all for the selection to the R. H. J. S. by direct recruitment under Rule 7 (1) (ii), read with Rule 2 of the Rajasthan Higher Judicial Service Rules, 1955.

Out of these one was not called for interview, eight were absent and the remaining 83 (eighty-three) candidates have been interviewed by us from the 27th April to 7th May, 1964.

Although four posts had been advertised, we are of opinion that only two candidates come upto the requisite standard of ability and competence. We have therefore thought fit to recommend only two candidates for appointment under the Rules in the following order of merit:

(1) Shri Kalyan Dutt Sharma, Advocate, Alwar.

(2) Shri Kisore Singh Lodha, Advocate, Jodhpur.

This may be circulated to all Hon. Judges for approval."

The Full Court approved. No recommendation was sent to the Governor till

January 13, 1965 for reasons which were stated as follows:

"On May 4, 1964 some Judicial officers of Rajasthan filed a Civil Writ Petition No. 803 of 1964 (referred to in paragraph 4 by the petitioners) under Article 226 of the Constitution before the High Court. They also prayed for staying the selection during the pendency of the writ petition but their request was rejected on May 8, 1964. However, the High Court on its administrative side thought it proper to postpone the selection of Rajasthan Judicial Service till the pendency of that writ petition and as the two lists, i. e., one of selected direct recruits and the other of Rajasthan Judicial Service officers to be promoted to Rajasthan Higher Judicial Service were, according to the rules, to be sent to the Governor together, even the latter list was not sent earlier.

Before the decision of the High Court in that writ petition it was considered that there were 18 posts available for appointment, out of which 4 posts were to be filled by direct recruitment and 14 by promotion from amongst officers of the Rajasthan Judicial Service. In that writ petition the High Court, by its judgment dated November 27, 1964 directed as follows:—

"Accordingly, we reject the application in regard to all the reliefs sought by the petitioners in their writ petition. But in view of our finding that the number of vacancies on the date of its determination by the Governor was only 9 and not 18 we direct respondent No. 1 that these vacancies only shall be filled in from the sources in the proportion provided in the rules."

When the judgment of the High Court was delivered, the Selection Committee on December 12, 1964 selected seven for promotion. This list was also circulated and approved by the Full Court. The two lists were then sent to the Governor on January 13, 1965. The High Court through the Registrar's affidavit stated that the High Court had not selected four persons as direct recruits but only two persons, namely, respondents 3 and 4, and that the petitioners were never selected.

4. The petitioners maintained before us that they were selected and sought to establish this from what they said were inferences from the replies of the High Court to the petition filed by the Rajasthan Judicial members in the High Court

and certain observations of this Court in the judgment of March 15, 1967 referred to.

5. Since the contention was so directly in contradiction of the position maintained by the High Court before us, we invited the petitioners to swear an affidavit before us that they were selected or to point out to us some record in which the fact that they were selected was noted. The petitioners made no attempt to swear the affidavit and still maintained that they could establish by argument that they were so selected. With the reply affidavit of the Registrar two copies of the petitions of these two petitioners were filed and they showed an endorsement by the Chief Justice and the two Judges who formed the Selection Committee that the applications of the petitioners were rejected on April 27, 1964. The petitioners cast doubts on the accuracy of this copy and one of them (H. C. Agarwala) even suggested that the endorsement was antedated and the other (R. K. Mehrotra) that the stand of the High Court was an afterthought. At the hearing the Advocate-General, Rajasthan placed in our hands the entire original file including the applications of the petitioners. The applications clearly bear the endorsement of rejection signed by the Chief Justice and the two Judges with the date 27-4-1964. The applications were submitted in triplicate and the other copies also bear the endorsement over the signature of one of the Judges.

6. In spite of the affidavit of the Registrar from which we have quoted extracts, and the original file, the petitioners continued to make the same assertions and to cast doubts on the authenticity of the record and the endorsement. They even went to the length of suggesting that the endorsement was contradicted by the marks given at the interview.

7. We have looked carefully into the record maintained by the High Court and have satisfied ourselves that the affidavit of the Registrar is borne out by it and that there is no reason to doubt the record. The only thing is that our brother Shelat in the earlier order said in the narration of facts:

"A number of applications were received by the High Court and after scrutiny thereof and interviews granted to the applicants, the Selection Committee, appointed under the said Rules and consisting of the Chief Justice, the Administrative Judge and another Judge of the High

Court nominated by the Chief Justice, selected four candidates. Besides these four posts, there were fourteen posts to be filled up from amongst the members of the Rajasthan Judicial Service by promotion. The said Committee selected eligible candidates from amongst those members and prepared another list. The High Court submitted the two lists prepared by the Committee to the Governor for appointments."

8. The mention of the figure 4 instead of 2 in two places is inaccurate since there is no record of selection of more than two candidates. We are satisfied that this error in narration of facts does not conclude us from stating the true facts which are as we have gathered from the original file.

9. The petition thus has no merit at all. Although this was brought to the notice of the petitioners, we are constrained to record that the petitioners, losing all sense of decorum and propriety, continued to maintain that they were selected and to insinuate that the record was not to be trusted. We asked them to swear an affidavit in support of their allegations but they declined to do so. We consider this conduct to be unscrupulous and unworthy.

10. The petition is dismissed with costs.

Petition dismissed.

AIR 1970 SUPREME COURT 778 (V 57 C 164)

(From Delhi: (1969) 74 ITR 808)

M. HIDAYATULLAH, C. J.,

J. M. SHELAT, C. A. VAIDIALINGAM,
A. N. GROVER AND A. N. RAY, JJ.

M/s. Jain Bros. and others, Appellants
v. The Union of India and others, Respondents.

Civil Appeal No. 1593 of 1969, D/- 18-11-1969.

(A) Constitution of India, Article 226 — Petition challenging imposition of penalty under Income Tax Act of 1961 — Amount of penalty determined on the basis of assessment under Section 23 (5) of Income Tax Act of 1922 — Validity of Section 23 (5) of 1922 Act can be assailed in the writ petition. (1969) 74 ITR 808 (Delhi), Reversed.

(Para 3)

BN/CN/A822/70/MLD/C

(B) Income Tax Act (1922), Section 23 (5) (as amended by Section 14 of Finance Act 1956) — Tax payable by registered firm — Assessment of, independently of tax payable by individual partners of the firm on their shares of profit — Such assessment cannot be challenged.

Section 23 (5) as amended in 1956, providing for assessment of tax payable by registered firm independently of tax payable by the individual partners of the firm on their shares of profits, cannot be challenged by invoking the general principles that the subject cannot be taxed twice over. (Para 6)

According to the scheme of the Income tax Acts a firm and its partners are distinct entities. So far as the Act of 1922 is concerned, Section 2 (2) which defines the assessee would obviously include a firm under Section 8 (42) of the General Clauses Act which provides that a person includes "any company or association or body of individuals whether incorporated or not." For the purpose of assessment at all crucial stages under Ss. 22 and 23 it is the firm which is treated as an assessee. Thus even before the amendment of Section 23 (5) in 1956 the character of the firm as a separate entity was well established. The firm, however, did not pay any tax itself and the assessment was made on the individual partners in accordance with the provisions of that section. After 1956 the firm did not cease to be an assessee; on the contrary it was recognised as a separate entity and was subjected to tax as such. AIR 1966 SC 1538, Disting. (Para 5)

Moreover it is not disputed that there can be double taxation if the legislature has distinctly enacted it. It is only when there are general words of taxation and they have to be interpreted they cannot be so interpreted as to tax the subject twice over to the same tax. The Constitution does not contain any prohibition against double taxation even if it be assumed that such a taxation is involved in the case of a firm and its partners after the amendment of Section 23 (5) by the Act of 1956. Nor is there any other enactment which interdicts such taxation. It is true that Sec. 3 is the general charging section. Even if Section 23 (5) provides for the machinery for collection and recovery of the tax, once the legislature has, in clear terms, indicated that the income of the firm can be taxed in accordance with the Finance Act of 1956 as also the income in the hands of the

partners, the distinction between a charging and a machinery section is of no consequence. Both the sections have to be read together and construed harmoniously. (Para 6)

(C) Income Tax Act (1961), S. 297 (2) (g) — Validity — Not violative of Art. 14 of the Constitution.

Section 297 (2) (g) inasmuch as it classifies, for imposition of penalty, into two groups of assessee with reference to the particular date, namely, completion of assessment proceedings on or after the first day of April 1962 does not violate Article 14 of the Constitution.

It is for the legislature to decide from which date a particular law should come into operation. There is no reason why pending proceedings cannot be treated by the legislature as a class for the purpose of Article 14. The date, first April 1962 which has been selected by the legislature for the purpose of Cls. (f) and (g) of Section 297 (2) cannot be characterised as arbitrary or fanciful. It is the date on which the Act of 1961 actually came into force. For the application and the implementation of the Act of 1961 it was necessary to fix a date and the stage of the proceedings which were pending for providing by which enactment they would be governed. AIR 1960 SC 923, Relied on; AIR 1967 SC 691, Disting. (Para 9)

As penalty has to be calculated and imposed according to the tax assessed, the imposition of penalty can take place only after assessment has been completed. For this reason there was every justification for providing in Cls. (f) and (g) that the date of the completion of the assessment would be determinative of the enactment under which the proceedings for penalty were to be held. It may be that the legislature considered that a separate treatment should be given in the matter of assessment itself and under Cls. (a) and (b) of Section 297 (2) the point of time when a return of income had been filed was made decisive for the purpose of application of the Act of 1922 or the Act of 1961. But merely because the legislature in its wisdom decided to give a different treatment to proceedings relating to penalty it is difficult to find discrimination with regard to the classification which has been made in Cls. (f) and (g) which are independent of Cls. (a) and (b). Although penalty has been regarded as an additional tax in a certain sense and for certain purposes it cannot be said that penalty proceedings are essentially a continuation of the pro-

ceedings relating to assessment where a return has been filed. (Para 10)

It cannot be said that while applying the penalty provisions contained in the Act of 1961 to cases of persons whose assessments are completed after first April 1962 any class has been singled out for special treatment. It is obvious that for the imposition of penalty it is not the assessment year or the date of the filing of the return which is important but it is the satisfaction of the income tax authorities that a default has been committed by the assessee which would attract the provisions relating to penalty. The crucial date, therefore, for purposes of penalty is the date of such completion. Mere possibility that some officer may intentionally delay the disposal of a case can hardly be a ground for striking down clause (g) as discriminatory under Article 14. The classification made is based on intelligible differentia having reasonable relation to the object intended to be achieved, namely, to prevent the evasion of tax. AIR 1969 MP 220 and (1968) 70 ITR 293 (All), Relied on.

(Paras 12 and 13)

(D) Income-tax Act (1961), Sections 271 (1) and 297 (2) (g) — Assessee committing default under 1922 Act — Case falling within terms of Section 297 (2) (g) — Assessee will be liable to penalty as provided by Section 271 (1) — Section 271 applies mutatis mutandis to proceedings relating to penalty initiated in accordance with Section 297 (2) (g). AIR 1969 SC 408, Relied on. (Para 14)

(E) Income-tax Act (1961), Section 271 (2) — Validity — Registered firm committing default attracting penalty — Section deeming it to be an unregistered firm for the purpose of imposition of penalty — No question of discrimination under Article 14 of the Constitution arises. (Para 15)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 408 (V 56)=

71 ITR 806, Third I.-T. Officer,
Mangalore v. Damodhar Bhat 14

(1969) AIR 1969 MP 220 (V 56)=

73 ITR 263, Gopichand Sarju
Prasad v. Union of India 13

(1968) 70 ITR 293 (All), I.-T. Officer,
A-Ward, Agra v. Firm Madan
Mohan Dhammamal 13

(1967) AIR 1967 SC 691 (V 54)=

(1967) 1 SCR 15, Jalan Trading
Co. (P) Ltd. v. Mill Mazdoor Union 11

(1966) AIR 1966 SC 1536 (V 53)=
60 ITR 95, Commr. of I.-T.,

Bombay, South v. Murlidhar Jhawar and Purna Ginning and Pressing Factory

(1960) AIR 1960 SC 923 (V 47) = 1960-3 SCR 528, M/s. Hatisingh Mfg. Co. Ltd. v. Union of India

(1921) 8 Tax Cas 38, Commr. of Inland Revenue v. Frank Bernard Sanderson

(1909) 5 Tax Cas 402= 100 LT 481, Stevens v. Durban-Roddepoort Gold Mining Co. Ltd.

The Judgment of the Court was delivered by

GROVER, J.— This is an appeal by certificate from a judgment of the Delhi High Court dismissing a petition under Articles 226 and 227 of the Constitution.

2. Appellant No. 1 which carries on business in Delhi was registered as a firm under Section 26A of the Indian Income-tax Act, 1922. Appellants 2 to 5 are its partners. On May 26, 1960, a notice under Section 22 (2) of that Act was served on the firm calling upon it to submit a return of its income for the assessment year 1960-61 (accounting year ending October 31, 1959). The return had to be filed within 35 days of the service of the notice. It was not filed. Further notices were served on two occasions. It filed a return on November 18, 1961, showing income of Rs. 3,55,566. The Income-tax Officer completed the assessment on November 23, 1964, computing the total income of the firm at Rs. 4,75,368. In view of the amendment made by the Finance Act of 1956 in Section 23 (5) of the Act of 1922 the tax payable by the firm as also the amount to be included in the income of each partner was determined. On the same date i.e., November 23, 1964, the Income-tax Officer issued a notice under Section 271 read with Section 274 of the Income-tax Act 1961 calling upon the firm to show cause why an order imposing a penalty should not be passed on account of its failure to furnish the return within time. After considering the explanation submitted by the assessee the Income-tax Officer made an order on November 19, 1966 under Cl. (a) of Section 271 (1) of the Act of 1961 imposing a penalty of Rs. 1,03,434 for non-compliance with the notice under Section 22 (2) of the 1922 Act. The appellants took the matter in appeal before the Appellate Assistant Commissioner challenging the imposition of penalty. Although those proceedings were still pend-

ing a writ petition was filed on August 26, 1966 in the High Court challenging, inter alia, the validity and the constitutionality of Section 23 (5) of the Act of 1922 and Section 297 (2) (g) and Section 271 (2) of the Act of 1961 respectively. The High Court did not accede to any of the contentions of the present appellants and the petition was dismissed.

3. We may first deal with the attack against Section 23 (5) of the 1922 Act. It is based on the general principle that you cannot tax the subject twice over to the same tax. The validity of this provision arises only in this way that it is the assessment made under it which can form the basis for imposing the penalty. The High Court declined to examine the matter on the ground that the assessment order dated November 23, 1964 could not be assailed in the writ petition and that the appellants had debarred themselves from getting any relief on account of laches and delay. In our opinion the point sought to be raised is directly connected with the imposition of penalty. If the question of penalty was at large and open to examination the validity of Section 23 (5) of the 1922 Act, the assessment under which would form the basis for determining the amount of penalty, could certainly be canvassed.

4. Section 23 (5) stood as follows after the amendment made by Section 14 of the Finance Act 1956:

"Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4) as the case may be,—

(a) in the case of a registered firm,
(i) the income-tax payable by the firm itself shall be determined; and

(ii) the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined."

In clause (a), clauses (i) and (ii) were substituted for the following words:

"the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him

on the basis of such assessment shall be determined."

is what the learned Judge said in his inimitable words:

After the amendment a registered firm was liable to pay income tax independently of the tax payable by the individual partners of the firm on their share of profits. Prior to the amendment of 1956 where the firm was unregistered the tax payable by the firm was computed as in the case of any other entity and the firm itself had to pay the tax. If the firm was registered under Section 26-A it did not pay the tax and there was no assessment of its liability. Each partner's share in the firm's profits was added to his income and after determination of the total income of each partner the levy was made on him individually. After 1956 tax at low rate became assessable on a registered firm though it was not liable to pay super tax. The partners of the registered firm remained liable for being charged on their individual assessment to both income-tax and super-tax in respect of their share in the profits of the firm. The partner, however, was entitled to certain rebate under Section 14 (2) (aa).

5. The position of the appellants is that the firm and its partners do not constitute a separate entity. Either the firm or the partners can be taxed but the same income in the hands of both cannot be simultaneously subjected to tax. It is well known that under the common law of England a firm is not a juristic person. The firm name is only a compendious expression to designate the various partners constituting it. Section 3 of the Act of 1922 which is the charging section treats the firm as a distinct entity. This Court has laid down in *Commissioner of Income-tax, Bombay South v. Murlidhar Jhawar & Purna Ginning & Pressing Factory*, 60 ITR 95= (AIR 1966 SC 1536) that partners of an unregistered firm might be assessed individually or they might be assessed collectively in the status of an unregistered firm. But the same income cannot be assessed twice, once in the hands of the partners and again in the hands of the unregistered firm. It follows that even in the case of a registered firm the same income, namely, of firm and the partners arising out of their share in the firm cannot be subjected to tax twice. The classic dictum of Rowlatt, J., in *The Commissioner of Inland Revenue v. Frank Bernard Sanderson*, (1921) 8 Tax Cas 38 illustrating the two stages of passage of money has been invoked. This

"It is often said, but not always understood, that in Income tax the same income is not taxed twice. That means that you cannot tax it more than once on one passage of money in the form of one sort of income. If a man earns £100 by his profession and gives it to his son to clothe himself, or to his daughter, for the year, the son or the daughter does not pay income tax; there is only one passage of the money in the form of that income. If a man earns £100 and pays it to somebody else for services rendered in a trade or profession by that other person, the sum of £100 enters upon another passage in another form of income, and therefore attracts Income-tax again." There is a good deal of fallacy in the argument raised on behalf of the appellants. In the first place, according to the scheme of the Income-tax Acts a firm and its partners are distinct entities. So far as the Act of 1922 is concerned Section 2 (2) which defines the assessee would obviously include a firm under Section 3 (42) of the General Clauses Act which provides that a person includes "any company or association or body of individuals whether incorporated or not". For the purpose of assessment at all crucial stages under Sections 22 and 23 it is the firm which is treated as an assessee. Thus even before the amendment of Section 23 (5) in 1956 the character of the firm as a separate entity was well established. The firm, however, did not pay any tax itself and the assessment was made on the individual partners in accordance with the provisions of that section. After 1956 the firm did not cease to be an assessee; on the contrary it was recognised as a separate entity and was subjected to tax as such. *Murlidhar Jhawar's case*, 60 ITR 95= (AIR 1966 SC 1536) can hardly be of much assistance as it related to an unregistered firm and to an assessment of accounting year ending November 6, 1953. The provisions which came up for consideration had no parallel to those made in respect of registered firm by an express amendment of Section 23 (5) by the Finance Act of 1956. The facile analogy of passage of money given by Rowlatt, J., will not carry the matter further where the statute has made an express provision for the income of the firm and the income in the hands of the partners being both liable to tax.

6. It is not disputed that there can be double taxation if the legislature has distinctly enacted it. It is only when there are general words of taxation and they have to be interpreted they cannot be so interpreted as to tax the subject twice over to the same tax (vide Channell, J., in *Stevens v. The Durban-Roddepoort Gold Mining Co. Ltd.*, (1909) 5 Tax Cas 402. The Constitution does not contain any prohibition against double taxation even if it be assumed that such a taxation is involved in the case of a firm and its partners after the amendment of Section 23 (5) by the Act of 1956. Nor is there any other enactment which interdicts such taxation. It is true that Sec. 3 is the general charging section. Even if Section 23 (5) provides for the machinery for collection and recovery of the tax, once the legislature has, in clear terms, indicated that the income of the firm can be taxed in accordance with the Finance Act of 1956 as also the income in the hands of the partners, the distinction between a charging and a machinery section is of no consequence. Both the sections have to be read together and construed harmoniously. It is significant that similar provisions have also been enacted in the Act of 1961. Sections 182 and 183 correspond substantially to Section 23 (5) except that the old section did not have a provision similar to sub-section (4) of Section 182. After 1956, therefore, so far as registered firms are concerned the tax payable by the firm itself has to be assessed and the share of each partner in the income of the firm has to be included in his total income and assessed to tax accordingly. If any double taxation is involved the legislature itself has, in express words, sanctioned it. It is not open to any one thereafter to involve the general principles that the subject cannot be taxed twice over.

7. We may now deal with the challenge to the constitutionality and validity of Section 297 (2) (g) of the Act of 1961. That provision appears in Chapter XXIII and is a part of Section 297 which deals with repeals and savings. Sub-section (1) provides that the Act of 1922 is repealed. Clause (a) of sub-section (2) says that notwithstanding the repeal where a return of income has been filed before the commencement of the Act of 1961 by any person for any assessment year proceedings for the assessment of that person for that year may be taken and continued as if the Act of 1961 had not been passed.

According to clause (b) where a return of income is filed after the commencement of the Act of 1961 the assessment has to be made in accordance with the procedure specified in the Act of 1961. Clauses (f) and (g) are in these words:

"(f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act".

The submission on behalf of the appellants has been that clause (g) of Section 297 (2) is violative of Article 14 inasmuch as it creates a discrimination between two sets of assessees with reference to a particular date, namely, completion of assessment proceedings on or after the first day of April 1962. In other words the assessees have been classified into two groups for imposition of penalty; the first group is of those assessees whose assessments have been completed before first April 1962. In their case, the proceedings for imposition of penalty have to be initiated and the penalty imposed under the Act of 1922 (vide clause (f)). The second group of assessees whose assessment is completed on or after the first day of April 1962 have to be proceeded with for the imposition of penalty in respect of any assessment for the year ending on 31st day of March, 1962 or any earlier year under the Act of 1961. The penalty has also to be imposed in their case under the latter Act. It all depends, therefore, on the sweet will of the Income-tax Officer to complete the assessment before the first day of April 1962 or to complete it thereafter in order to make the provisions of the Act of 1922 or the Act of 1961 applicable in the matter of initiation of proceedings for and imposition of a penalty. A fortuitous event of the assessment being made on or before first April 1961 has no reasonable relation with the object of legislation. It is further pointed that under clause (a) of Section 297 (2) where a return has been filed before the commencement of Act of 1961 i.e., first April, 1962 the proceedings for assessment have to be taken under the

Act of 1922. If the assessment has to be made under the Act of 1922 there seems to be no rationale behind the provisions contained in clauses (f) and (g) which introduce an apparent inconsistency and contradiction with what is provided by clause (a). Logically, it is claimed the proceedings for imposition of penalty should have followed the same course as the assessment where the return of income has been filed. Penalty partakes of the character of an additional tax and therefore its imposition should not have been made dependent on the date when the assessment has been completed, particularly, when under clauses (a) and (b) it is the date of filing of the return which governs the procedure relating to assessment under one Act or the other.

8. Under Section 22 (2) of the Act of 1922 the Income-tax Officer could serve a notice requiring any person whose total income was of such amount as to render him liable to income-tax to furnish within a specified period a return in the prescribed form setting forth his total income during the previous year. Under Section 28 if the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings, was satisfied that any person had, without reasonable cause, failed to furnish the return of his total income which he was required to furnish by notice given under Section 22 it could be directed that such person shall pay by way of penalty, in addition to the amount of income-tax and super-tax payable by him, a sum not exceeding $1\frac{1}{2}$ times that amount. Sub-section (4) provided that no prosecution for an offence could be instituted in respect of the same facts on which penalty had been imposed under the section. Sub-section (6) made it obligatory for the Income-tax Officer to obtain the previous approval of the Inspecting Assistant Commissioner before imposing any penalty. In the Act of 1961 the provisions relating to penalties are contained in Chapter XXI. Section 271 (1) (a) deals with the failure to furnish a return. If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under the Act is satisfied that such a default has been committed without reasonable cause he may direct that such person shall pay by way of penalty, in addition to the amount of tax payable by him a sum equal to 2 per cent of the tax for every month during which the default continues, but

not exceeding in the aggregate 50 per cent of the tax. Section 274 (1) provides that no order imposing a penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Section 275 lays down the period of limitation for imposing a penalty. Such an order cannot be passed after the expiration of two years from the date of the completion of proceedings in the course of which the proceedings for imposition of a penalty have been commenced. It may be mentioned that in Chapter XXII dealing with offences and prosecutions a provision has been made in Section 276 for punishment with fine in case of failure without reasonable cause or excuse to furnish in due time a return under Section 139 (2) which was equivalent to Section 22 (2) of the Act of 1922. As the present case relates only to a penalty having been imposed on account of the failure to furnish a return we may notice the main changes made in the Act of 1961 in the matter of imposition of penalty for such a default. The first departure from the Act of 1922 is that no prosecution could be instituted under the Act of 1922 in respect of the same facts on which a penalty had been imposed. Under the Act of 1961 a penalty can be imposed and a prosecution launched on the same facts. The second change is that under the Act of 1922 the Income-tax Officer could not impose any penalty without the previous approval of the Inspecting Assistant Commissioner. Under the 1961 Act no such previous approval is necessary. Thirdly the Act of 1922 did not prescribe any minimum amount of penalty. According to the Act of 1961 the penalty cannot be less than the minimum prescribed. This is of course subject to the Commissioner's power of reduction. Fourthly the maximum penalty impossible in a case where there has been a failure to file a return in compliance with a notice issued by the Income-tax Officer has been reduced under the Act of 1961. Lastly there was no time limit in the Act of 1922 for passing of a penalty order but under the Act of 1961 a period of two years has been prescribed by Section 275 as stated above. Thus whereas under the Act of 1922 a defaulting assessee had certain protection in the matter of prosecution no such protection has been afforded under the Act of 1961; but the maximum amount of penalty which can be imposed has been reduced and a period of limitation has been prescribed for

passing a penalty order which is of distinct advantage to a defaulting assessee. It is not possible to accept the suggestion on behalf of the appellants that the substantive and the procedural provisions relating to penalty contained in the Act of 1961 are altogether onerous.

9. Now the Act of 1961 came into force on first April 1962. It repealed the prior Act of 1922. Whenever a prior enactment is repealed and new provisions are enacted the legislature invariably lays down under which enactment pending proceedings shall be continued and concluded. Section 6 of the General Clauses Act 1897 deals with the effect of repeal of an enactment and its provisions apply unless a different intention appears in the statute. It is for the legislature to decide from which date a particular law should come into operation. It is not disputed and no reason has been suggested why pending proceedings cannot be treated by the legislature as a class for the purpose of Article 14. The date, first April 1962 which has been selected by the legislature for the purpose of clauses (f) and (g) of Section 297 (2) cannot be characterised as arbitrary or fanciful. It is the date on which the Act of 1961 actually came into force. For the application and the implementation of the Act of 1961 it was necessary to fix a date and the stage of the proceedings which were pending for providing by which enactment they would be governed. According to *M/s. Hatisingh Mfg. Co. Ltd. v. Union of India*, 1960-3 SCR 523= (AIR 1960 SC 923), the State is undoubtedly prohibited from denying to any person equality before the law or the equal protection of the laws but by enacting a law which applies generally to all persons who come within its ambit as from the date on which it becomes operative no discrimination is practiced. In that case although a distinction had been made with reference to Section 25FFF (1) of the Industrial Disputes Act, 1947 as inserted by Act 16 of 1957 between employers who had closed their undertakings on or before November 27, 1956 and those who had done so after that date, it was held that Article 14 had not been violated.

10. According to the arguments on behalf of the appellants Article 14 is attracted because the classification which has been made is purely arbitrary depending on the accident of the date of the completion of the assessment. There can be no manner of doubt that penalty

has to be calculated and imposed according to the tax assessed. It follows that imposition of penalty can take place only after assessment has been completed. For this reason there was every justification for providing in clauses (f) and (g) that the date of the completion of the assessment would be determinative of the enactment under which the proceedings for penalty were to be held. It may be that the legislature considered that a separate treatment should be given in the matter of assessment itself and under cls. (a) and (b) of Section 297 (2) the point of time when a return of income had been filed was made decisive for the purpose of application of the Act of 1922 or the Act of 1961. But merely because the legislature in its wisdom decided to give a different treatment to proceedings relating to penalty it is difficult to find discrimination with regard to the classification which has been made in clauses (f) and (g) which are independent of clauses (a) and (b). Although penalty has been regarded as an additional tax in a certain sense and for certain purposes it is not possible to hold that penalty proceedings are essentially a continuation of the proceedings relating to assessment where a return has been filed.

11. The majority decision in *Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Union*, 1967-1 SCR 15= (AIR 1967 SC 691) hardly affords any parallel. There the retrospective operation of the Payment of Bonus Act 1965 which came into force in May 29, 1965 was made by Section 33, the provisions of which were held to be violative of Article 14, to depend on the pendency on that date of any dispute regarding payment of bonus relating to any accounting year from 1962 onwards. The year 1962 had apparently no connection with the date on which the Act came into operation which was May 29, 1965.

12. It is well settled that in fiscal enactments the legislature has a larger discretion in the matter of classification so long as there is no departure from the rule that persons included in a class are not singled out for special treatment. It is not possible to say that while applying the penalty provisions contained in the Act of 1961 to cases of persons whose assessments are completed after first April 1962 any class has been singled out for special treatment. It is obvious that for the imposition of penalty it is not the assessment year or the date of the filing of

the return which is important but it is the satisfaction of the income-tax authorities that a default has been committed by the assessee which would attract the provisions relating to penalty. Whatever the stage at which the satisfaction is reached, the scheme of Sections 274 (1) and 275 of the Act of 1961 is that the order imposing penalty must be made after the completion of the assessment. The crucial date, therefore, for purposes of penalty is the date of such completion.

13. It is equally difficult to understand the argument that because it rests with the Income-tax Officer to complete the assessment by a particular date it will depend on his fiat whether the penalty should be imposed under the Act of 1922 or under the Act of 1961. There is no presumption that officers or authorities who are entrusted with responsible duties under the taxation laws would not discharge them properly and in a bona fide manner. If in a particular case any mala fide action is taken that can always be challenged by an assessee in appropriate proceedings but the mere possibility that some officer may intentionally delay the disposal of a case can hardly be a ground for striking down clause (g) as discriminatory under Article 14. We are clearly of the view, in concurrence with the decisions in *Gopi Chand Sarjuprasad v. Union of India*, 73 ITR 263 = (AIR 1969 MP 220) and *Income-tax Officer A-Ward, Agra v. Firm Madan Mohan Danna Mal*, (1968) 70 ITR 293 (All) that no discrimination was practised in enacting that clause which would attract the application of Article 14. The classification made is based on intelligible differentia having reasonable relation to the object intended to be achieved. The object essentially was to prevent the evasion of tax.

14. We are further unable to agree that the language of Section 271 does not warrant the taking of proceedings under that section when a default has been committed by failure to comply with a notice issued under Section 22 (2) of the Act of 1922. It is true that clause (a) of sub-section (1) of Section 271 mentions the corresponding provisions of the Act of 1961 but that will not make the part relating to payment of penalty inapplicable once it is held that Section 297 (2) (g) governs the case. Both Sections 271 (1) and 297 (2) (g) have to be read together and in harmony and so read the only conclusion possible is that for the imposition of a penalty in respect of any assess-

ment for the year ending on March 31, 1962 or any earlier year which is completed after first day of April 1962 the proceedings have to be initiated and the penalty imposed in accordance with the provisions of Section 271 of the Act of 1961. Thus the assessee would be liable to a penalty as provided by Section 271 (1) for the default mentioned in S. 28 (1) of the Act of 1922 if his case falls within the terms of Section 297 (2) (g). We may usefully refer to this Court's decision in *Third Income-tax Officer Mangalore v. Damodar Bhat*, 71 ITR 806 = (AIR 1969 SC 408) with reference to Section 297 (2) (j) of the Act of 1961. According to it in a case falling within that section in a proceeding for recovery of tax and penalty imposed under the Act of 1922 it is not required that all the sections of the new Act relating to recovery or collection should be literally applied but only such of the sections will apply as are appropriate in the particular case and subject, if necessary, to suitable modifications. In other words, the procedure of the new Act will apply to cases contemplated by Section 297 (2) (j) of the new Act *mutatis mutandis*. Similarly the provisions of Section 271 of the Act of 1961 will apply *mutatis mutandis* to proceedings relating to penalty initiated in accordance with Section 297 (2) (g) of that Act.

15. Lastly the challenge to Section 271 (2) of the Act of 1961 on the ground of contravention of Article 14 may be considered. According to that provision when the person liable to penalty is a registered firm then notwithstanding anything contained in the other provisions of the Act of 1961 the penalty imposable under sub-section (1) shall be the same amount as would be imposable on that firm if that firm were an unregistered firm. It is pointed out that in the case of assessee other than registered firms the maximum penalty imposable under Section 271 (1) (i) cannot exceed in aggregate 50 per cent of the tax payable by the assessee; whereas in the case of a registered firm the maximum penalty is not made to depend upon the tax assessed on or payable by such firm. On the contrary the registered firm will have to pay the same penalty as an unregistered firm which may far exceed the maximum limit of 50 per cent prescribed by the above provision. This, according to the appellants, constitutes discrimination under Article 14 of the Constitution. Now a firm when re-

gistered is treated as a separate entity liable to tax. After 1956 it has to pay tax at a special reduced rate. If a firm got itself registered the partners were entitled to certain benefits and advantages. It was, however, open to the legislature to say that once a registered firm committed a default attracting penalty it should be deemed or considered to be an unregistered firm for the purpose of its imposition. No question of discrimination under Article 14 can arise in such a situation. We fully share the view of the High Court that there was nothing to prevent the legislature from giving the benefit of a reduced rate to a registered firm for the purpose of tax but withhold the same when it committed a default and became liable to imposition of penalty.

16. The appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 786 (V 57 C 165)

S. M. SIKRI, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

S. N. Sharma, Appellant v. Bipen Kumar Tiwari and others, Respondents.
Criminal Appeal No. 256 of 1969, D/- 10-3-1970.

Criminal P. C. (1898), Ss. 159, 156 and 157 — Interpretation of Section 159 — Investigation of cognizable offence by police — Magistrate has no power to stop investigation and direct magisterial enquiry — Mala fide exercise of power of investigation by police — Remedy is to invoke writ jurisdiction. — Constitution of India, Article 226.

The power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation, or, in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case.

(Paras 3 and 5)

The use of the expression "as he thinks fit" in Section 159 makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to Section 157 (1), and it is

in those cases that, if he thinks fit, he can choose the second alternative of proceeding himself or deputing any Magistrate subordinate to him to proceed to hold a preliminary enquiry as the circumstances of the case may require.

(Para 4)

Though the Code gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Art. 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers. The fact that the Code does not contain any other provision giving power to a Magistrate to stop investigation by the police cannot be a ground for holding that such a power must be read in Section 159 of the Code.

(Para 7)

Cases Referred: Chronological Paras

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| (1967) AIR 1967 Pat 416 (V 54)= | |
| 1967 Cri LJ 1677, Pancham Singh v. State | 6 |
| (1949) AIR 1949 Lah 204 (V 36) = | |
| 50 Cri LJ 965, Crown v. Mohammad Sadiq Niaz | 6 |
| (1945) AIR 1945 PC 18 (V 32)= | |
| 71 Ind App 203= 46 Ind App 413, King Emperor v. Khwaja Nazir Ahmad | 6 |

The Judgment of the Court was delivered by

BHARGAVA, J.:— A first information report was lodged by one Vijay Shankar Nigam in Police Station Cantonment, Gorakhpur, in respect of an incident alleged to have taken place at about 7 p. m. on 10th April, 1968, in front of his house. The report stated that one Bipen Kumar Tiwari had been attacked by certain goondas who also stabbed him with a knife and further caused injuries to Vijay Shankar Nigam also. One of the principal accused named in that report was S. N. Sharma, Additional District Magistrate (Judicial), Gorakhpur, who is the appellant in this appeal. The allegation against him was that it was at his instigation that the goondas had attacked Bipen Kumar Tiwari and attempted to murder him. The offences made out by

the report lodged by Vijay Shankar Nigam were cognizable and the Police, after registering the case, started investigation. On the 13th April, 1968, the appellant moved an application before the Judicial Magistrate having jurisdiction to take cognizance of the offence, alleging that a false report had been lodged against him at the connivance and instance of the local police. It was urged that it would, therefore, be desirable in the interest of justice that provisions of Section 159 of the Code of Criminal Procedure be invoked and the preliminary enquiry may be conducted by the Court itself and necessary directions may be issued to the Police to stop the investigation. The Magistrate, after hearing both parties, passed an order directing the police to stop investigation and decided to hold the enquiry himself. Thereupon, on 2nd May, 1968, an application was moved in the High Court of Allahabad under Section 561A, Criminal Procedure Code, to quash the order passed by the Magistrate on 13th April, 1968, on the ground that he had no jurisdiction to pass such an order under Section 159, Criminal Procedure Code. This application was allowed by the High Court by its judgment dated 15th January, 1969, so that the High Court quashed the order of the Judicial Magistrate and held that the police of Gorakhpur was at liberty to conclude the investigation and submit its report to the Magistrate after which the case could proceed in accordance with law. The appellant has challenged this order of the High Court in this appeal brought up by special leave.

2. Section 156 (1) of the Code of Criminal Procedure empowers an officer-in-charge of a police-station to investigate any cognizable case without the order of a Magistrate. Sub-section (2) of Section 156 lays down that no proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate, while sub-s. (3) gives power to any Magistrate empowered under Section 190 of the Code to order such an investigation in any case as mentioned in sub-section (1). Section 157 requires that, whenever such information is received by an officer-in-charge of a police station that he has reason to suspect the commission of an offence which he is empowered to investigate under Section 156, he must forthwith send a report of it to

the Magistrate empowered to take cognizance of such an offence upon a police report and, at the same time, he must either proceed in person, or depute one of his subordinate officers to proceed, to the spot to investigate the facts and circumstances of the case, and, if necessary, to take measures for discovery and arrest of the offender. This provision is qualified by a proviso which is in two parts. The first clause of the proviso enables an officer-in-charge of a police station not to proceed to make an investigation on the spot or to depute a subordinate officer for that purpose if the information received is given against a person by name and the case is not of a serious nature. The second clause of the proviso permits the officer-in-charge of a police station not to investigate the case if it appears to him that there is no sufficient ground for entering on an investigation. The report to be sent to the Magistrate under sub-section (1) of Section 157 requires that in each of the cases where the officer-in-charge of the police station decides to act under the two clauses of the proviso, he must state in his report his reasons for not fully complying with the requirements of sub-section (1) and, in addition, in cases where he decides not to investigate on the ground mentioned in the second clause of the proviso, he is required to notify to the informant the fact that he will not investigate the case or cause it to be investigated. These provisions are followed by Section 159 which is as follows:

"159. Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code."

3. The High Court has held that, under Section 159, the only power, which the Magistrate can exercise on receiving a report from the officer-in-charge of a police station, is to make an order in those cases which are covered by the proviso to sub-section (1) of Section 157, viz., cases in which the officer-in-charge of the police station does not proceed to investigate the case. The High Court has further held that this Section 159 does not empower a Magistrate to stop investigation by the police in exercise of the power conferred on it by Section 156. It is the correctness of this decision which has been challenged by the appellant,

and the ground taken is that Section 159 should be interpreted as being wide enough to permit the Magistrate to proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary enquiry into, or otherwise to dispose of, the case in the manner provided in this Code, even if the report from the police, submitted under Section 157, states that the police is proceeding with the investigation of the offence. It was urged by counsel for the appellant that the narrower interpretation of Section 159 accepted by the High Court will leave persons at the mercy of the police who can harass any one by having a false report lodged and starting investigation on the basis of such a report without any control by the judiciary. He has particularly emphasised the case of the appellant who was himself a Judicial Officer working as Additional District Magistrate and who moved the Magistrate on the ground that the police had engineered the case against him.

4. We, however, feel constrained to hold that the language used in Sec. 159 does not permit the wider interpretation put forward by counsel for the appellant. This section first mentions the power of the Magistrate to direct an investigation on receiving the report under S. 157, and then states the alternative that, if he thinks fit, he may at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary enquiry into, or otherwise to dispose of, the case. On the face of it, the first alternative of directing an investigation cannot arise in a case where the report itself shows that investigation by the police is going on in accordance with Section 156. It is to be noticed that the second alternative does not give the Magistrate an unqualified power to proceed himself or depute any Magistrate to hold the preliminary enquiry. That power is preceded by the condition that he may do so, "if he thinks fit." The use of this expression makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to Section 157 (1), and it is in those cases that, if he thinks fit, he can choose the second alternative. If the expression "if he thinks fit" had not been used, it might have been argued that this section was intended to give in wide terms the power to the Magistrate to adopt

any of the two courses of either directing an investigation, or of proceeding himself or deputing any Magistrate subordinate to him to proceed to hold a preliminary enquiry as the circumstances of the case may require. Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first, but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable.

5. It may also be further noticed that, even in sub-section (3) of Section 156, the only power given to the Magistrate, who can take cognizance of an offence under Section 190, is to order an investigation; there is no mention of any power to stop an investigation by the police. The scheme of these sections, thus, clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation, or, in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case. The power of the police to investigate has been made independent of any control by the Magistrate.

6. The High Court of Lahore in *Crown v. Mohammad Sadiq Niaz*, AIR 1949 Lah 204 and the High Court of Patna in *Pancham Singh v. State*, AIR 1967 Pat 416 interpreted Section 159 to the same effect as held by us above. The reasons given were different. Both the Courts based their decisions primarily on the view expressed by the Privy Council in *King-Emperor v. Khwaja Nazir Ahmad*, 71 Ind App 203 = (AIR 1945 PC 18). That case, however, was not quite to the point that has come up for decision before us. The Privy Council was concerned with the question whether the High Court had power under Section 561A of the Code of Criminal Procedure to quash proceedings being taken by the police in pursuance of first information reports made to the police. However, the Privy Council made some remarks which have been relied upon by the High Courts and are to the following effect:—

"In India, as has been shown, there is a statutory right on the part of the police

to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus."

This interpretation, to some extent, supports the view that the scheme of the Criminal Procedure Code is that the power of the police to investigate a cognizable offence is not to be interfered with by the judiciary. Their Lordships of the Privy Council were, of course, concerned only with the powers of the High Court under Section 561A, Cr. P. C., while we have to interpret Section 159 of the Code which defines the power of a Magistrate which he can exercise on receiving a report from the police of the cognizable offence under Section 157 of the Code. In our opinion, Section 159 was really intended to give a limited power to the Magistrate to ensure that the police investigate all cognizable offences and do not refuse to do so by abusing the right granted for certain limited cases of not proceeding with the investigation of the offence.

7. Counsel appearing on behalf of the appellant urged that such an interpretation is likely to be very prejudicial particularly to Officers of the judiciary who have to deal with cases brought up by the police and frequently give decisions which the police dislike. In such cases, the police may engineer a false report of a cognizable offence against the Judicial Officer and may then harass him by carrying on a prolonged investigation of the offence made out by the report. It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Art. 226

of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers. The fact that the Code does not contain any other provision giving power to a Magistrate to stop investigation by the police cannot be a ground for holding that such a power must be read in Section 159 of the Code.

8. In the result, the decision of the High Court in this case must be upheld, so that the appeal fails and is dismissed.
Appeal dismissed.

AIR 1970 SUPREME COURT 789
(V 57 C 166)

(From: Punjab)*

S. M. SIKRI, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Fateh Bibi etc., Appellants v. Charan Dass, Respondent.

Civil Appeal No. 364 of 1967, D/- 10-3-1970.

Hindu Law of Inheritance (Amendment) Act (1929), Section 1 — Act applies even when a Hindu male dies intestate before 21-2-1929 but is succeeded by female heir who dies after that date — AIR 1934 Mad 138 and AIR 1935 All 203, held overruled by AIR 1937 Mad 699 and AIR 1936 All 507 (FB) respectively.

Under the Act the paternal uncle and his son are postponed to son's daughter, daughter's daughter, sister and sister's son. The Act, which altered the order of succession of certain persons mentioned therein and which came into operation on February 21, 1929 applies not only to the case of a Hindu male dying intestate on or after February 21, 1929 but also to the case of such a male dying intestate before that date if he was succeeded by a female heir who died after that date. Succession in such cases to the estate of the last Hindu male who died intestate did not open until the death of the life estate holder. During the lifetime of the life estate holder, the reversioners in Hindu law have no vested interest in the estate and they have a mere spes successionis. The point of

* (L. P. A. No. 42 of 1959, D/- 30-10-1961 — Punj.)

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time for the applicability of the Act is when the succession opens, viz., when the life estate terminates. In consequence, the questions as to who is the nearest reversionary heir, or what is the class of reversionary heirs will fall to be settled at the date of the expiry of the ownership for life or lives. The death of a Hindu female life estate holder opens the inheritance to the reversioners and the one most nearly related at the time to the last full owner becomes entitled to the estate.

Under the Act even the sister of the last male holder must be considered to have succeeded to the property of the brother in her own right as a preferential heir under the Act though the estate taken by her under Section 3 (b) will only be a life estate. AIR 1946 PC 173, Rel. on; AIR 1934 Mad 138 and AIR 1935 All 203 held overruled by AIR 1937 Mad 699 (FB) and AIR 1936 All 507 (FB), respectively. (Paras 17, 16)

Cases Referred: Chronological Paras

- (1952) AIR 1952 SC 60 (V 39) =
1952 SCR 203, Annagouda Nathgouda Patil v. Court of Wards 13
- (1946) AIR 1946 PC 173 (V 33) =
73 Ind App 187, Lala Duni Chand v. Mt. Anar Kali 27
- (1937) AIR 1937 Mad 699 (V 24) =
ILR (1937) Mad 946 (FB), Lakshmi v. Anantharama 10, 16
- (1937) AIR 1937 Oudh 402 (V 24) =
ILR 13 Luck 380, Bindeshwari Singh v. Baij Nath Singh 16
- (1937) AIR 1937 Pat 117 (V 24) =
ILR 16 Pat 215 (FB), Pokhan Dusad v. Mt. Manoa 16

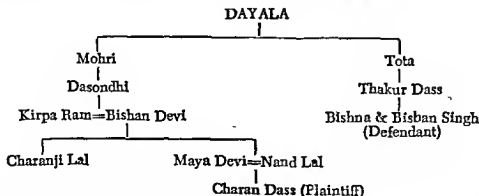
- (1936) AIR 1936 All 507 (V 23) =
ILR 58 All 1041 (FB), Rajpali Kumar v. Sarju Rai 10, 16
- (1936) AIR 1936 Lah 124 (V 23) =
ILR 17 Lah 356, Shakuntala Devi v. Kaushalya Devi 16, 17
- (1935) AIR 1935 All 203 (V 22) =
4 All WR 1458, Kanhaiya Lal v. Mst. Champa Devi 9
- (1934) AIR 1934 Mad 138 (V 21) =
ILR 57 Mad 716, Krishnan Chettiar v. Manikammal 9

M/s. G. S. Vohra and Harbans Singh, Advocates, for Appellants; Mr. Bishan Narain, Senior Advocate (M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji and Co. with him), for Respondent.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: The short question that arises for consideration in this appeal, filed by the legal representatives of the deceased defendant, on certificate, is whether on a true construction of the Hindu Law of Inheritance (Amendment) Act, 1929 (Act II of 1929) (hereinafter referred to as the Act), it applies only to the case of a Hindu male dying intestate on or after February 21, 1929 (when the Act came into force) or whether it applies in the case of a Hindu male dying intestate before the Act came into operation and succeeded by a female heir who died after that date.

2. The following pedigree will be useful in appreciating the relationship of the parties as well as the basis of the claim made regarding the title to the properties by the parties.



3. The respondent-plaintiff instituted Suit No. 41 of 1955 in the Subordinate Judge's Court, Jagraon, against the original defendant for recovery of possession of the suit properties. According to the

plaintiff, Kirpa Ram was the last owner of the properties. Even during his lifetime his only son Charanji Lal had died. On the death of Kirpa Ram, his widow Bishan Devi became the owner of the

properties and was in possession of the properties for her lifetime. After the death of Bishan Devi, her daughter Maya Devi (daughter of Kirpa Ram and Bishan Devi) became her heir and remained in possession of the property till her death. After Maya Devi's death, according to Dharma Shastras the plaintiff, as the daughter's son of Kirpa Ram, was entitled to succeed to the properties which were in the possession of Bishan Devi and later on of Maya Devi, his mother. It was alleged by the plaintiff that the defendant, after the death of Bishan Devi claiming to be entitled to the properties of Kirpa Ram, got mutation in the Revenue Registers effected in his name on or about January 6, 1947. Therefore, according to the plaintiff, the defendant had no right, title or interest to the properties of Kirpa Ram and the mutation obtained by him could not affect the rights of the plaintiff as the daughter's son of Kirpa Ram. On these allegations the plaintiff prayed for a declaration regarding his title to the property and for recovery of possession of the same from the defendant.

4. The defendant contested the claim of the plaintiff on various grounds. He alleged that Charanji Lal did not pre-decease Kirpa Ram but, on the other hand, after the death of Kirpa Ram, Charanji Lal, his son, became heir and was in possession of the properties left by his father. Charanji Lal died long afterwards, in or about 1926 and, after his death, his mother Bishan Devi became heir to the property left by Charanji Lal, for her lifetime. After the death of Bishan Devi the defendant claimed that he, as a collateral of Kirpa Ram, became entitled to the properties of the latter and, as such, got mutation effected in his favour, according to law. He further averred that Maya Devi did not at all come into possession of the estate after the death of Bishan Devi. In fact the defendant even disputed the fact that Maya Devi was the daughter of Bishan Devi. Even if Maya Devi was the daughter of Bishan Devi, the defendant alleged that according to the custom governing the parties, Maya Devi had no right to the properties left by Bishan Devi. On these allegations, the defendant maintained that he was rightly entitled to the properties of Kirpa Ram and that the plaintiff has no cause of action for having the mutation effected in the

Revenue Registers in his favour cancelled.

5. The Trial Court, by its judgment and decree dated February 22 1956 decreed the plaintiff's claim. It found that Maya Devi was the daughter of Kirpa Ram and Bishan Devi and that the plaintiff was the son of Maya Devi. The Trial Court further found that Charanji Lal did not pre-decease his father Kirpa Ram but, on the other hand, after the death of Kirpa Ram, Charanji Lal was the last male holder of the entire property and was in possession, as such, till his death. It was also further found that the parties were governed by their personal law and not by custom in matters of succession. It has been found that Charanji Lal died issueless on August 22, 1925 and, after his death, his mother Bishan Devi was in possession of the property as a life-estate holder. After her death on November 26, 1946 Maya Devi was in possession of the property, again as a life-estate holder, till her death on March 25, 1950. Though no claim was made by the plaintiff to succeed to Charanji Lal as his sister's son, and though his claim was to succeed to the property of Kirpa Ram as the latter's daughter's son, the Trial Court held that on the finding that Charanji Lal was the last male holder, the claim of the plaintiff had really to be decided on the basis of the Act under which the plaintiff, as the sister's son of Charanji Lal, has got a preferential claim. The contention of the defendant that the Act did not apply inasmuch as Charanji Lal had died long before the date when the Act came into force (February 21, 1929), was not accepted and the Court took the view that succession opened in favour of the plaintiff only after the death of Maya Devi in 1950. In this view the trial Court held that the plaintiff, being the sister's son of the last male holder (Charanji Lal) was to be preferred to the defendant who was only a paternal uncle of Charanji Lal and as such, decreed the suit.

6. The defendant carried the matter in appeal before the learned District Judge, Ludhiana, in C. A. No. 53 of 1956. The learned Judge, in his judgment dated March 14, 1957, has stated that the defendant only attacked the finding of the trial Court that the plaintiff was the daughter's son of Kirpa Ram and the findings on the other issues were not challenged. The learned Judge, on this

point, agreed with the finding of the trial Court that Maya Devi was the daughter of Kirpa Ram and Bishan Devi and that the plaintiff was the son of Maya Devi. The decree of the trial Court was confirmed.

7. The defendant again challenged the decrees of both the Subordinate Courts before the Punjab High Court in Regular Second Appeal No. 359 of 1957. Before the learned Single Judge the appellant raised two contentions: (1) That the plaintiff never set up any claim as a preferential heir under the Act being the sister's son of the last male holder and, as such, his title should not have been recognised by the Subordinate Courts; and (2) In any event, the Act does not apply inasmuch as the last male holder Charanji Lal died as early as August 22, 1925, long before the coming into force of the Act on February 21, 1929.

8. The learned Judge, after a reference to the pleadings, held that the first contention was well founded as the plaintiff claimed title to the properties only as the daughter's son of Kirpa Ram and had even alleged that Charanji Lal had predeceased his father and no claim as the sister's son of Charanji Lal was ever made. But, in view of the findings recorded by the two Subordinate Courts that the plaintiff was the sister's son of Charanji Lal who had also been held to be the last male holder, the learned Single Judge held that the applicability of the Act did arise for consideration.

9. The learned Judge agreed with the findings of the two Courts that Charanji Lal was the last male holder of the properties in question and that he was the absolute owner of those properties and there was no question of the property in his hands being coparcenary property. But, regarding the applicability of the Act, the learned Judge held that as Charanji Lal died on August 22, 1925, the succession to his estate must be considered to have opened on the date of his death and, as the Act came into force only on February 21, 1929 the heirs of Charanji Lal must be found on the date the succession opened, viz., August 22, 1925; and the heir to Charanji Lal on that date was his paternal uncle, the defendant. According to the learned Judge the fact that the life estate of the mother and sister of Charanji Lal intervened after his death, will not affect the rights of the defendant as the Act has

no retrospective operation. For this view, the learned Judge relied on two earlier decisions, one of the Madras High Court in Krishnan Chettiar v. Manikammal, ILR 57 Mad 718 = (AIR 1934 Mad 138) and the other of the Allahabad High Court in Kanhaiya Lal v. Mt. Champa Devi, AIR 1935 All 203 holding that the Act applied only to the case of a Hindu male dying intestate on or after February 21, 1929. In this view the learned Judge, by his judgment dated November 18, 1958 held that the rightful heir to the estate of Charanji Lal was the defendant and reversed the decrees of the two Subordinate Courts and dismissed the plaintiff's suit with costs throughout.

10. The plaintiff-respondent carried the matter in Letters Patent Appeal No. 42 of 1959 before a Division Bench of the Punjab High Court. The Division Bench noticed that the decisions relied on by the learned Single Judge had been overruled by Full Bench decisions of the same Courts in Lakshmi v. Anantharama, ILR (1937) Mad 948 = (AIR 1937 Mad 699) (FB) and Rajpali Kunwar v. Sarju Rai, ILR 58 All 1041 = (AIR 1938 All 507) (FB) where it had been held that under the Hindu Law it is the death of the female heir that opens inheritance to the reversioners who, till then possess only an inchoate right, generally termed a spes successionis. It has been further held that the Act will apply even to cases where the last male-holder dies intestate before the passing of the Act and the limited female heir is alive after the coming into force of the Act, as the succession to the deceased male member must be considered to open only after the passing of the Act and will be governed by the provisions of the Act. Following these decisions, the Division Bench reversed the judgment of the learned Single Judge and decreed the plaintiff's suit for possession holding that under the Act the plaintiff, being the sister's son of the last male holder Charanji Lal, was the preferential heir.

11. Mr. Vohra, learned counsel for the appellant, no doubt urged that the interpretation placed upon the Act by the Division Bench is erroneous. According to him the Act will apply only to cases of Hindu male dying intestate after the Act came into force, i. e., after February 21, 1929; and, in this case, as Charanji Lal died on August 25, 1925 long before the Act came into force, succession to his estate opened on the date of the

death of Charanji Lal and on that date the defendant, in Hindu Law, was entitled to succeed to the estate.

12. Mr. Bishen Narain, learned counsel for the plaintiff-respondent, pointed out that it was rather unfortunate that the later Full Bench decisions of the Madras and Allahabad High Courts were not brought to the notice of the learned Single Judge who had followed the decisions of those Courts which had been subsequently overruled. The learned Counsel also pointed out that according to the decisions of the various High Courts, the view taken by the Letters Patent Bench was correct.

13. We are of the opinion that the decision of the Letters Patent Bench is correct. No doubt, originally the view taken by some of the High Courts was that the Act applies only if the last male holder dies after the coming into force of the Act and it will have no retrospective application to cases of Hindu males dying intestate before the date of the Act. That view has now been given the go-by as is seen from the later decisions to which we shall refer presently. But before we refer to those decisions, we shall quote the observations of this Court in *Annagouda Nathgouda Patil v. Court of Wards*, 1952 SCR 208 at p. 215 = (AIR 1952 SC 60 at pp. 63-64) regarding the object and scope of the Act. This Court observed:

"The object of the Act as stated in the preamble is to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; and Section 1 (2) expressly lays down that 'the Act applies only to persons who but for the passing of this Act would have been subject to the Law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will.' Thus the scope of the Act is limited. It governs succession only to the separate property of a Hindu male who dies intestate. It does not alter the law as regards the devolution of any other kind of property owned by a Hindu male It is to be noted that the Act does not make these four relations statutory heirs under the Mitakshara Law under all circumstances and for all purposes; it makes them heirs only when the propositus is a male and the property in respect to which it is sought to be applied is his separate property."

The four relations, referred to in the above extract, are: the son's daughter, daughter's daughter, sister and sister's son. Under the Mitakshara Law, in the line of heirs, the paternal uncle came just after the paternal grandfather and his son followed him immediately. But, by the Act, the four relations mentioned above have been introduced between the grandfather and the paternal uncle and his son. That is, the paternal uncle and his son are postponed to these four relations by the Act.

14. In the case before us we have already pointed out that Charanji Lal was the absolute owner of the property and therefore there was no question of the property being held in coparcenary and there is no controversy that the property was not disposed of by will by Charanji Lal. Therefore, *prima facie* the Act will apply to the estate of Charanji Lal if it can be held that the succession to his estate opened only when his sister Maya Devi died on March 25, 1950.

15. The question is: When did succession open to the estate of Charanji Lal. Was it on the date when he died, i. e., August 22, 1925; or was it when his sister Maya Devi died, viz., March 25, 1950?

16. In this connection we may refer to the decisions in *Shakuntla Devi v. Kaushalya Devi*, ILR 17 Lah 356 = (AIR 1936 Lah 124); ILR 58 All 1041 = (AIR 1936 All 507) (FB); *Pokhan Dusadh v. Mst. Manoa*, ILR 16 Pat 215 = (AIR 1937 Pat 117) (FB); ILR (1937) Mad 948 = (AIR 1937 Mad 699) (FB) and *Bindeshari Singh v. Baij Nath Singh*, ILR 13 Luck 380 = (AIR 1937 Oudh 402). In all these cases the last male holder had died before the date of the Act and the estate was in the possession of a life-estate holder either a widow or a mother who died after the coming into force of the Act. It has been held in all these decisions that the succession to the estate of the last male-holder must be considered to open only on the termination of the life-estate and the Act will apply in considering the heirs of the last male holder at the termination of the life estate.

17. It is not necessary for us to refer to any of these decisions in great detail as the matter has been considered by the Judicial Committee of the Privy Council in *Lala Duni Chand v. Mt. Anar Kali*, 73 Ind App 187 = (AIR 1946 PC 173).

The Judicial Committee had held that the Act which altered the order of succession of certain persons mentioned therein and which came into operation on February 21, 1929 applies not only to the case of a Hindu male dying intestate on or after February 21, 1929 but also to the case of such a male dying intestate before that date if he was succeeded by a female heir who died after that date. The Judicial Committee, has further held that succession in such cases to the estate of the last Hindu male who died intestate did not open until the death of the life-estate holder. It has also been held that during the lifetime of the life-estate holder, the reversioners in Hindu Law have no vested interest in the estate and that they have a mere spes successionis. It was contended before the Judicial Committee that the words 'Hindu male dying intestate' occurring in the preamble to the Act connotes the future tense, of a Hindu male dying after the Act has come into force. This contention was rejected by the Judicial Committee, which observed as follows:

"In the argument before their Lordships reliance was placed on the words 'dying intestate' in the Act as connoting the future tense, but their Lordships agree with the view of the Lahore High Court in ILR 17 Lah 350 = (AIR 1936 Lah 124) that the words are a mere description of the status of the deceased and have no reference, and are not intended to have any reference, to the time of the death of a Hindu male. The expression merely means 'in the case of intestacy of a Hindu male'. To place this interpretation on the Act is not to give a retrospective effect to its provisions, the material point of time being the date when the succession opens, namely, the death of the widow."

We are in entire agreement with the above observations of the Judicial Committee and accordingly hold that the point of time for the applicability of the Act is when the succession opens, viz., when the life estate terminates. In consequence, it must be further held that the questions as to who is the nearest reversionary heir, or what is the class of reversionary heirs will fall to be settled at the date of the expiry of the ownership for life or lives. The death of a Hindu female life-estate holder opens the inheritance to the reversioners and the one most nearly related at the time

to the last full owner becomes entitled to the estate.

18. We hold that the Act applies also to the case of a Hindu male dying intestate before the Act came into operation and has been succeeded by a female heir who died after that date. In this case, on the findings recorded by all the Courts, the last female heir died only on March 25, 1950 and, under the Act, the plaintiff, as the sister's son of Charanji Lal, is entitled to succeed to his estate, in preference to the defendant who is only a paternal uncle. We have already pointed out that the paternal uncle is postponed to the four relations referred to in the Act, the last of whom is the sister's son.

19. Before we conclude, we may state that in this case the succession can be considered to have opened even on November 28, 1946 when Bishen Devi's (the mother's) life estate terminated and it must be held that even Maya Devi, the sister of Charanji Lal, must be considered to have succeeded to the property of her brother, in her own right as a preferential heir under the Act, though the estate, taken by her under Section 8 (b) will only be a life-estate. No doubt these aspects have not been raised before any of the Courts, nor even before us.

20. The result is that the decision of the Letters Patent Bench of the High Court is correct. In consequence the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 794
(V 57 C 167)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Ferozi Lal Jain, Appellant v. Man Mal and another, Respondents.

Civil Appeal No. 302 of 1967, D/- 11-3-1970.

Houses and Rents — Delhi and Ajmer Rent Control Act (38 of 1952), S. 13 (1) Proviso — Court merely proceeding on basis of compromise between parties — Decree is in contravention of Sec. 13 (1) and is nullity.

The jurisdiction of the court to pass a decree for recovery of possession of any premises depends upon its satisfaction that one or more of the grounds

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mentioned in Section 13 (1) have been proved. Where the court had proceeded solely on the basis of the compromise arrived at between the parties, the court was not competent to pass the decree. Hence the decree under execution must be held to be a nullity. (1969) 2 SCR 432 and Civil Appeal No. 98 of 1966, D/- 3-12-1968 (SC), Rel. on.

(Paras 5, 6)

Cases Referred: Chronological Paras

(1969) 2 SCR 432, Bahadursingh v. Muni Subrat Dass 7

(1968) Civil Appeal No. 98 of 1966, D/- 3-12-1968 = (1969) 1 SCWR 56, Smt. Kaushalya Devi v. K. L. Bansal 7

The following Judgment of the Court was delivered by

HEGDE, J: In this execution appeal by special leave the only question that arises for decision is whether the decree under execution is a nullity as held by the High Court as well as by the courts below.

2 The appellant is the owner of Shop No. 4682, Plot No. 21, Daryaganj, Delhi. He leased out that shop to the 1st respondent on November 8, 1953. One of the terms of the lease was that the 1st respondent should not sub-let the shop. On the allegation that the 1st respondent has sub-let the shop to the second respondent, the appellant brought a suit in the court of Sub-Judge, 1st Class, Delhi for the eviction of the respondents, under Section 13 of the Delhi and Ajmer Rent Control Act, 1952 (to be hereinafter referred to as the Rent Control Act). The respondent denied the sub-lease alleged by the appellant. Their case was that the second respondent was a partner of the 1st respondent. During the pendency of the trial of the suit, the appellant and the 1st respondent entered into a compromise on the basis of which a compromise decree was passed by the court. The compromise petition does not make any reference to the alleged sub-lease. The order made by the court in that connection reads thus:

"As per compromise, decree for ejectment and for Rs. 165 with proportionate costs is passed in favour of the plaintiff and against the defendant. The parties shall be bound by the terms of the compromise. The terms of the compromise be incorporated in the decree-sheet. Orders pronounced.

Dated the 4th March, 1965."

3. Under the terms of the compromise, the 1st respondent was given four years' time from the date of the compromise decree for delivering possession of the suit premises. At the end of the said four years, the appellant attempted to execute the decree. At that stage, the second respondent resisted the execution contending that he is not bound by the decree. Thereafter there was a second compromise between the appellant and the 2nd respondent, under the terms of which the second respondent was given time till February 28, 1963 to vacate the premises. At the expiry of that period, the appellant again levied execution. The second respondent again resisted the execution on various grounds, one of which was that the decree having been passed in contravention of Section 13 of the Rent Control Act, the same is a nullity and as such it is not executable. This contention was accepted by the execution court, the appellate court as well as by the High Court.

4. Section 13 of the Rent Control Act provides for the protection of a tenant against eviction. The material portion of Section 13 (1), the clause relevant for our present purpose reads:

"Notwithstanding anything to the contrary contained in any other law or any contract, no decree or order for the recovery of possession of any premises shall be passed by any court in favour of the landlord against any tenant (including a tenant whose tenancy is terminated):

Provided that nothing in this sub-section shall apply to any suit or other proceeding for such recovery of possession 'if the Court' is satisfied.....

(b) that the tenant without obtaining the consent of the landlord in writing has, after the commencement of this Act.

(i) sublet, assigned or otherwise parted with the possession of, the whole or any part of the premises"

(emphasis (here in ' ') supplied)

5. From this provision, it is clear that after the Rent Control Act came into force, a decree for recovery of possession can be passed by any court only if that court is satisfied that one or more of the grounds mentioned in Sec. 13 (1) are established. Without such a satisfaction, the court is incompetent to pass a decree for possession. In other words, the jurisdiction of the Court to pass a decree for recovery of possession of

any premises depends upon its satisfaction that one or more of the grounds mentioned in Section 13 (1) have been proved.

6. From the facts mentioned earlier, it is seen that at no stage, the Court was called upon to apply its mind to the question whether the alleged subletting is true or not. Order made by it does not show that it was satisfied that the subletting complained of has taken place, nor is there any other material on record to show that it was so satisfied. It is clear from the record that the court had proceeded solely on the basis of the compromise arrived at between the parties. That being so there can be hardly any doubt that the court was not competent to pass the impugned decree. Hence the decree under execution must be held to be a nullity.

7. Our conclusion in this regard is supported by the decisions of this Court in *Bahadur Singh v. Muni Subrat Dass*, (1969) 2 SCR 432 and *Smt. Kaushalya Devi v. K. L. Bansal*, Civil Appeal No. 93 of 1968, D/- 3-12-1963 (SC). In the former case the decree under execution was made on the basis of an award and in the latter case, it was passed on a compromise. In both the cases this Court held that as the decrees in question were passed in contravention of Section 13 (1) of the Rent Control Act, they were void and hence no execution can be levied on the basis of those decrees.

8. In the result this appeal fails and the same is dismissed. In the circumstances of the case, we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 796

(V 57 C 168)

(From Patna)

S. M. SIKRI, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Smt. Maheshwari Devi and others, Appellants v. State of Bihar and others, Respondents.

Civil Appeal No. 1625 of 1966, D/- 11-3-1970.

Tenancy Laws — Bihar Land Reforms Act (30 of 1950), S. 4 (h) — Order under — Deputy Collector not purporting to pass final order but sending a recom-

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mendation to Additional Collector after hearing parties — Additional Collector passing final order without hearing parties — Held order of the Additional Collector was bad — Fact that the Deputy Collector had the powers of the Collector for purposes of Section 4 (h) was irrelevant — Decision of High Court reversed.
(Para 6)

The following Judgment of the Court was delivered by

SIKRI, J.:— This appeal by special leave is directed against the judgment of the Patna High Court dismissing the petition under Articles 226 and 227 of the Constitution filed by the appellants before us. The Revenue authorities had annulled a settlement made in favour of the appellant, in exercise of the powers conferred by clause (h) of Section 4 of the Bihar Land Reforms Act, 1950, hereinafter referred to as the Act. Three orders were sought to be quashed by this petition: (1) order dated May 24, 1961 passed by the Additional Collector Bhagalpur, (2) order dated November 28, 1962, passed by the Commissioner, Bhagalpur Division; and (3) order dated November 3/8, 1961, passed by the Government of Bihar.

2. The learned Counsel for the appellants has raised three points before us: (1) The order of the Additional Collector, dated May 24, 1961, whereby he set aside the settlement made in favour of the appellants' predecessors, having been passed without hearing the appellants, under Section 4 (h) of the Act, was without jurisdiction and void; (2) the appeal to the Collector against the order of the Additional Collector, dated May 24, 1961, was not barred by time inasmuch as the report of the Amin, which was made part of the order of the Deputy Collector and was also part of the order of the Additional Collector, was not supplied till June 2, 1962; and (3) the State Government's order confirming the annulment of the settlement was void because it was made before the appeal to the Collector was heard.

3. It appears to us that if the appellants succeed on the first point the appeal must be allowed and the case remanded to the Additional Collector to dispose of it according to law. The facts relevant for the determination of point No. 1 are as follows: The appellants allege that a total area of 57.90 acres, comprising several plots including a big tank and its embankments, lying in village

Kasba Mandar in Bhagalpur District, was settled with the predecessor-in-interest of the appellants by the then proprietor of the village sometime in the year 1923, and that since the date of settlement the settlee and her successors-in-interest have been in peaceful possession of the said property; after the abolition of the Zamindari under the provisions of the Act an attempt was made in 1955 to annul this settlement but the proceeding under the Act was set aside by the Government who directed that in view of the amendment made to clause (h) of Section 4 of the Act formal proceedings under the amended Act should be taken after hearing the parties. The Government sent back the record with a letter No. 5642 dated July 26, 1960 with a direction that in view of the amendment the finding of the Additional S. D. O. of May 17, 1958, had become void and, therefore, fresh proceeding be started under Section 4 (h) of the Act, and after hearing the parties orders may be passed. A copy of the Government letter was sent to the S. D. O. Banka, with office Memo No. 2824-R dated August 6, 1960, with a request to take action accordingly and to send the report. It appears that Shri R. S. Roy, Deputy Collector Incharge Land Reforms, Banka, held the enquiry after giving the notice to the parties and hearing them.

4. A part of the order dated February 18, 1961, passed by Deputy Collector, Land Reforms, Banka, may be extracted:

"O. P. files three petitions today. One is to call for some order and letter of the Additional Collector concerning this case. Since this proceeding will be forwarded to Additional Collector after completion the O. P. may request him to examine these papers."

On April 15/19, 1961, the following order was recorded:

"Report separately prepared. The record with the report may be sent to Additional Collector."

The report concluded with these words:

"I also, do not think any Government interest or public interest will be affected if these two plots are allowed to remain in possession of the Opposite parties on fixation of fair rent. Settlement of the rest of the area is fraudulent and has been done to deprive the State Government from taking over their property which are of public importance and for public utility. 'There, their settlement should be set aside.' (emphasis (here in ') is supplied)

The Additional Collector wrote under the report as follows:

"I fully agree with the report of the D. C. L. R. Banka dated 19-4-1961. The Hukumnamas and the rent receipts subsequently produced have been forged in order to lay false claim on these Gair-majrua Am and other public land. Except plots Nos. 1788 and 2145 that is, the first two plots in the list the settlements of the remaining 18 plots of Khata No. 187 and 5 plots under Khata No. 181 'are hereby annulled' under the power conferred on me under Section 4 (h) of the Bihar Land Reforms Act. Under the proviso 2 of Section 4 (h) of the Bihar Land Reforms Act the record shall be forwarded to Government for confirming the annulment." (emphasis (here in ') supplied) This order is dated May 24 1961, and was admittedly passed by the Additional Collector without giving to the parties any opportunity of being heard by him.

5. The same arguments which have been urged before us were urged before the High Court but the High Court felt that as the Deputy Collector, Land Reforms, Banka, had the powers of a Collector for the purposes of Section 4 (h) of the Act, the real order under Section 4 (h) must be held to be the report of the Deputy Collector, dated April 19, 1961, and not the order of the Collector dated May 24, 1961. On this conclusion the High Court felt that it was not necessary for the Additional Collector to have given further opportunity to the appellants to be heard.

6. It seems to us quite clear from the reading of the orders set out above that the Deputy Collector had not purported to pass a final order at all. What he purported to do was to send a recommendation to the Additional Collector and it was the Additional Collector who passed a final order. The fact that the Deputy Collector had the powers of the Collector for the purposes of Section 4 (h) of the Act seems to us irrelevant for the purpose of this case. Even from the interim order dated February 18, 1961, it is clear that the Deputy Collector had proceeded on the basis that the Additional Collector will go into the matter, and even the Government in its order dated November 3/6, 1961, confirmed the order dated May 24, 1961.

7. In the result the appeal is allowed with costs here and in the High Court, the judgment of the High Court set aside

and the case remanded to the Additional Collector to dispose of it according to law.

8. We may mention that it has been urged before us that Section 4 (h) of the Act has nothing to do with the annulment of settlements on the ground that they were obtained by fraud. We need not decide this question. It would be open to the parties to raise the point before the Additional Collector.

Appeal allowed.

AIR 1970 SUPREME COURT 798

(V 57 C 169)

(From: Punjab)*

J. M. SHELAT AND C. A.
VAIDIALINGAM, JJ.

M/s. Banshi Dhar Lachhman Prasad and another, Appellants v. Union of India and others, Respondents.

Civil Appeal No. 1623 of 1966, D/- 11-8-1970.

Central Excise and Salt Act (1944), Section 35 (1) Proviso — Assistant Collector condoning certain losses and imposing certain penalty in respect of losses not accounted for — Collector in appeal remanding proceedings for de novo adjudication — Order of Collector does not contravene Proviso to Section 35 (1).

The Assistant Collector had condoned the losses to a certain percentage in respect of about five lots and imposed a penalty of Rs. 407/- under Rule 223-A of the Central Excise Rules on the remaining losses not accounted for. The Collector in appeal set aside the order of the Assistant Collector and, without prejudice to the contentions of the parties, remanded the proceedings to the Assistant Collector with a direction to adjudicate the matter de novo. It was contended that the order of the Collector was contrary to the proviso to Section 35 (1) as it would have the result of depriving the appellant of the favourable directions obtained by him under the order of the Assistant Collector and would have the effect of subjecting him to a greater penalty than had been adjudged under the order of the Assistant Collector.

Held that the contention could not be accepted. What the Collector had done

*(Civil Writ Appln. No. 30-D of 1960, D/- 8-4-1964 — Punj.)

CN/CN/B210/70/DHZ/A

was to give the appellants an opportunity of satisfying, if they could, the authority concerned that there was no justification for the issue of the notices under R. 223-A. The order did nothing more than this. If the appellants were able to satisfy the authority properly, the result might even be that no action would be taken under Rule 223-A. (Para 18)

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.:— This appeal, on certificate, is directed against the judgment, dated April 8, 1964 of the Punjab High Court in Civil Writ Application No. 30/D of 1960, filed by the appellants under Articles 226 and 227 of the Constitution.

2. The appellants challenged in their writ petition, as many as eight orders passed on different dates by the various respondents herein, under the Central Excises and Salt Act, 1944 (hereinafter called the Act). As pointed out by the High Court, the writ petition was very prolix and had been drafted in a very confusing manner and the objections raised by the respondents followed the same pattern. But, when one reads through the various orders passed by the authorities, as well as the averments made in the writ petition and in the counter-affidavit of the respondents, the following facts emerge.

3. The appellant No. 1, is a firm carrying on business in tobacco and is a licensee of private bonded warehouses and duty paid godown at Haldwani, District Nainital. Appellant No. 2 is the proprietor of the firm. On September 23, 1956, Shri J. P. Bhatia, Deputy Superintendent of Central Excise, Rampur Circle, visited the duty-paying and non-duty paying tobacco premises of the appellant in connection with the inspection of the premises regarding their suitability or otherwise in respect of a proposal that had been made by the firm for an addition to their non-duty paid premises. According to the appellants, nobody was present on their behalf at the time of the visit of the Deputy Superintendent. The keys of the godown were given by one Khuda Bux, who also was an independent tobacco licensee. According to the respondents one Sham Lal who is a lawyer by profession, was associated with the appellant's business and was present when Shri Bhatia visited the godown but declined to co-operate

with the department. On inspection of both types of premises, the Deputy Superintendent found various substitutions and shortage of tobacco.

4. On October 2, 1956 the Superintendent of Central Excise, Rampur, issued a notice to the appellants under R. 160 of the Central Excise Rules, 1944 (hereinafter referred to as the rules), demanding the payment of a sum of Rs. 8,713-8-0. The notice, Exhibit A, gave particulars of the demand to the effect that duty was demanded on 226 maunds, 12 seers and 11 chataks of substituted tobacco and 16 maunds, 7 seers and 8 chataks of tobacco that was short. This notice also gave full particulars as to how these figures had been arrived at. The notice itself was issued without prejudice to any other action that may be taken under the Act.

5. The appellants made a representation, Exhibit F, to the Collector, alleging that the inspection had been done by the Deputy Superintendent during their absence and a notice under Rule 160 had been issued without any legal authority. They also filed an appeal, Exhibit G, dated December 20, 1956 to the Collector of Central Excise, Allahabad, against the demand Exhibit A, challenging the legality of the demand notice. By order dated January 23, 1957 — Exhibit H — the Assistant Collector, after holding that the demand made by the Superintendent of Central Excise was justified, advised the appellants to deposit the amount demanded and to lodge an appeal with the Collector of Central Excise, Allahabad. The appellants, under Exhibit R-5, dated February 2, 1957 filed a further appeal before the Collector of Central Excise, who, by his order dated April 14, 1958 — Exhibit R — disposed of the appeal by stating that as the demand made by the Superintendent of Central Excise had been revised under the Collector's order dated March 8, 1958 — Exhibit Q — it was open to the appellants to move the Government of India by revision if they were aggrieved by the order of March 8, 1958. There is no controversy that the appellants did not go in revision to the Government of India by filing any revision, at any rate, so far as the demand notice Exhibit A was concerned.

6. The Deputy Superintendent, on the basis of his inspection on September 28, 1956 submitted a report on October 12, 1956 setting out in detail the circumstan-

ces of his visit as well as the quantity of substituted tobacco and the shortage found in the appellants' premises. In the report, the officer had referred to the issue of a demand notice, Exhibit A, and he asked for instructions from his higher authorities regarding the further disposal of the goods.

7. On this, two sets of proceedings were initiated against the appellants, on January 19, 1957 under Exhibit I, the Collector issued a notice to the appellants under Rules 32, 40, 151 (c) and (d), 160 and 226 calling upon them to show cause as to why action should not be taken in the manner indicated in the notice regarding the quantity of substituted tobacco and the shortage referred to in the demand Ex. A. Exhibit I gives in very great detail full particulars regarding the quantity of tobacco under the two heads, viz., of substitution and deficiency. The appellants sent a reply, Exhibit J, dated February 2, 1957 to the show cause notice. They had referred therein to the practice followed by them and also made a grievance that the inspection had been done by the Deputy Superintendent without their knowledge and that one Khuda Bux who gave the key to the premises and who was stated to have been present was neither their agent nor competent to represent them. The appellants pleaded that they had not committed any offence justifying the taking of any action against them.

8. The Collector, by order dated March 8, 1958 — Exhibit Q — disposed of the appeal and came to the conclusion that tobacco of different variety was found in the warehouse than that entered in the registers and there had been substitution and deficiency but he reduced the quantity mentioned in the demand notice Exhibit A and, accordingly, revised the duty and penalty. The Collector had also made the appellants pay the incidental charges for cartage, loading, unloading and also rent for the premises hired for storage of the seized goods. This order, Exhibit Q, it must be mentioned, refers in great detail to the various objections raised by the appellants in their reply dated February 2, 1957 as well as the points raised by the counsel for the appellants at the time of the hearing on June 3, 1957 and it was, after a consideration of all these objections and the materials on record that the Collector came to the conclusions referred to above. It will also be noted that the demand,

Exhibit A, as well as the order of the Assistant Collector, Exhibit H, were modified to a certain extent.

9. The appellants filed an appeal before the Central Board of Revenue, Exhibit S, against the order of the Collector and the Board, by its order dated March 31, 1959, Exhibit T, confirmed the order of the Collector.

10. A further revision taken before the Central Government, Exhibit U, dated May 15, 1959 by the appellants, was rejected on October 17, 1959 under Exhibit V.

11. Another type of proceedings was initiated against the appellants by the Superintendent, Central Excise, issuing a notice dated March 7, 1957 — Exhibit K, under Rule 223-A, alleging that the appellants had failed to account for the consignments mentioned therein at the time of the annual stock-taking in 1956. It was also stated that the stock-taking was on October 2, 1956 and November 9, 1956. A further notice, Exhibit L, dated April 22/23, 1957 was issued by the Superintendent of Central Excise regarding the contravention of Rule 223-A, in respect of certain other consignments which the appellants were alleged to have failed to account at the time of annual stock-taking. After considering the explanation submitted by the appellants that the tobacco was wet-dried in storage, the Assistant Collector, by order dated June 10, 1957 — Exhibit M — held that the explanation cannot be accepted and that the losses were excessive. However, he condoned the losses to a certain percentage in respect of about five lots and imposed a penalty of Rs. 407/- under Rule 223-A, on the remaining losses not accounted for.

12. The appellants had taken up the matter before the Collector, Central Excise, in Appeal No. 28 of 1958. The Collector, by his order dated February 6, 1958 — Exhibit N — set aside the order of the Assistant Collector and, without prejudice to the contentions of the parties, remanded the proceedings to the Assistant Collector with a direction to adjudicate the matter de novo.

13. The revision taken against this order before the Central Government proved of no avail, as will be seen by the Government's order dated March 31, 1959 — Exhibit P.

14. We have very exhaustively referred to the various proceedings initiated

against the appellants as well as the nature of the orders passed and as they will clearly show, in our opinion that the appellants' grievance — which will be presently dealt with — is unfounded. The appellants challenged almost all the orders before the High Court, on various grounds. The High Court, after a fairly exhaustive consideration of the matter, has substantially confirmed the orders which were under attack. But, in respect of certain directions given by the Collector of Central Excise, in his order Exhibit Q, dated March 8, 1958 the High Court modified those directions. The High Court set aside the order of the Collector regarding the confiscation of 14 maunds and 33 seers of mixed stock and leaf tobacco and the demand of Rs. 50/- for its redemption, besides penalty and payment of rent; subject to this modification regarding the directions contained in Exhibit Q, the High Court declined to interfere with the other directions contained in Exhibit Q, as well as the various other orders.

15. Mr. Daniel Latifi, learned counsel appearing for the appellants, found considerable difficulty in satisfying us that any illegality or irregularity had been committed by the various authorities when the orders in question were passed. Mr. Latifi stressed that the orders of the Central Board of Revenue—Exhibit T—and of the Central Government — Exhibit V — are not speaking orders, especially as the Board and the Central Government were dealing with the liabilities of parties in hearing an appeal and revision under the Act and there is no indication that in either of these orders the authorities concerned had really applied their minds to the points arising for decision. We are not impressed with this contention of the learned counsel. It must be remembered that the demand notice — Exhibit A — gives full particulars regarding the substitution and shortage of tobacco. The Collector had issued the notice — Exhibit I — giving full particulars of these matters and the appellants had also sent a fairly exhaustive reply to the same. Finally the order — Exhibit Q — itself is very exhaustive and sets out meticulously, in great detail, the quantity of tobacco under the head of substitution and shortage. The order refers in extenso to the various points raised in the appellant's reply dated February 2, 1957 as well as the further points pressed before the Collector on the date of hearing,

AIR 1970 ALLAHABAD 257 (V 57 C 42)

FULL BENCH

BISHAMBHAR DAYAL, G. C. MATHUR
AND B. N. LOKUR, JJ.

Seth Munna Lal, Appellant v. Seth Jai Prakash, Respondent.

F. A. F. O. No. 324 of 1965, D/- 18-11-1968, against Judgment of IInd Civil J. Meerut, D/-21-5-1965.

Civil P. C. (1908), O. 9, Rr. 9, 13 and O. 17, Rr. 3, 2 — Court purporting to act under O. 17, R. 3 — Actual order such as could be passed under O. 9 read with O. 17, R. 2 — Application for restoration can be entertained — AIR 1954 All 222, Overruled.

It is permissible to entertain an application for restoration under O. 9 even when the Court purports to act under O. 17, R. 3 if the circumstances set out by the Court are such that an order under O. 9 read with O. 17, R. 2 would be legally justified and the actual order passed is one which could be legally passed under O. 9 read with O. 17, R. 2. (1899) ILR 22 All 66, Foll.; AIR 1954 All 222, Overruled. Case law discussed. (Para 7)

Cases Referred: Chronological Paras

- (1958) 1958 All LJ 290 = 1958 All WR (HC) 406, Laxmichand v. Ishwar Din 4
- (1954) AIR 1954 All 222 (V 41) = 1953 All LJ 653, Faiyaz Khan v. Mithan 4
- (1952) AIR 1952 All 208 (V 39) = ILR (1950) All 240, Qudrutullah v. Mohd. Kasim Khan 3
- (1952) AIR 1952 All 652 (V 39) = 1950 All LJ 799, Sri Krishen v. Radha Kishen 4
- (1949) AIR 1949 All 423 (V 36) = 1948 Oudh WN 416, Rafiq Ahmad v. Mohammad Shafi 3
- (1940) AIR 1940 All 217 (V 27) = 1940 All LJ 200, Raja Singh v. Manna Singh 3
- (1899) ILR 22 All 66 = 1899 All WN 176, Lalta Prasad v. Nand Kishore 5
- H. P. Gupta, for Appellant; Sudhir Chandra and Shanti Bhushan, for Respondent.

G. C. MATHUR, J.:— The following question has been referred to this Full Bench for opinion:—

"Whether a decision recorded specifically under O. 17, R. 3 of the Code of Civil Procedure would exclude relief under the provisions contained in Order 9 of the Civil P. C. irrespective of the question whether, in recording its decision under R. 3, the Court acted rightly or wrongly?" The question arises in the following circumstances: A suit was filed by the respondent against the appellant for rendition of accounts and recovery of commis-

sion. May 6, 1965, was an adjourned date of hearing. On this date, the defendant was absent and the Court recorded an order in the order sheet (English note) to the following effect:—

"This is an adjourned date of hearing because the defendant had been allowed adjournment on the previous date, viz., 14-4-1965. The defendant to-day has failed to appear and, in my view, this suit should be heard under R. 3 of O. 17, Civil P. C. I accordingly proceed to hear the suit under O. 17, R. 3. Civil P. C."

Thereafter the plaintiff's witnesses were examined and the next day was fixed for judgment. On May 7, 1965, the Court delivered its judgment, decreeing the suit on merits. On May 20, 1965, the appellant (defendant) filed an application, praying for an order setting aside the decree, treating the decree as an ex parte decree. This application was rejected on May 21, 1965, by the following order:—

"For the reasons given in the English Note dated 6-5-1965, the suit was decided under O. 17, R. 3, Civil P. C. and, therefore, this application (under provisions not noted) for setting aside the decree is not maintainable and is hereby rejected."

Against this order, the appellant (defendant) filed an appeal before this Court. Before the Bench hearing the appeal, the defendant-appellant contended that the decree must be taken to be an ex parte decree passed under O. 9, R. 6 read with O. 17, R. 2 and, therefore, the application to set aside the decree was maintainable under O. 9, R. 13. The respondent urged that, since the Court below acted under O. 17, R. 3, the only remedy of the appellant was by way of an appeal against the decree. A question arose before the Bench whether it was open to it to go into the question whether O. 17, R. 3 applied to the case or O. 17, R. 2 read with O. 9, R. 6 applied. The Bench found that there was a conflict of opinion on this question between the decisions of Division Benches of this Court and it, accordingly, referred the question set out above for opinion to a Full Bench.

2. Before examining the previous decisions of this Court on this point, it will be convenient to refer to the relevant provisions of law. Order 9 of the Code of Civil Procedure deals with the appearance of parties and consequence of non-appearance on the first date fixed for the hearing of a suit. Rule 6, inter alia, provides that, if, on this date, the plaintiff appears and the defendant does not appear, the Court may proceed ex parte if it is proved that the summons was duly served. Rule 13 confers a right on the defendant to make an application for setting aside the ex parte decree. Rule 8 provides that, if, on this date, the defendant appears and the plaintiff does not appear, the Court shall dismiss the suit unless the defendant ad-

mits the claim or a part of the claim. Rule 9 confers a right on the plaintiff to apply for an order to set aside the dismissal. Order 17 deals with adjournments and the procedure at the adjourned date of hearing. Rules 2 and 3 of this Order, with which we are concerned, have been amended by this Court and, as amended, stand thus:—

"Rule 2— Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. 9 or make such other order as it thinks fit.

Where the evidence or a substantial portion of the evidence, of any party has already been recorded and such party fails to appear on such day, the Court may, in its discretion, proceed with the case as if such party were present, and may dispose of it on the merits.

Explanation— No party shall be deemed to have failed to appear if he is either present or represented in Court by agent or pleader, though engaged only for the purpose of making an application"

"Rule 3— Where, in a case to which R. 2 does not apply any party to a suit, to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

The words "in a case to which Rule 2 does not apply" in R. 3 were added on January 17, 1963. Before the amendment, there could be a case which fell both under R. 2 and R. 3 and, in such a case, it was open to the Court to decide whether it would proceed under R. 2 or R. 3. But, after the amendment, the two rules have become mutually exclusive and, if a case falls under R. 2, it would not be open to the Court to proceed under R. 3.

3. Learned counsel for the defendant-appellant has relied upon three decisions of Division Benches of this Court. The first case, on which he relied, is *Raja Singh v. Manna Singh*, AIR 1940 All 217. In this case, on the adjourned date for the hearing of a suit, the plaintiff appeared but the defendants did not. The Court examined the plaintiff's witnesses and decreed the suit, stating that the suit was decided under O. 17, R. 3. The defendants filed an application under O. 9, R. 13. The application was allowed and the decree was set aside. The plaintiff came to this Court in revision and contended that, since the suit was decreed under O. 17, R. 3, no application under O. 9, R. 13, lay. This Court held that the suit was not heard and decided in accordance with the provi-

sions of O. 17, R. 3 and that an application for restoration under O. 9, R. 13, lay. It was observed by the Bench that the mere fact that the Court had remarked that it was acting under O. 17, R. 3 cannot make O. 17, R. 3 applicable.

The second case relied on is *Rafiq Ahmad v. Mohammad Shafi*, AIR 1949 All 423. In this case, the plaintiffs had examined some of their witnesses but, on the adjourned date of hearing, thereafter they were absent. The Court proceeded to decide the suit on merits under O. 17, R. 3 and dismissed it. The plaintiffs made an application under O. 9, R. 9, Civil P. C. but it was dismissed as not maintainable. The plaintiffs then came to this Court on appeal. It was held by a Division Bench of this Court that O. 17, R. 3 had no application to the facts of this case and that the lower Court could not proceed to decide the suit on merits. It was further held that the plaintiffs could treat the dismissal as one under O. 17, R. 2 read with O. 9, R. 8 and were entitled to file an application under O. 9, R. 9. In this case, an objection was specifically raised that the question whether the Court could or could not proceed to dispose of the suit on merits under O. 17, R. 3 could not be gone into. This objection was overruled by reference to the case of AIR 1940 All 217 (Supra).

The last case relied on is *Qudrutullah v. Mohammad Kasim Khan*, AIR 1952 All 208. In this case, on an adjourned date for further hearing, neither the defendant nor his witnesses appeared and the trial Court, after hearing arguments and considering the material on the record, purported to decide the case on merits under O. 17, R. 3. The defendant filed an application under O. 9, R. 13 for setting aside the decree but it was rejected on the ground that it was not maintainable as the decree was not an ex parte decree. Against that order, the defendant appealed to this Court. This Court held that the lower Court was bound to proceed under O. 17, R. 2, and that, therefore, the suit must be deemed to have been decreed ex parte. It accordingly held that the application for restoration was maintainable. The only reason, which can be gathered from these three decisions for going behind the decision of the trial Court to proceed under Order 17, Rule 3, is that the remarks of the trial Court that it was acting under Order 17, Rule 3 cannot make Order 17, Rule 3 applicable.

4. Let us now examine the cases relied upon by learned counsel for the plaintiff-respondent. The first case relied upon is *Sri Krishen v. Radha Kishen*, AIR 1952 All 652. In this case, on the adjourned date of hearing, the plaintiffs were absent but the defendants were present. The Court proceeded under O. 17, R. 3 and dismissed the suit. The plaintiffs applied

under O. 9, R. 9 for setting aside the order but the court rejected the application on the ground that the dismissal was not for default but under O. 17, R. 3. The plaintiffs then filed an appeal in the lower appellate Court but the appeal was dismissed. The plaintiffs then came to this Court in revision. This Court dismissed the revision. It observed:

"The question whether an application for restoration is maintainable must be decided upon an interpretation of the order which the Court passes. If there is any doubt about the intention of the Court passing the order as to whether it intended to proceed under O. 17, R. 3 or O. 17, R. 2, in that case we can say that the order should be construed as one which ought to have been passed. But this cannot be done when the Court expressly passes an order under one of the two Rules. In that case, the aggrieved party should file an appeal against the order which is in fact a decree, and not apply for restoration."

Two things have to be noted about this case: The first is that this Court observed that the question whether the application for restoration was maintainable or not must be decided upon an interpretation of the Order. The second is that this Court, in fact, examined the facts and circumstances of the case and came to the conclusion that the trial Court acted rightly in proceeding under O. 17, R. 3. The next case relied upon is Faiyaz Khan v. Mithan, AIR 1954 All 222. In this case, on the adjourned date of hearing, the defendant was absent and his counsel reported no instructions. The Court proceeded under O. 17, R. 3, recorded the evidence of the plaintiff's witnesses and decreed the suit. An application by the defendant under O. 9, R. 13 was dismissed on the ground that it did not lie as the decision was on merits under O. 17, R. 3. The defendant filed an appeal before this Court. This Court noticed the conflict in the earlier decisions and observed:

"We therefore, find ourselves in the somewhat embarrassing position of having to decide between conflicting decisions of this Court. With great respect we are of opinion that the view taken in the cases which we have last mentioned is to be preferred. We think that if the order granting the plaintiff a decree is actually made by the Court under O. 17, R. 3, an application by the defendant under O. 9, R. 13 will not lie and that the defendant's remedy is by way of appeal or review. This view appears to us not merely to have the merit of practical convenience — for it is important that the litigant should be in no doubt as to where his remedy lies—but sound in principle. What has to be considered is the power vested in the Judge who decided the suit; and if in so deciding he purported to act under O. 17,

R. 3, he could have, it appears to us, no jurisdiction under O. 9, R. 13 to set aside the decree which he had passed. His order may be wrong but so long as it stands, he has no power to alter it."

This case fully supports the contention of learned counsel for the respondent. The last case, on which reliance is placed, is Laxmi Chand v. Ishwar Din, 1958 All LJ 290. In this case, on the adjourned date of hearing, defendant No. 1 was absent. The Court proceeded under O. 17, R. 3, examined the witnesses of the plaintiff and decreed the suit. Defendant No. 1 filed an application under O. 9, R. 13 for setting aside the decree but the application was rejected on the ground that it was not maintainable as the suit was decided on merits. Against that order, a revision was filed in this Court. This Court examined the facts and circumstances of the case and came to the conclusion that the case clearly fell within the purview of O. 17, R. 3. After examining the previous decisions of this Court, the Bench observed:

"There is thus a preponderance of opinion of this Court in favour of the view that, if the order granting the plaintiff a decree is actually made by the Court under O. 17, R. 3, in circumstances where R. 3 may be attracted and not covered by R. 2, an application by the defendant under O. 9, R. 13 will not lie. What has to be considered in such cases is the power vested in the judge who decided the suit and if in so deciding it, he purported to act under O. 17, R. 3, he could have no jurisdiction under O. 9, R. 13 to set aside the decree which he had passed."

With respect, the observations appear to us to be somewhat contradictory. The first sentence seems to indicate that an application under O. 9, R. 13 will not lie only if the suit has been decreed under O. 17, R. 3 and the circumstances are such that R. 2 would not apply and R. 3 may be applicable. In our opinion, these cases do not reveal any decisive reason in favour of the view that where the Court specifically proceeds under O. 17, R. 3, the order can, in no case, be treated as one under O. 17, R. 2 or O. 9.

In AIR 1940 All 217 and 1958 All LJ 290 (Supra), the Benches hearing the cases actually went into the question whether the orders of the trial Court were really under O. 17, R. 3 or under O. 17, R. 2 and do not appear to have taken the extreme view. We are unable to accept the extreme view taken in AIR 1954 All 222 (Supra). The following example would be sufficient to show why we cannot accept this view. On an adjourned date of hearing, the plaintiff is absent and, without recording any evidence, the trial Court purports to proceed under O. 17, R. 3 and passes an order in these terms: "The suit

is dismissed for default of the plaintiff under O. 17, R. 3." Surely, when it is brought to the notice of the Court that the dismissal could be only under O. 9, R. 8, it would not shut its eyes and refuse to entertain an application for restoration under O. 9, R. 9. The consideration mentioned by Mootham, C. J. in AIR 1954 All 222 (Supra) that it was important that the litigant should be in no doubt as to where his remedy lies is outweighed by the consideration that, if the defaulting party is compelled to file an appeal, it will result in unnecessary delay and expense to the parties.

5. We agree with learned counsel for the respondent that it is not permissible to go into the question as to what order the trial Court should have passed and then to decide whether an application under O. 9, R. 9 or 13 lies against the order that should have been passed. We are of opinion that the circumstances, in which the order was passed, have to be examined and the order, as passed, has to be interpreted to find out whether the order in law and substance, is one under O. 17, R. 3 or under O. 17, R. 2 read with O. 9. The answer to the question referred is to be found in the decision of a Full Bench of this Court in *Lelta Prasad v Nand Kishore*, (1899) ILR 22 All 66. This was a case decided under the provisions of the Code of Civil Procedure of 1882 but the material provisions of that Code are in pari materia with the corresponding provisions of the Code of 1908 with which we are concerned. In this case, some evidence, oral as well as documentary, had been taken and then the hearing was adjourned. There were several adjournments. On the last adjourned date the plaintiff was not present. The suit was dismissed "for default of appearance and for want of prosecution". The plaintiff filed an application for restoration under Section 103 (equivalent to O. 9, R. 9), contending that the dismissal was for default under S. 102 (equivalent to O. 9, R. 8) read with Section 157 (equivalent to O. 17, R. 2). The application was disallowed on the ground that the order dismissing the suit was not, in effect, an order under Section 102, that it was a dismissal for want of proof and, therefore, the plaintiff's remedy was by way of appeal against the decree and not by an application under Section 103. Against the order rejecting his application, the plaintiff filed an appeal in this Court. The appeal was heard by a Full Bench of four learned Judges and it held that the dismissal of the suit was under Section 102 (O. 9, R. 8) and that the application under Section 103 (O. 9, R. 9) was maintainable. In the course of his judgment, Strachey, C. J., with whom the other learned Judges agreed, observed:

"In the second place, what is the meaning of the opening words of Section 103

of the Code 'when a suit is wholly or partially dismissed under Sec. 102?' Is it a dismissal under Section 102 merely if the order says that it is passed under Section 102? Or is it only a dismissal under Section 102, if, irrespective of the language of the order, the suit was dismissed upon an actual non-appearance of the plaintiff in fact or law? Or is the suit dismissed under Section 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance, or non-appearance, the real meaning and substance of the Court's action is that it dismisses the suit on the view, whether right or wrong, that the defendant appears that the plaintiff does not appear? We think that the third of these views is the correct one. The mere naming of the section is not conclusive though, no doubt, it may be a useful piece of evidence in construing the order, which must be read and construed as a whole. But, although the Court may describe an order of dismissal as being made under Section 102, the order, taken as a whole, may show that the description is an error, and that the Court was not really dismissing the suit on the view that the plaintiff was not appearing. So, too, if Section 102 is not named, and even if some other section, whether Sec. 158 or any other, is named, still it may be that that is a mere misdescription, and that nevertheless the real reason for the dismissal is that in the Court's view the defendant appears and the plaintiff does not appear. In such a case, notwithstanding the misdescription, there is in substance and in fact a dismissal of the suit for non-appearance of the plaintiff, and therefore a dismissal under Section 102, although that dismissal may be absolutely wrong, either because the Court was mistaken in supposing that the plaintiff did not appear, or for any other reason. If the Court was mistaken in supposing that the plaintiff did not appear, still, whether the mistake was one of fact or of law, the appearance would not make the dismissal one not ordered under Section 102, it would only make the dismissal under that section a wrong one. In other words, a suit is dismissed under Section 102 if the dismissal is based on the state of things contemplated in that section, that is, if the Court's reason for the dismissal is its view that the plaintiff has not appeared.

If that is the correct view of the meaning of the opening words of Section 103, referring to a suit being dismissed under Section 102, it follows that a plea by the defendant, in answer to the plaintiff's application under Section 103, that the order under Section 102 was illegally made, is irrelevant. Section 103 allows the plaintiff to apply for an order to set the dismissal aside, where the suit has been in

fact wholly or partially dismissed under Section 102. If there has been such a dismissal in the sense I have explained, whether right or wrong, the plaintiff is entitled to apply to the Court to set it aside, and it is no answer to such an application to say that the order sought to be set aside was illegal for any reason whatever. Therefore, the defendant cannot contest the application in limine as one which cannot be entertained at all under Section 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact and in law."

We entirely agree with these observations. What has been said by the Full Bench regarding Section 103 (O. 9, R. 9) applies equally to O. 9, R. 13. A suit is decreed under O. 9, R. 6 if apart from the mere description which the Court gives to its action, the real meaning and substance of the Court's action is that it proceeds to decree the suit on the view that the plaintiff appears and the defendant does not. We have accordingly come to the conclusion that, if the facts, on the basis of which the Court has proceeded under O. 17, R. 3, are such under which an order under O. 17, R. 2 read with O. 9 would be legally justified and the order actually passed is also one which could be legally passed under O. 9, it is permissible to hold that the order is an order under O. 9 and that an application under O. 9, R. 9 or 13, as the case may be, lies.

6. The view, which we are taking, appears to us to be just and equitable also. If an order, in law and substance, is an order under O. 9, though purported to be passed under O. 17, R. 3, it would cause much unnecessary expenditure of time and money to the aggrieved party if he is compelled to file an appeal instead of an application for restoration. In the appeal which will be against the decree, a court-fee will have to be paid according to the valuation and the subject-matter of the suit. It is well known that an appeal takes a much longer time for disposal than an application for restoration; then the scope of the appeal would be very limited. Obviously, in a majority of such appeals, the decree will not be challenged on the merits as the evidence, if any, would be one-sided. Such appeals will mainly be on the ground that the trial Court should have proceeded under O. 17, R. 2 read with O. 9 and not under O. 17, R. 3. If the appellate Court allows the appeal, it will set aside the decree on the ground that the trial Court was not justified in proceeding under O. 17, R. 3 and remand the case. If the trial Court then does not pass an order under O. 9, the defaulting party will obtain restoration without even having to satisfy the Court that it had a reasonable cause for its default. But if it passes an order under O. 9 then the defaulting party will be en-

titled to file an application for restoration under O. 9. Thus the parties would still be in the same position as they would have been if the defaulting party had been originally permitted to file a restoration application and had not been compelled to file an appeal. The time, labour and money spent on the appeal will be to no one's advantage.

7. Our answer to the question referred is that it is permissible to entertain an application for restoration under O. 9 even when the Court purports to act under O. 17, R. 3 if the circumstances set out by the Court are such that an order under O. 9 read with O. 17, R. 2 would be legally justified and the actual order passed is one which could be legally passed under O. 9 read with O. 17, R. 2.

Order accordingly.

AIR 1970 ALLAHABAD 261 (V 57 C 43) FULL BENCH

K. B. ASTHANA, GYANENDRA KUMAR
AND HARI SWARUP, JJ.

Krishna Gopal, Appellant v. Gokul Prasad and another, Respondents.

Ex. First Appeal No. 35 of 1966, D/-21-8-1969, against decree of Civil, J. Farukhabad, D/-13-2-1965.

(A) Civil P. C. (1908), Ss. 144 and 145 (as amended by U. P. Act 24 of 1954) and O. 21, R. 60 — Release of property from attachment — Effect of — Restitution can be claimed — Liability of surety is enforceable at instance of person entitled to enforce that liability against supurdar, whether he be a judgment-debtor or a third party claimant. 1962 All LJ 539 & AIR 1920 All 245 (1), Overruled.

According to Section 144 as amended in U. P. it is no longer necessary that the variation or reversal of the order should be effected by means of an order of an appellate or revisional authority. The amendments made in Sections 144 and 145, Civil P. C. by U. P. Act 24 of 1954 make it abundantly clear that restitution can be claimed even in cases where the order of attachment is modified in any manner. In cases of restitution the Court only puts back a person, who has suffered the loss, in the same position in which he was prior to the passing of the Court's order by which he was deprived of his property. It is wholly immaterial who moves the Court to get back the property from the supurdar for being restored back to the rightful claimant. Sub-sections (b) and (c) of Section 145 nowhere lay down that the restitution can be claimed only by the judgment-debtor. The liability of the surety is enforceable under the provisions of Section 145, Civil P. C. at the instance

of the person entitled to enforce that liability against the supurdar, whether he be the judgment-debtor or a third party claimant. The rights of the judgment-debtor and the third party claimant arise on the attachment being lifted, in one case by the release of the property from execution and in the other by the acceptance of the claim of the third party and passing of an order of release by the Court under O. 21, R. 60, Civil P. C. Case law discussed. 1962 All LJ 539 & AIR 1920 All 245 (1). Overruled. (Paras 7, 16, 19)

The adding of the explanation to Section 145 makes the persons in whose custody the attached property is left 'sureties' within the meaning of S. 145 (b) and the restitution of the property or recovery of its equivalent can be enforced in execution against them. The order of the Court directing the restitution is enforceable in the same manner as a decree is enforced by execution. 1952 AC 109 & AIR 1953 SC 244, Rel on. (Paras 9, 10)

(B) Civil P. C. (1908), S. 145 and O. 21, R. 60, 90 — Release of property attached — Property sold away by surety and sale proceeds misappropriated — Order for recovery and execution for the same under S. 145 — Properties of surety sold in execution of that order — No appeal filed by supurdar — Order under S. 145 cannot be challenged as nullity by way of an objection to sale. (Para 20)

Cases Referred: Chronological Paras
(1966) AIR 1966 All 250 (V 53) =
1965 All LJ 604, Shyam Lal v. Poonamchand 17, 18
(1965) AIR 1965 SC 1477 (V 52) =
1965-2 SCR 436, Mahibhai Mohan-
bhai Barot v. Patel Manibhai
Gokalbhai 12
(1962) 1962 All LJ 539 = 1962 All
WR (HC) 438, Gulsher Khan
Supardar v. Bedilal 15
(1961) AIR 1961 SC 803 (V 48) =
1961 (1) Cri LJ 859, Teeka v.
State of U. P. 6
(1953) AIR 1953 SC 244 (V 40) =
1953 SCR 773, State of Bombay v.
Pandurang Vinayak Chhapalkar 9
(1952) 1952 AC 109 = 1951-2 All
ER 587, East End Dwellings Co.
Ltd. v. Finsbury Borough Council 9
(1949) AIR 1949 All 306 (V 36) =
1949 All WR (HC) 8, Mathura
Das v. Hari Shankar 19
(1931) AIR 1931 All 567 (V 18) =
1931 All LJ 865 (FB), Shakir
Husain v. Chandoo Lal 12, 19
(1920) AIR 1920 All 245 (1) (V 7) =
18 All LJ 357, Kallu Khan v.
Abdulla Khan 15, 16
(1919) AIR 1919 PC 55 (V 6) =
46 Ind App 228, Raj Raghubar
Singh v. Jai Indra Bahadur
Singh 22

HARI SWARUP, J.:— This appeal has been filed against the order of the Civil Judge, Farrukhabad, by which he allowed the objections under Sections 47 and 151, Civil P. C. and set aside the sale and directed that the money deposited be returned to the auction purchaser.

2. The facts giving rise to the present appeal in short are that one Ambalal Patel obtained a decree against Ram Rakshpal and Shanta Prasad in suit No. 36 of 1957. The decree was put in execution and the execution case was numbered as 44 of 1960. In execution of the decree on 27-8-1960 a stock of foodgrains was attached by the Amin and given in the security of Gokul Prasad and Markandi on their executing a bond for the return of the property whenever required by the Court and to pay a sum of Rs 3333 in case of default. Kishan Gopal filed objections in execution and contended that the property attached belonged to him and not to the judgment-debtor and was not liable to attachment. These objections of Krishan Gopal under O 21, R 58 were enquired into by the Executing Court and a final Order under O. 21, R. 60 was passed by the Court releasing the property in favour of Kishan Gopal, Gokul Prasad and Markandi.

The sureties, however, refused to return the goods and alleged that due to rains it had been spoiled and thrown away. On enquiry made by the Court, it came to the conclusion that the case put up by the sureties was false and that they had sold away the goods and misappropriated the proceeds. The Court on this finding directed that a formal order be prepared for recovery of Rs. 3333 along with costs from the sureties and execution for the same be proceeded under Section 145, Civil P. C. In this execution the properties of the sureties were sold on 17th of March, 1963. Gokul Prasad filed an objection under Sections 47 and 151, Civil P. C. for setting aside the sale on the ground that the order in execution of which the property had been put to sale was a nullity and the sale was, therefore, invalid. The contention was that Section 145, Civil P. C. was not applicable to the circumstances of the case and no execution could be launched for recovery of the amount from the sureties. This objection was allowed by the Executing Court and the sale was ordered to be set aside. The present appeal is against that order. It has been filed by Kishan Gopal whose properties have been attached in execution of the decree against Ram Rakshpal and Shanta Prasad.

3. There have been a number of amendments in the relevant provisions of the Civil P. C. in so far as they apply to the State of U. P. O. 21, R. 43 provides for attachment of movable properties other

B. R. Avasthi, for Appellant; S. O. P. Agarwal, Ambika Prasad, for Respondents.

than agricultural produce in possession of judgment-debtor. Rule 122 was added by the Allahabad High Court, with the result that agricultural produce also became liable to such attachment.

4. The Allahabad amendment further permitted the making of an arrangement as may be deemed convenient and economical and it did not remain necessary that the property must be secured in the custody of either the attaching officer or his subordinate. The attached property in the present case was thus entrusted by the Court to the custody of Gokul Prasad and Markandi in pursuance of these provisions. In the bond executed by these two persons it was stated that the goods which had been attached by the Amin were in their custody as sureties. They undertook to keep the goods in safe custody and to produce the same forthwith on demand, at any place which may be communicated by the Court or the Court's Amin and that in case they fail to produce the goods, the Court may recover from the person and properties of the sureties, the estimated price of the goods. The estimated price was mentioned as Rs. 3333. Gokul Prasad and Markandi thus became bound as sureties either to return the goods or to pay the value thereof.

5. Order 21 of the Civil P. C. prescribes the mode of dealing with the objections both of the judgment-debtor as well as of third parties whose property is erroneously attached in execution of a decree. Kishan Gopal, who claimed the property to be his own, filed objections under R. 58 of O. 21, whereupon the Court proceeded to investigate the same. He was thus deemed to be a party to the suit itself for the purposes of his claim. Evidence was taken under O. 21, R. 59 and the Court passed a final order under O. 21, R. 60, Civil P. C. releasing the property. The effect of this order was to let the property go back to the claimant from whose possession it was attached by the Court.

6. The property during attachment continued to remain in the custody of the Court Amin or in the custody of the 'Supurdar' as contemplated by R. 122 of O. 21, Civil P. C. In either case it continued to remain in the constructive possession of the Court. It was held in the case of Teeka v. State of Uttar Pradesh, AIR 1961 SC 803, that

"Whether the Amin keeps the buffaloes in his custody or entrusts them to a Sapurdar is in law the possession of the Court and so long as the attachment is not raised, the possession of the Court continues to subsist."

It is only for the sake of convenience that the Court, instead of keeping the property in its actual custody, gives it in

the custody of Sapurdar pending decision of the objection either of the judgment-debtor or of a third party. If the objection of the judgment-debtor or the third party succeeds, the property is released in favour of such objector. In such a case, the Court remains responsible for handing back the property to the successful claimant, as throughout the period of attachment the property remains in the custody of the Court itself.

7. The right of the successful claimant to get back the property on an order being passed by the Court under O. 21, R. 60 arises under Section 144, Civil P. C. and he becomes entitled to get a restitution of the property in his favour. Section 144, Civil P. C. as applicable to U. P., runs as follows:—

"144(1) Where and in so far as a decree or order is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

According to Section 144, as amended in U. P., it is no longer necessary that the variation or reversal of the order should be effected by means of an order of an appellate or revisional authority. The right to restitution arises even if the order is varied or reversed by some other process. Where the order of attachment is varied by an order passed under O. 21, R. 60, Civil P. C., the claimant still becomes entitled to restitution under Section 144, Civil P. C. By an order of attachment the true owner of the property is deprived of his possession over the same as well as of his right to deal with it in the manner he likes, so long as the order of attachment remains in force. The result is that the property is kept off from his custody for the time being. When the order of attachment is varied or reversed under O. 21, R. 60, he immediately becomes entitled to get back his property by process of restitution under Section 144, Civil P. C.

8. The procedure for enforcement of the right of restitution is laid down in Section 145, Civil P. C. Section 145, as amended by the U. P. Act 24 of 1954, runs as under:—

"145. Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof, or
 - (b) for the restitution of any property taken in execution of a decree, or
 - (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees and such person shall, for the purposes of appeal, be deemed a party within the meaning of Section 47: Provided that such notice as the Court in each case thinks sufficient has been given to the surety.
- Explanation — For the purpose of this section a person entrusted by a Court with custody of any property attached in execution of any decree or order shall be deemed to have become liable as surety for the restitution of such property within the meaning of clause (b)."

9. The adding of the explanation to Section 145 makes it clear that the person in whose custody the property is left would be deemed to be a surety for the purposes of restitution of the property. In *East End Dwellings Company Ltd. v. Finsbury Borough Council*, 1952 AC 109 at p. 132 Lord Asquith said:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it..... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This statement has been cited with approval by the Supreme Court in *State of Bombay v. Pandurang Vinayak Chapalkar*, 1953 SCR 773 = (AIR 1953 SC 244). The adding of the explanation to Section 145 makes Gokul Prasad and Markandi 'sureties' within the meaning of Sec. 145 (b), Civil P. C. and the restitution of the property or recovery of its equivalent can be enforced in execution against them. Section 145 also provides the extent and the manner in which the liability of the sureties is to be enforced.

10. We are, therefore, of the opinion that the order of the Court directing the restitution is enforceable in the same

manner as a decree is enforced by execution. There is no doubt that the property was taken from the custody of the true owner in execution of a decree and he is only claiming restitution of that property.

11. It was held by the Privy Council in the case of *Raj Raghubar Singh v. Jai Indra Bahadur Singh*, AIR 1919 PC 55 that if the sureties have a personal liability, it can be enforced under Section 145, Civil P. C. and in other cases by the exercise of the inherent powers of the Court. In the present case there is no charge over any property and the liability of the sureties is a personal liability and therefore, it is enforceable under the provisions of Section 145, Civil P. C. The procedure which the Court is to follow is laid down in Section 145, Civil P. C. as applicable in U. P. and we are of the opinion that the liability in the present case is enforceable under Section 145, Civil P. C.

12. In *Mahijibhai Mohanbhai Barot v. Patel Manibhai Gokalbhai*, AIR 1965 SC 1477, it was held that an application for restitution is an application for execution of a decree. The restitution and execution are thus synonymous in their applicability for recovery of the property by the person entitled thereto. A Full Bench in *Shakir Hussain v. Chandoo Lal*, AIR 1931 All 567 held that

"the action of the attaching Officer in handing over the property to a surety or supurddar is within his lawful powers under R. 122, and certainly upon his action being approved either expressly or impliedly by the Court, the surety becomes an officer of the Court. But apart altogether from this there is no reason why in suitable circumstances Section 145 should not be applicable",

and that

"although a sahana would not be a surety, a supurddar, who has given an undertaking to produce the goods when ordered by the Court is a surety although the undertaking is not given to the Court directly but through the attaching officer, and by such an undertaking he becomes liable under Section 145."

We respectfully agree with the view expressed in *Shakir Hussain's case*, AIR 1931 All 567.

13. The learned counsel for the Supurddar opposite parties contended that the provisions of Section 145, Civil P. C. were not applicable in the case of a restitution claimed by a third party but were applicable only in the case of restitution claimed by a judgment-debtor. We do not find any justification for this contention specially in view of the amendment made in Section 145 by the U. P. Act No. 24 of 1954. The explanation added to that section makes it clear that the provisions of Section 145 are applicable even to third party claimants. The provisions

of Order 21 as held above deal with the objections both of judgment debtor and third parties. In either case the property is held by the surety after attachment for the benefit of the person entitled thereto. If the property is found to be belonging to judgment-debtor but not attachable in execution of the decree, the judgment-debtor gets the right to claim the restitution. If the property is held to be belonging to a third party and not attachable in execution of the decree, the property is liable to be returned to the third party claimant.

14. We see no difference in the claim for restitution by a judgment-debtor or a third party, in so far as sureties are concerned. The sureties hold the property on behalf of the Court and the Court restitutes the property to the rightful claimant. It is wholly immaterial as to who has moved the Court for getting back the property from the sureties for being restituted to the rightful claimant.

15. The learned counsel for the Supurdar placed reliance on Gulsher Khan Supardar v. Bedi Lal, (1962) All. L.J. 539 for the proposition that Section 145 applies only to cases where a decree is executed and not in any other circumstances. Reliance has also been placed on the case of Kallu Khan v. Abdullah Khan, 18 All LJ 357 = (AIR 1920 All 245 (1)) wherein it was laid down that the remedy of the aggrieved party was to file a suit for recovery of the goods or damages and not to move the Court in execution. The case of Gulsher Khan, 1962 All LJ 539 (Supra) considered the provisions of Section 145 as they stood prior to the amendment made by Act No. 24 of 1954 and it has not taken into account the effect of the Explanation added to Section 145 by the amending Act. The observations made in the case are also in the nature of obiter dicta. There the Court had found that the bond executed by the sureties was on its own terms not enforceable. It was also held that it was not such a bond which came within the purview of Section 145, Civil P. C. The further observations made by the learned Judges that the judgment-debtor had no right to invoke the provisions of Section 145, Civil P. C. are merely obiter dicta. With great respect we do not think the view expressed in the case lays down the correct law.

16. In the case of 18 All LJ 357 = (AIR 1920 All 245 (1)) (Supra), which in our opinion does not lay down the correct law, no reasons have been given for arriving at the above conclusion. The submission of the learned counsel that the provisions of Section 145, Civil P. C. can be invoked only by the judgment-debtor and none else is in our opinion not correct. The amendments made in Sections 144 and 145, Civil P. C. make it abundantly clear

that restitution can be claimed even in cases where the order of attachment is modified in any manner. In cases of restitution the Court only puts back a person, who has suffered the loss, in the same position in which he was prior to the passing of the Court's order by which he was deprived of his property. It is wholly immaterial who moves the Court to get back the property from the Supurdar for being restored back to the rightful claimant. Sub-sections (b) and (c) of Section 145 nowhere lay down that the restitution can be claimed only by the judgment-debtor.

17. The learned counsel for the sureties also relied on the case of Shyamlal v. Poonamchand, 1965 All LJ 604 = (AIR 1966 All 250) for the proposition that that decree-holder alone could claim the benefit of Section 145, Civil P. C. at whose instance the property was initially attached and made over to a supurdar. In the case of Shyamlal, 1965 All LJ 604 = (AIR 1966 All 250) the property had been attached in execution of one decree and handed over to a Supurdar. This very property was attached subsequently in execution of another decree. Meanwhile, the first decree was satisfied and the order of attachment was withdrawn, so the Supurdar returned the goods to the judgment-debtor, without obtaining any order on the point from the Execution Court. The second decree-holder then applied for restitution of the property under Section 145, Civil P. C. and this Court held that the second decree-holder could not in the circumstances of the case get restitution of the property under Section 145, Civil P. C. It was observed in Shyamlal's case, 1965 All LJ 604 = (AIR 1966 All 250) (Supra) that the provisions of Section 145 were meant for the protection of the decree-holder at whose instance the property was attached and made over to the custodian and that it was not meant for the benefit of all the persons who hold various decrees against the same judgment-debtor, inasmuch as the goods had never been left in the custody of the Supurdar at the instance of these other decree-holders.

18. Shyamlal's case, 1965 All LJ 604 = (AIR 1966 All 250) (Supra) certainly does not lay down the law that the benefit of Section 145, Civil P. C. cannot be taken by a third party whose property had been wrongly attached and who had become entitled to claim restitution by virtue of a decision in his favour under O. 21, R. 60, Civil P. C. In Shyamlal's case, 1965 All LJ 604 = (AIR 1966 All 250) the second decree-holder could not invoke the provisions of S. 145, Civil P. C. as he was not really claiming any restitution as understood in law.

19. In Mathura Das v. Hari Shanker, AIR 1949 All 306, this Court, follow-

ing the law declared in Shalir Husain's case, AIR 1931 All 567 held that the liability of a Supurdar could be enforced at the instance of the judgment-debtor. The learned Judges observed thus:

"..... under Cl. (b) of S. 145 of the Code each of the appellants to whom the property taken in execution of a decree had been entrusted became liable as surety for restitution of the property;as surety his liability was the same which he had himself undertaken under the supurdnama."

In the case of Mathura Das the Judges were of the opinion that the restitution of the attached property from the custody of the surety was also covered by the provisions of Cl. (c) of Section 145 of the Code, in so far as each surety had rendered himself liable for the fulfilment of the conditions entered in the Supurdnama executed by them. It was observed that,

".....the appointment of the appellants as supurdars would be deemed to have been approved by the Court when the Amin submitted the papers relating to the attachment of the property including the Supurdnama. The appointment was on the conditions mentioned in the Supurdnama. These conditions, after the implied approval by the Court, must be taken to have been imposed by the order of the Court and that order could, therefore, be executed against the appellants in order to enforce the liability undertaken by them."

It was held in the above case that the person entitled to enforce the liability was the judgment-debtor and that liability could be enforced by an application under Section 145 of the Code or by a regular suit. We are in respectful agreement with the view expressed by the Division Bench in the case of Mathura Das, AIR 1949 All 306 (Supra) that the liability of the surety is enforceable under the provision of Section 145, Civil P. C. at the instance of the person entitled to enforce that liability against the Supurdar, whether he be the judgment-debtor or a third party claimant. The rights of the judgment-debtor and the third party claimant arise on the attachment being lifted, in one case by the release of the property from execution and in the other by the acceptance of the claim of the third party and passing of an order of release by the Court under O. 21, R. 60, Civil P. C.

20. The learned counsel for the appellant has also contended that in the instant case the order passed by the Court under Section 145, Civil P. C. had become final, as no appeal against the same was filed by the Supurdars and they had, therefore, no right to challenge the same by way of an objection to the sale. There is force in this contention. We have already held that the order passed by the Court under

Section 145, Civil P. C. was a valid order and the same cannot be treated as nullity by the Supurdar, when challenging the sale in execution of that order.

21. In the result the appeal succeeds. The impugned order is set aside and the sale is ordered to be confirmed. In view of the circumstances of the case, we make no order as to costs.

Appeal allowed

AIR 1970 ALLAHABAD 266 (V 57 C 44)

FULL BENCH

JAGDISH SAHAI, SATISH CHANDRA
AND R. L. GULATI, JJ.

M/s. Badri Prasad Ayodhya Prasad, Applicant v. Commissioner of Sales Tax, U. P. Lucknow, Opposite Party.

Sales Tax Appln. No. 419 of 1966, D/- 20-8-1969.

Sales Tax — U. P. Sales Tax Act (15 of 1948), Ss. 10 (3) (1), 11 — Dismissal of revision application under S. 10 (3) on grounds of limitation — Question whether dismissal was right is question of law — Revising Authority is competent to make reference to High Court under S. 11 against such order. S. T. R. No. 556/1961, D/-18-2-1963 (All), Overruled.

The question whether or not an application under Section 10 (3) of the Act was rightly dismissed as barred by limitation is a question of law arising out of the order of the Judge (Revisional). The question of limitation can be decided only by applying the law relating to limitation provided by the Act dealing with the matter. The question of limitation is, therefore, one of law. Even when an application is dismissed as barred by limitation it would be an order under Section 10 (3) (i) and the question of limitation would arise out of an order passed by the revising authority under that section and for that reason a reference can be made by the revising authority to High Court under Section 11 of the Act. S. T. R. No. 556 of 1961, D/- 18-2-1963 (All), Overruled; AIR 1956 SC 367, Rel. on.

(Paras 6, 8, 10 and 12)
Cases Referred: Chronological Para:
(1963) STR No 556 of 1961, D/- 18-2-1963 (All), Sukhan Lal Amar Nath v. Commr. Sales Tax 4, 5, 10, 11
(1956) AIR 1956 SC 367 (V 43) =
(1956) 29 ITR 607, Mela Ram and Sons v. Commr. of Income-tax, Punjab 10

P. N. Pachauri, for Applicant.

JAGDISH SAHAI, J.:— The question referred to this Full Bench by a Division Bench of this Court is:—

"Whether on the facts and in the circumstances of the case the question wh-

JM/KM/E702/69/BDB/R

ther a revision application under S. 10 (3) of the U. P. Sale Tax Act was rightly dismissed as barred by limitation can be referred to this Court under Section 11 of that Act?"

2. M/s. Badri Prasad Ayodhya Prasad were assessed to sales tax. They filed two appeals; one against the exemption order and the other against the assessment order. Their prayer was that they were entitled to get exemption on the turnover of food-grains for the entire year or at least from 30-7-1958. They challenged the assessment order on the ground that the tax determined was excessive. The two appeals were disposed of on 30th of April, 1961. M/s. Badri Prasad Ayodhya Prasad filed two revision applications before the Additional Judge (Revisions) on 23-6-1964 challenging the appellate orders passed by the appellate authority on 30th of April, 1961.

3. The delay in the filing of the revision applications was explained by the aforesaid assessee by saying that they did not receive copies of the appellate order and that they received the certified copies only on 12-6-1964 after they had applied for the same on 4th of June, 1964.

4. The Additional Judge (Revisions) Sales Tax, dismissed both the revision applications as barred by time. Thereafter M/s. Badri Prasad Ayodhya Prasad filed an application before the Additional Judge (Revisions) under Section 11 (1) of the U. P. Sales Tax Act (hereinafter referred to as the Act) for referring certain questions of law to this Court. The Additional Judge (Revisions) dismissed the application following the decision of this Court in Sukhan Lal Amar Nath v. Commr. of Sales Tax, S. T. R. No. 556 of 1961, D/- 18-2-1963 (All), holding "that no reference can be made when the revision is dismissed on ground of limitation." Thereafter M/s. Badri Prasad Ayodhya Prasad filed an application under Section 11 (4) for calling a statement of case and for the submission of certain questions of law by the Additional Judge (Revisions) to this Court for its opinion.

5. The applications came up for hearing before a Bench of this Court which was of the opinion that the decision in S. T. R. No. 556 of 1961, D/- 18-2-1963 (All) (Supra) "calls for reconsideration."

6. Having heard the learned counsel for the parties I am of the opinion that the question whether or not an application under Section 10 (3) of the Act was rightly dismissed as barred by limitation is a question of law arising out of the order of the Judge (Revisions).

7. My reasons are as follows:—

8. The question of limitation can be decided only by applying the law relating to limitation provided by the Act dealing with the matter. The question of limitation is, therefore, one of law.

9. Sections 10 (3) (i) and 10 (3-B) of the Act read:—

10(3)(i). "The Revising Authority or any Additional Revising Authority may, for the purposes of satisfying itself as to the legality or propriety of any order made by any appellate or assessing authority under this Act, in its discretion, call for and examine either on its own motion or on the application of the Commissioner of Sales Tax or the person aggrieved, the record of such order and pass such order as it may think fit."

10(3-B). "The application under sub-section (3) shall be made within one year from the date of service of the order complained of but the Revising Authority may on proof of sufficient cause entertain an application within a further period of six months."

10. It has been contended that the Judge (Revisions) can pass an order under Section 10 (3) (i) of the Act only if he has entertained the revision application considering the same to be within limitation. The submission is that a reference can be made to this Court by the revising authority only if the question of law arises out of the order passed under Section 10 (3) (i) of the Act and that inasmuch as the question of limitation would have been decided earlier, the question of limitation cannot be said to arise out of the order passed under Section 10 (3) (i) of the Act. For this reliance is placed upon S. T. R. No. 556 of 1961, D/- 18-2-1963 (All) (Supra). Desai, C. J., who spoke for the Court observed as follows:—

"The Judge (Revisions) had no jurisdiction to refer the question because even if whether the cause made out by the assessee was sufficient or not were a question of law, it was not one arising out of an order referred to in Section 10 (3). The scheme of Sections 10 and 11 is this. By sub-sec. (3) (i) of the Judge (Revisions) is given power, either on his own motion or on an application of the person aggrieved, to call for and examine the record of any order made by an assessing authority and pass such order as it may think fit. An application by the person aggrieved is required to be made, vide Section 3 (B), within one year or if the Judge (Revisions) allows for sufficient cause, within one and a half years. An order under sub-section (3) (i) can be passed by him only after he calls for the record and he can call for the record only after he has entertained the application, if made more than a year from the date of the impugned order, on sufficient cause being shown. Sub-section (3-A) requires that a copy of the order passed by him under sub-section (3) must be served upon the applicant and an application under Section 11 (1) is to be made within 126 days from the date of this service of the

order. Not only must the application be made within this period but also it must be for reference of a question of law arising out of that very order. It is, therefore, clear that if an application is time-barred and is rejected on that ground there can be no order contemplated by Section 10 (3), and no service of any order under sub-section (3-A) and therefore, no application under S. 11 (1) "

With great respect to Desai, C J I find myself in disagreement. Even an order dismissing the revision application on the ground of being barred by limitation would be passed under Section 10 (3) (i). Section 10 (3-B) only provides the period of limitation and does not require an order to be passed under that provision dismissing a revision application if it is time barred by limitation. The only provision which deals with the orders passed by the revising authority is S. 10 (3) (i).

I am, therefore, of the opinion that even when an application is dismissed as barred by limitation it would be an order under Section 10 (3) (i) and the question of limitation would arise out of an order passed by the revising authority under that section. The view that I am taking finds support from *Mela Ram and Sons v Commr of Income-tax, Punjab*, 29 ITR 607 = (AIR 1956 SC 367) where it was held by the Supreme Court that an order by the Appellate Assistant Commissioner holding that there was no sufficient reason for excusing delay under Section 30 (2) of the Income-tax Act and rejecting the appeal as time-barred is an order passed under Section 31 and an appeal lies from that order to the Appellate Tribunal.

11. In my opinion therefore, STR 556 of 1961, D/- 18-2-1963 (All) (Supra) does not lay down correct law.

12. I answer the question referred to us by saying that the question whether a revision application under Section 10 (3) of the Act was rightly dismissed as barred by limitation is a question of law arising out of the order of the Tribunal passed under Section 10 (3) (i) of the Act and for that reason a reference can be made by the revising authority to this Court under Section 11 of the Act. I would direct the parties to bear their own costs.

13. SATISH CHANDRA, J.: I agree.

14. GULATI, J.: I agree.

Answer accordingly.

AIR 1970 ALLAHABAD 268 (V 57 C 45)
FULL BENCH

S N DWIVEDI, G C MATHUR AND
GANGESHWAR PRASAD, JJ.

B. Malik, Petitioner v. Union of India
and another, Opposite Parties.

Civil Misc. Writ Nos 3006 of 1967, 1946
of 1968, D/- 10-9-1969.

EM/KM/E724/69/RGD/P

(A) Constitution of India, Art. 221 (2),
Proviso — Proviso should receive broad
construction — Date of appointment is
material in respect of judges right to pen-
sion — (Civil P. C. (1908), Preamble —
Interpretation of Statutes — Proviso).

Per Dwivedi, J.:— Though ordinarily a
proviso should receive strict construction,
the proviso to Art. 221 (2) should receive
broad construction not merely because it is
a part of the Constitution which generally
receives a liberal interpretation, but be-
cause it is designed to secure a historic
social interest in a democratic society. It
is the social interest in the independence
of Judges from men and their government.
If the Judges are to dispense with fear-
less and favourless justice between man
and man and between man and the gov-
ernment, they should be kept above the
throne by granting them complete econo-
mic security. (Para 4)

Accordingly to the proviso the date of
appointment, and not the date of retire-
ment, of a judge is material for ascertain-
ing his rights in respect of his pension. He
acquires a contingent interest in the plexus
of rights availing on the date of his ap-
pointment. (Para 8)

"Rights in respect of pension" is a wider
expression. It may include the quantum
of pension, the medium of payment, the
time of payment, the place of payment
and the remedies for enforcement of pay-
ment, etc. The words 'rights in respect
of' clearly bear out this inclusiveness of
the expression. (Para 9)

So Parliament cannot alter or change the
rights in respect of pension vesting in him
at the date of his appointment to the
detriment, or loss or injury to the inter-
est, of the Judge. But every sort of al-
teration or change will not be to his dis-
advantage. Only such alteration or change
as will materially and really diminish the
value of any right in respect of pension
is prescribed by the proviso. A formal
or unsubstantial change may be over-
looked. AIR 1955 SC 41, Applied.

(Para 10)

So the Court will examine the facts
and circumstances of each case to find out
if Parliament has changed the mere form
or the substance of the rights. If only
formal change has been made and the
substance of the rights is not affected
injuriously, the law should not be frowned
upon. (Para 11)

The complainant should bear the burden
of showing that Parliamentary alteration
or change is to his disadvantage. (para 12)

(B) Constitution of India Arts. 221 (2)
and 376 (1) and Schedule II, Part D —
Government of India Act (1935) Sec-
tion 221 (2) — Pre-constitution Judge —
Conditions in respect of his right to pension
is governed by Schedule II, Part D and
Government of India (High Court Judges)
Order, 1937 made under Section 221

Government of India Act, 1935 — Rights are not affected by High Court Judges (Conditions of Service) Act, 1954 — Lawful extinguishment of right to receive payment in sterling extinguishes accessory right to conversion, to receive payment in rupees.

By virtue of Art. 376 (1) a pre-constitution Judge became a Judge under the Constitution. Under Art. 221 (2) in respect of his right to pension, it is necessary to find out his rights in respect of pension at the time of his appointment as a Judge in the Republic of India, that is, on January 26, 1950. For this purpose reference has to be made to the Second Schedule to the Constitution. Clause 10(4) of Part D of the Schedule provided that the law in force immediately before the commencement of the Constitution would apply. So the 1937 order made under Section 221 of Government of India Act, 1935, applied to a Pre-constitution Judge continuing to be a Judge under the constitution. That was the law then in force.

(Paras 13, 27, 29)

Broadly speaking, the 1937 order provided in the third schedule, for the basic pension and the additional pension payable to a Judge on his retirement. The quantum of pension was expressed in sterling only. The pension was expressed to be annual. No place of payment of pension was expressly stated in the order. Nor did the Order expressly provide for remedies for the enforcement of payment of pension. The order did not fix the place of payment of pension in England.

(Paras 14, 15, 27)

Assuming that England was the place of payment of pension, Cl. 21 of 1937 Order provided that pensions expressed in sterling only, if paid in India, would be converted into rupees at such rate of exchange as the Governor-General might fix from time to time.

(Para 16)

The Parliament did in no way affect the rights under 1937 Order, in respect of pension by the High Court Judges (Conditions of Service) Act, 1954 which applied to the pre-Constitution judges, who were on the Bench at the time the Constitution came into force. The Act did not vary the rupee quantum of pension to his disadvantage at the time of its commencement. Mere change of the medium of payment from sterling to rupee, without any reduction in value, does not matter. It is one of the forms only. The change became necessary on India becoming a sovereign Republic. There is no difficulty about the place of payment as well. Most of the judges will, on their retirement, live in India now. It is to their advantage that they should draw their pension in India. Moreover, the Act does not fix the place of payment. There is no difficulty in paying the rupee pen-

sion to a judge outside India. The debtor is bound to find the creditor.

(Paras 19, 20, 28, 34, 55)

Assuming that Cl. 21 of 1937 order did give a right to convert sterling into rupees or a right to receive payment in rupees at a particular rate of exchange, it cannot fairly be complained that the vanishing of this right is to the Judges' disadvantage. This right is not absolute and self-sustaining. It is alternative and dependent. Under the 1937 order the principal right is the right to a pension in sterling. This principal right has lawfully been transmuted into a right to a pension in rupees by the 1954 Act. The transmutation is not to the disadvantage of the Judges. When the principal right is lawfully extinguished, the alternative right, which is necessary to the principal right, cannot survive. On the lawful extinguishment of the principal right to payment in sterling, the alternative right of conversion of sterling into rupees is automatically extinguished. Accessorium non ducit, sed sequitur suum principale. (1942) 316 US 502 = 86 Law Ed 1629, Rel. on.

(Para 21)

The proviso to Art. 221 (2), is not expressed in an absolute and forbidding language. It gives some freedom to Parliament to vary the rights in respect of pension. But it should not be understood that Parliament may make any kind of variance. All that is decided here is that the alterations made by the 1954 Act do not infringe the proviso to Art. 221 (2) in their application to the pre-Constitution Judges.

(Para 23)

High Court Judges (Condition of Service) Act is not violative of the proviso to Art. 221 of the Constitution, inasmuch as it does not vary the rights of the pre-Constitution Judges continuing in office at the time of the Act.

(Paras 34, 57)

Cases Referred: Chronological Paras

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| (1968) AIR 1968 SC 1372 (V 55) = | |
| (1968) 3 SCR 224, Taraknath Ghose v. State of Bihar | 49 |
| (1964) AIR 1964 SC 787 (V 51) = | |
| (1964) 5 SCR 431 R. P. Kapur v. Union of India | 49, 50 |
| (1959) AIR 1959 SC 564 (V 46) = | |
| 1959 Supp (1) SCR 928, Attar Singh v. State of U. P. | 10 |
| (1955) AIR 1955 SC 41 (V 42) = | |
| 1955-1 SCR 777, State of Bombay v. Bhanji Munji | 10 |
| (1955) AIR 1955 SC 817 (V 42) = | |
| 1955-2 SCR 541, State of Madras v. K. M. Rajagopalan | 39, 44, 49 |
| (1954) AIR 1954 SC 245 (V 41) = | |
| 1954 SCR, 786, State of Bihar v. Abdul Majid | 46 |
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| TLR 697, Kahan v. Federation of Pakistan | 11 |

- (1947) AIR 1947 FC 23 (V 34) =
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- (1938) AIR 1938 PC 26 (V 25) =
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Nicosia v. Ohanes Chakarian 43
- (1937) AIR 1937 PC 54 (V 24) =
1937 AC 587, Auckland Corpora-
tion v. Alliance Assurance Co. 43
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61 Ind. App. 190, Secy. of State v.
Parashram Madhavrao 46
- (1934) 1934 AC 122 = 103 LJ Ch
85, Adelaide Electric Supply Co.
v. Prudential Assurance Co. 43
- (1934) 1934 AC 176 = 103 LJ PC 41
Reilly v. The King 46
- (1933) 1933-1 Ch. 373 = 102 LJ Ch.
163, Broker Hill Proprietary Co.
v. Latham 43
- (1923) 1923-2 Ch. 468 = 93 LJ Ch. 263
In re Chestermans Trust's Mott v.
Browning 43
- (1921) AIR 1921 Cal 239 (V 8) =
ILR 48 Cal 886, Dekhari Tea Co.
Ltd. v. Assam Bengal Rly. Co.
Ltd. 43
- (1904) 194 U.S. 451 = 48 Law Ed.
1087 Davis v. Mills 11

J. Swarup, for Petitioner, H. N. Seth,
for Opposite Parties.

DWIVEDI, J.:— I have read the judg-
ments of my brothers G. C. Mathur and
Gangeshwar Prasad, and I entirely agree
with them that these petitions should be
dismissed. As the matter is obviously
of importance, I have thought it proper
to deal with certain aspects in my own
way.

2. The Constitutional History before
January 26, 1950 is not relevant. It is
not necessary to refer to it. By virtue
of Article 376 (1) all pre-Constitution
Judges became Judges under the Consti-
tution. Their salaries, allowances, and
rights in respect of leave of absence and
pension are determined not by any pre-
Constitution law of its own force but
under Article 221 of the Constitution. So
in respect of these matters there is no
difference between pre-Constitution Judges
and post-Constitution Judges. Both of
them derive rights from one common
source—Article 221.

3. Article 221 (1) settles the salary of
the Judges, Article 221(2) deals with their
allowances, and rights in respect of leave
of absence and pension. Our immediate
concern is with Article 221 (2) It reads:
“(2) Every Judge shall be entitled to
such allowances and to such rights in
respect of leave of absence and pension
as may from time to time be determined

by or under law made by Parliament and,
until so determined, to such allowances
and rights as are specified in the Second
Schedule.

Provided that neither the allowances of
a Judge nor his rights in respect of leave
of absence or pension shall be varied to
his disadvantage after his appointment.”

4. Now I am aware of the ordinary
rule of strict construction of a proviso.
But I think that this proviso should re-
ceive a broad construction. I say this not
merely because it is part of the Consti-
tution which generally receives a liberal
interpretation. I say this because it is
designed to secure a historic social inter-
est in a democratic society. It is the
social interest in the independence of
Judges from men and their government.
If the Judges are to dispense with fear-
less and favourless justice between man
and man and between man and the Gov-
ernment, they should be kept above ‘the
throne’ by granting them complete econo-
mic security. Their rights to economic
advantages should be fixed definitely at
the time of their call to office and should
be insulated from subsequent impair-
ment (See Holdsworth: Constitutional
Position of the Judges, (1932) 48 Law
Quarterly Review, R 25). When the Com-
missioners of Inland Revenue, purporting
to act under the vague words of the
National Economy Act, 1931, made a
deduction from the salary of the Judges,
Holdsworth warned:

“It is clear that if the English legal sys-
tem is to develop in the future on the
same high plane of intellectual excellence
as it has developed in the past, the stand-
ard of the intellect of the bench must
be maintained. And we should remember
that, if this standard of intellectual excel-
lence is not maintained, that law-abiding
instinct, which is the life-blood of civilisa-
tion, will be imperilled”. (Ibid, pp 32-33).

5. The Law Commission of India, com-
menting upon the devaluation of the
privileges of the Judges, said:

“It is necessary for all to realise that
the role assigned to the judiciary under
the Constitution is an essential one and
that the high ideals, the attainment of
which is aimed at by our Constitution,
social and economic justice, equality,
freedom and dignity of the individual,
will be impossible of achievement unless
the judiciary fearlessly discharges its
duties in every complaint of excess of
power by the legislatures or the execu-
tive brought to its notice.” (Report, Vol. I,
p. 81).

6. Recognising the society-shaping
role of the Judges the Constitution-
makers gave them greater security by
the proviso to Article 221(2) than the
Constitutions of U.S.A. and Australia. So
the wide words of the proviso should
receive their fullest scope.

7. According to the main part of clause (2) of Article 221 rights in respect of pension are to be determined by Parliament. Until Parliament has so determined, the rights are regulated by the Second Schedule. As soon as Parliament occupies the field, the Second Schedule ceases to operate even though it may continue in the Constitution as an inorganic fact of history.

8. According to the proviso the date of appointment, and not the date of retirement, of a Judge is material for ascertaining his rights in respect of his pension. He acquires a contingent interest in the plexus of rights availing on the date of his appointment. This is put beyond any shadow of doubt by the words 'after his appointment'. Any other view will rob the proviso of its real significance.

9. The expression 'rights in respect of pension' in the main part and in the proviso is important. The proviso immobilises governmental action against impairment of 'rights in respect of pension' and 'not merely pension.' 'Rights in respect of pension' is a wider expression. It may include the quantum of pension, the medium of payment, the time of payment, the place of payment and the remedies for enforcement of payment, etc. The words 'rights in respect of' clearly bear out this inclusiveness of the expression.

10. According to the Shorter Oxford Dictionary, the word 'disadvantage' means 'detriment', loss or injury to 'interest'. So Parliament cannot alter or change the rights in respect of pension vesting in him at the date of his appointment to the detriment, or loss or injury to the interest, of the Judge. But every sort of alteration or change will not, I think, be to his disadvantage. Only such alteration or change as will materially and really diminish the value of any right in respect of pension is prescribed by the proviso. Speaking about Articles 19(1) (f) and 31 Sri Justice Vivian Bose said: "These articles deal with substantial and substantive rights and not with illusory phantoms of title." *State of Bombay v. Bhanji Munji*, (1955) 1 SCR 777 at p. 780 = (AIR 1955 S.C. 41 at pp. 43-44). It seems to me that this rationalisation should also apply to the proviso to Article 221 (2). So a formal or unsubstantial change may be overlooked, (See *Attar Singh v. State of U.P.*, (1959) Supp. (1) SCR 928 = (AIR 1959 S.C. 564) for the application of the de minimis rule).

11. The Constitution of the U.S.A. absolutely forbids any impairment of the obligations of contract. Speaking in that context, Justice Holmes made this generalised remark: "Constitutions are intended to preserve practical and substantial rights, not to maintain theories". *Davis v. Mills*, (1904) 194 U.S. 451 = 48 Law Ed.

1067. So the Court will examine the facts and circumstances of each case to find out if Parliament has changed the mere form or the substance of the rights. If only formal changes have been made and the substance of the rights is not affected injuriously, the law should not be frowned upon.

12. Lastly, the complainant should bear the burden of showing that Parliamentary alteration or change is to his disadvantage.

13. It is now necessary to find out the rights of the petitioners in respect of pension at the time of their appointment as a Judge in the Republic of India, that is on January 26, 1950. For this purpose we have to refer to the Second Schedule to the Constitution. Clause 10(4) of Part D of the Schedule provided that the law in force immediately before the commencement of the Constitution would apply. So the 1937 Order applied to the petitioners. That was the law then in force.

14. Broadly speaking, the 1937 Order provided in the Third Schedule for the basic pension and the additional pension payable to a Judge on his retirement. The quantum of pension was expressed in sterling only. The pension was expressed to be annual. No place of payment of pension was expressly stated in the Order. Nor did the Order expressly provide for remedies for the enforcement of payment of pension.

15. It is said on behalf of the petitioners that the 1937 Order fixed the place of payment of pension in England. My brothers have rejected this argument, and I agree with them. But let us assume for the sake of argument that England was the place of payment of pension in the case of Sri Justice Malik and Sri Justice Desai.

16. Clause 21 of the 1937 Order provided that pensions expressed in sterling only, if paid in India, would be converted into rupees at such rate of exchange as the Governor-General might fix from time to time. It is said that Clause 21 gave them a right to convert the sterling pension into a rupee pension in India at the rate of exchange prescribed by the Governor-General from time to time.

17. These are all the rights claimed under the 1937 Order. How has Parliament affected these rights by the High Court Judges (Conditions of Service) Act 1954? Admittedly the Act applies to the petitioners.

18. The Act converts the sterling pension into a rupee pension. The pension is expressed to be annual. No place for payment of pension is expressly mentioned in the Act. There is indicated no procedure for enforcement of payment of pension.

19. Let us now compare the rights under the 1937 Order with the rights under the Act. In respect of the time of payment and remedies for enforcement of payment there is absolutely no difference. As regards the quantum of pension in terms of rupees, the Act on the date of its commencement, admittedly gave more to Sri Justice Malik than Clause 21 of the 1937 Order. No attempt has been made on behalf of Sri Justice Desai to show that the Act, at the relevant time, gave him less than the 1937 Order. So the Act did not vary the rupee-quantum of pension to their disadvantage at the time of its commencement.

20. Mere change of the medium of payment from sterling to rupee, without any reduction in value, does not matter. It is one of form only. The change became necessary on India becoming a Sovereign Republic. There is no difficulty about the place of payment as well. Most of the Judges will, on their retirement, live in India now. It is to their advantage that they should draw their pension in India. Moreover, the Act does not fix the place of payment. There is no difficulty in paying the rupee pension to a Judge outside India. The debtor is bound to find the creditor.

21. Assuming that Clause 21 does give a right to convert sterling into rupees or a right to receive payment in rupees at a particular rate of exchange, the petitioners cannot fairly complain that the vanishing of this right is to their disadvantage. This right is not absolute and self-sustaining. It is alternative and dependent. Under the 1937 Order the principal right is the right to a pension in sterling. This principal right has lawfully been transmuted into a right to a pension in rupees by the 1954 Act. The transmutation is not to the disadvantage of the petitioners. When the principal right is lawfully extinguished, the alternative right, which is accessory to the principal right, cannot survive. The accessory right does not lead but follows its principal. Thus when the obligation of the principal is extinguished by release or discharge, the obligation of the surety is also extinguished. The creditor cannot then complain that the extinction of the obligation of the surety impairs the obligation of his contract with the principal debtor. So here, on the lawful extinguishment of the principal right to payment in sterling, the alternative right of conversion of sterling into rupees is automatically extinguished. Accessorium non ducit, sed sequitur suum principale.

22. In *Faitoute Iron and Steel Co. v. Asbury Park*, (1942) 316 U.S. 502=86 L. Ed. 1629 the State law substituted the unsecured debts with a certain rate of interest by the same amount of the principal with a lower rate of interest on the

basis of a composition agreement consented to by 85% of the creditors. The appellant did not consent and complained of the impairment of the obligations of his contract. The Supreme Court sustained the law. Holding that it did not violate the Contract Clause of the Constitution, Justice Frankfurter said: "Particularly in a case like this are we in the realm of actualities and not of abstractions and paper rights, of what things are worth in dollars and cents, and in what is proposed to realise paper values." Dilating on the obscure distinction between changes of the substance of the contract and changes of the remedy he said: "The dividing line will remain obscure, if we deal with empty abstract rights instead of worldly gains and losses, if we indulge in doctrinaire talk about 'rights' and 'remedies', instead of giving these concepts a content that carries meaning to the understanding of men."

23. The State law was sustained in spite of the absolute command of the Contract Clause. The proviso to Article 221 (2), to some extent *pari materia*, is not expressed in as absolute and forbidding language. It gives some freedom to Parliament to vary the rights in respect of pension. But it should not be understood that Parliament may make any kind of variance. All that is decided here is that the alterations made by the 1954 Act do not infringe the proviso to Article 221 (2) in their application to the petitioners.

24. G. C. MATIUR, J.:— These two writ petitions have been filed by the two retired Chief Justices of this Court, Sri B. Malik and Sri M. C. Desai, claiming that they are entitled to have their pensions fixed in sterling and to be paid every month after converting the amount into rupees at the rates of exchange prevailing on the dates of the payments. Sri Desai has further claimed a right to receive his pension in sterling in U.K., if and when he so wishes.

25. Sri Malik was appointed Additional Judge of the Allahabad High Court on March 13, 1944, and was made permanent on May 1, 1944. He was appointed Chief Justice on October 15, 1947, and retired from that post on January 11, 1955. His pension was fixed at Rs. 15,590/- per annum and he has been drawing the same since 1955. After devaluation of the rupee in 1966, he wrote to the Central Government to fix his pension in sterling and to pay it after converting it into rupees at the devalued rate of exchange. He claimed that, instead of Rs. 15,590 per annum, he should be paid Rs. 24,724 56 P. per annum. The Central Government declined to accept this request.

26. Sri Desai was appointed Additional Judge on December 13, 1948, and was made permanent on January 24, 1950. He was

appointed Chief Justice on February 17, 1961 and retired from that post on January 25, 1966. His pension was fixed at Rs. 19,340/- per annum. He commuted part of his pension and, thereafter, received Rs. 80.5. 86 P. every month towards his pension. After devaluation, he also wrote to the Central Government, claiming to have his pension fixed in sterling and then converted into rupees at the prevailing rate of exchange. He also requested the Government to pay his pension for certain months in sterling in U.K. Both these requests were turned down by the Government.

27. Both the petitioners were appointed Judges when the Government of India Act, 1935, was in force. Section 221 of this Act made provision for the salaries etc. of Judges and was in these terms:—

"221. The Judges of the several High Courts shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may, from time to time, be fixed by His Majesty in Council:

Provided that neither the salary of a Judge, nor his rights in respect of leave of absence or pension, shall be varied to his disadvantage after his appointment."

Under this provision, the Government of India (High Court Judges) Order 1937, was made by an Order in Council dated March 18, 1937, which came into force from April 1, 1937. Paragraphs 17 to 24 of this Order dealt with pensions. Paragraph 17 laid down the requirements, upon the fulfilment of which a Judge became entitled to pension. Paragraph 18(a) provided that the pension payable to a Chief Justice or a Judge who was not a member of the Indian Civil Service, or to a Chief Justice of a High Court other than the Chief Court of Oudh who was a member of the I.C.S. was to be paid in accordance with Part I of the Third Schedule of that Order. Paragraph 18(b) provided that the pension of a Judge, who was a member of the I.C.S. and was not a Chief Justice of a High Court other than the Chief Court of Oudh, was to be paid in accordance with Part II of the Third Schedule.

Part I of the Third Schedule laid down certain rules for determining the basic pension and the additional pension to which a retired Judge was entitled and expressed the pension in sterling. Part II of the Third Schedule provided that the basic pension was to be the pension to which a Judge was entitled under the ordinary rules of the I.C.S. and his service as Judge was to be treated as service therein. It also laid down certain scales for the computation of the additional pension. Paragraph 19(2) provided that any service Judge, who was entitled to a pen-

sion under paragraphs 17 and 18 had a right to elect to receive the pension either under paragraphs 17 and 18 or under paragraph 19(3), sub-section (3) of paragraph 19 prescribed the pension which a service Judge was entitled to. The main part of paragraph 21, upon which some of the arguments turn, was in these words:—

"21. Pensions expressed in sterling only shall, if paid in India, be converted at such rate of exchange as the Governor-General may from time to time prescribe."

Paragraph 24 provided that the authority competent to grant pension to a Judge under this order was the Governor of the province in which the High Court was situated. These were the terms which governed the pensions of Judges before the Constitution came into force.

When India became a Sovereign Democratic Republic, it was open to it to dispense with the services of the Judges of the Crown or to re-appoint them or to continue them in its service. It was equally open to it, if it chose to continue or re-appoint the existing Judges in spite of the provisions of Section 221 of the Government of India Act, to prescribe new terms and conditions of service. The provision regarding the existing Judges in the provinces is contained in Article 376 of the Constitution which reads:

"376. (1) Notwithstanding anything in clause (2) of Article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution, shall, unless they have elected otherwise, become, on such commencement, the Judges of the High Court in the corresponding State and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 221 in respect of the Judges of such High Court.

Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court or as Chief Justice or other Judge of any other High Court.

(2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in Clauses (1) and (2) of Article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.

(3) In this article, the expression 'Judge' does not include an acting Judge or an additional Judge."

The Constitution thus virtually put an end to the terms of the existing Judges and appointed them to the High Courts in the corresponding States without following the procedure laid down for appointment of Judges in Article 217(1). Article 376 provides that, if such Judges do not elect otherwise, they shall become Judges of the High Courts in the corresponding States, even if they are not qualified under Article 217(2) to be appointed Judges under Article 217(1). Thus, after the Constitution, there were two types of Judges in the High Courts, i.e., (i) those who became Judges on 26-1-1950 under Article 376, and (ii) those who were appointed Judges under Article 217(1). Both types of Judges were entitled only to such salaries and allowances and to such rights in respect of leave of absence and pension as were provided for in Article 221. This Article states:

"221. (1) There shall be paid to the Judges of each High Court such salaries, as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

The Second Schedule deals with Judges of the High Courts in paragraph 10. Sub-paragraph (1) of paragraph 10 lays down the salary of the Chief Justices and other Judges. Sub-paragraph (2) provides for the payment of a special pay to the Judges and the Chief Justices, who were Judges and Chief Justices in the provinces before the Constitution, equal to the difference between their salary which they were getting and the salary fixed by sub-paragraph (1). Sub-paragraph (3) deals with travelling allowance. Sub-paragraph (4) makes provisions for leave and pension of Judges until they were determined by an Act of Parliament in these words:—

"10(4) — The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the High Court of any State shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the High Court in the corresponding Province."

Thus, under sub-paragraph (4), all the post-Constitution Judges were governed in respect of leave and pension by the 1937 Order. Parliament made provision

for determining the rights in respect of leave and pension by the High Court Judges (Conditions of Service) Act, 1954, which came into force on May 20, 1954. Chapter III of this Act deals with pensions. Section 14 provides that, subject to the other provisions of the Act, every Judge shall, on his retirement, be paid a pension in accordance with the scale and provisions laid down in Part I of the First Schedule. Section 15(a) provides that I.C.S. Judges shall, on retirement, be paid a pension in accordance with the scale and provisions mentioned in Part II of the First Schedule and Section 15(b) provides that other service Judges shall, on retirement, be paid a pension in accordance with the scale and provisions laid down in Part III of the First Schedule. The proviso to this section states.

"Provided that every such Judge shall elect to receive the pension payable to him either under Part I of the First Schedule or, as the case may be, Part II or Part III of the First Schedule, and the pension payable to him shall be calculated accordingly."

Section 18 provides that

"Pensions expressed in sterling only shall, if paid in India, be converted into rupees at such rate of exchange as the Central Government may, from time to time, specify in this behalf."

Section 21 makes the President of India the authority competent to grant pension to a Judge. Section 25(1) provides:

"25 (1)—Nothing contained in this Act shall have effect so as to give to a Judge who is serving as such at the commencement of this Act less favourable terms in respect of his allowances or his rights in respect of leave of allowance (including leave allowances) or pension than those to which he would be entitled if this Act had not been passed."

Part I of the First Schedule lays down the rules for computing the basic pension and the additional pension of Judges. Both types of pensions are mentioned in rupees only. Under Part II the basic pension of a Judge was to be the pension to which he was entitled under the ordinary rules of the Indian Civil Service if he had not been appointed a Judge, his service as a Judge being treated as service therein. The additional pension mentioned in this part was in sterling. Part III of the First Schedule is not relevant for these cases. The additional pension mentioned in Part II of the First Schedule was stated in sterling as, at the time when the Act was passed, the pension paid to the I.C.S. officers was expressed in sterling. In 1956, the rules for payment of pension to I.C.S. officers were amended and their pensions became payable in rupees in India. Thereafter in 1958, the 1954 Act was amended and the additional pensions

payable under Part II were also stated in rules.

28. It will be convenient to first deal with the contention of Sri H. N. Seth, learned counsel for the Union of India, that the pensionary rights of those Judges, who retired after the coming into force of the 1954 Act, are governed entirely by that Act and that they cannot claim anything under the 1937 Order. He says that, when Sri Malik became the Chief Justice and Sri Desai became a Judge, under Article 376 of the Constitution they lost all the benefits which had been given to them by the 1937 Order and their pensionary rights thereafter were to be determined by an Act of Parliament on the dates on which they retired. In other words, the right to receive pension accrues on the date of retirement of a Judge and, on January 26, 1950, the petitioners could not claim any benefit under paragraph 10(4) of the Second Schedule to the Constitution. This contention cannot be accepted. The proviso to Article 221 pre-supposes the existence and accrual of a right in respect of the pension on the date of appointment of a Judge and protects that right.

Take the case of a Judge appointed under Article 217(1) of the Constitution in 1951. Will he have no right in respect of pension on the date of appointment? If the answer is 'no', then there can be no right which can be protected by the proviso as the proviso protects only such a right as came into existence on the date of appointment. It is, therefore, clear that Judges appointed under Article 217(1) as well as those who became Judges under Article 376 of the Constitution acquired rights in respect of pension under paragraph 10(4) of the Second Schedule in accordance with the provisions of the 1937 Order.

29. It was urged by Sri Jagdish Swarup appearing for Sri Malik that paragraph 10(4) of the Second Schedule was in force on the date on which Sri Malik retired and, consequently, he was entitled to a pension in accordance with the provisions of the 1937 Order. This argument is based on the fact that paragraph 10(4) was actually deleted from the Second Schedule of the Constitution by the Constitution (Seventh Amendment) Act on October 19, 1956. It is urged that, in view of this fact, paragraph 10(4) remained in force till October 19, 1956, and was in force on January 11, 1955, when Sri Malik retired. This contention is without any force. Article 221(2) clearly provides that the pensionary rights of a Judge were to be governed by the provisions specified in the Second Schedule only till Parliament determined the rights in respect of leave of absence and pension by a law made by it. As soon as Parliament enacted the 1954 Act, the provi-

sions in the Second Schedule relating to leave and pension ceased to be operative. Though paragraph 10(4) was deleted from the Constitution on October 19, 1956, it ceased to have any force from May 20, 1954, when the 1954 Act came into force.

30. Before coming to the main contention raised by the petitioners, the contention of Sri Seth may be considered that Sri Desai could only claim a pension in accordance with the 1954 Act as he was appointed Chief Justice after the Act came into force. His submission is that Sri Desai was entitled to a pension as Chief Justice and no rights could have been acquired by him to this pension before he became Chief Justice. The argument is not sound. The pensions, which the 1954 Act contemplates are pensions of Judges, Chief Justices of High Courts are also Judges. Their tenure as Chief Justice is only taken into account in determining the additional pension payable to them as Judges. The date, on which a Judge becomes the Chief Justice, is irrelevant and the relevant date is the date on which he becomes a Judge. The right of a Judge to pension accrues on the date when he is appointed a permanent Judge. No separate right of pension accrues when a Judge is appointed Chief Justice. It is, therefore, not correct to say that Sri Desai became entitled to his pension as Chief Justice and from the date on which he was so appointed.

31. Both the petitioners have contended that the 1954 Act is applicable only to those Judges who were appointed after this Act came into force and that it did not apply to Judges who were appointed either before the Constitution came into force or before the Act came into force. In clause (g) of Section 2(1) of the Act, a Judge is defined to mean a Judge of a High Court and to include a Chief Justice, an acting Chief Justice, an additional Judge and an acting Judge of a High Court. Under Chapter III of the Act, pension is payable to every "Judge" who qualifies for it. Judges, who were either appointed or became Judges before the 1954 Act, are included in the definition of "Judge" and are entitled to get pension under Chapter III. There is no provision in the Act excluding from its operation Judges appointed before the Act came into force. Further, Section 25(1) of the Act, which has been quoted above, would have been wholly unnecessary if the Act did not apply to Judges serving on the date of commencement of the 1954 Act. It is quite clear that the Act was intended to apply to all Judges and Chief Justices who were serving on the date of the commencement of the 1954 Act.

32. The main contention of the petitioners is that the 1954 Act is violative of the proviso to Article 221 of the Consti-

tution inasmuch as it varies the rights of the petitioners in respect of their pensions to their disadvantage. It has first to be seen what were the rights in respect of the pensions enjoyed by the petitioner and then whether such rights have been varied to their disadvantage by the Act. The petitioners claim that, they acquired the following three rights under the 1937 Order:—

(i) The right to a certain amount of pension expressed in the 1937 Order in sterling;

(ii) the right to receive the pension in sterling; and

(iii) the right to receive the pension in sterling in UK

There is no doubt regarding the first right. The second right is sought to be spelt out of the words of paragraph 21 of the 1937 Order: "expressed in sterling only". It is urged that these words refer to the schedules of the 1937 Order and paragraph 21 directs that where the pension is expressed in the Order in sterling only and payment is made in India, then the amount should be converted into rupees at the prescribed rate of exchange at the time of each payment.

According to the respondent, these words refer to the Pension Payment Order and that paragraph 21 merely provides that, if in the Pension Payment Order, the pension is expressed in sterling, then, if payment is made in India, the amount shall be converted into rupees at the prescribed rate of exchange. Because of the use of the word 'only', the interpretation suggested by the petitioners is to be preferred. In the payment order, pension can be expressed either in sterling or in rupees but not in both and, therefore, the use of the word 'only' would be inappropriate in reference to the payment order. But, in the Third Schedule to the 1937 Order, pensions are stated in sterling only and, in the Fourth Schedule, in sterling as well as in rupees. It thus appears that paragraph 21 refers to the pensions expressed in sterling in the Third Schedule. In 1937, there were some Indian and some non-Indian Judges in the High Courts of the provinces. Some had to be paid pensions in rupees and some in sterling. It was for the Government to decide whether a Judge was to be paid in rupees or in sterling after taking into consideration his wishes in the matter and the fact whether, after retirement, he had settled in India or elsewhere. There is no express provision in the 1937 Order which confers upon Judges the right to receive their pension in sterling and to compel the Government to pay it in sterling. Paragraph 21 merely provides that where the pension is to be paid in India and the Order expresses the pension in sterling then the amount shall be entered in the payment order in rupees

after conversion at the prescribed rate of exchange. The pension was mentioned in the 1937 Order in sterling only for purposes of calculation and did not imply that the payment order had to be issued in sterling in every case. The pension could equally have been expressed in rupees in the 1937 Order and then there would have been a provision, corresponding to paragraph 21, providing that pensions expressed in rupees only, if paid outside India, shall be converted into sterling at the prescribed rate of exchange. It would not have meant that all payment orders were to be issued for payment in rupees. Therefore, paragraph 21 did not confer any right upon a Judge to insist upon receiving his pension in sterling. Even if it be held that, before the Constitution came into force, a Judge had the right under the 1937 Order to receive his pension in sterling, it is extremely doubtful whether that could be the position under the Constitution. When India became a Sovereign Democratic Republic on January 26, 1950, and its Constitution provided for the pensionary rights of its Judges in accordance with the 1937 Order, it could never have been intended that the pension was to be paid in a foreign currency. The 1937 Order was adopted as a transitional measure only for laying down the scales for the determination of pensions. It thus appears that, on the date on which the 1954 Act came into force, the petitioners had no right to receive their pensions in sterling.

33. Sri Desai claims the right to receive the pension in U.K. by virtue of paragraph 933-A of the Civil Service Regulations. The main part of this paragraph provided:

"When a pension is stated in sterling, it is payable at the Home treasury, or, at the option of the pensioner, if he be residing in India, at any treasury in India, converted into rupees at such rate of exchange as the Secretary of State in Council may by order prescribe."

This contention assumes that, under the 1937 Order, Sri Desai was entitled to his pension in sterling. Even if that were so, paragraph 933-A was not applicable and did not confer any right to receive the pension in U.K. Chapter XLVIII of the Civil Services Regulations, which contains paragraph 933-A, deals with payment of pensions. This paragraph was not applicable to Judges of the High Court as the rules relating to their pensions were contained in Chapter XXIII. It was also contended on behalf of Sri Desai that paragraph 933-A was made applicable to Judges of the High Courts by paragraph 26 of the 1937 Order. Paragraph 26 laid down subsidiary conditions of service of Judges. It provided that the conditions of service of a Judge shall be determined by the rules for the time being

applicable to a member of the I.C.S. holding the rank of Secretary to the Government of a province in which the principal seat of the High Court was situated. Paragraph 26 did not deal with any pensionary rights but with subsidiary rights, such as medical facilities etc. Then paragraph 933-A of the Civil Service Regulations could only be made applicable to Judges by paragraph 26 of the 1937 Order if it was applicable to members of the I.C.S. holding the rank of a Secretary. Paragraph 933-A was not applicable to members of the I.C.S. either, as the pensions of members of the I.C.S. were dealt with in Chapter XLIX of the Regulations. Clearly, paragraph 933-A of the Regulations was not applicable to High Court Judges and was not made applicable by paragraph 26 of the 1937 Order. On its own words, this paragraph was applicable when a pension was stated in sterling in the payment order; but the pension of Sri. Desai was not expressed in sterling in the pension payment order. This paragraph was deleted from the Regulations in the year 1956. Sri. Desai has failed to establish that he had any right to receive his pension in U.K.

34. It is now to be seen whether the 1954 Act varies the rights of the petitioners in respect of their pensions, which they had acquired before the Act came into force, to their disadvantage. The first right i.e. the right to a certain amount of pension expressed in sterling was certainly varied by the Act and was converted into a right to receive a certain amount of pension expressed in rupees. Mere change from a foreign currency into the Indian currency cannot be deemed to be an alteration which is to the disadvantage of an Indian citizen. It is not the case of the petitioners that the amounts mentioned in rupees in the 1954 Act are lower than the amounts which were mentioned in sterling in the 1937 Order if those amounts were converted into rupees at the rates of exchange prevailing in 1954. In fact, it is conceded by Sri Malik that the pension determined in rupees and expressed in his payment order is a little higher than what it would have been if it had been calculated in sterling under the 1937 Order and then converted into rupees in accordance with the rate of exchange prevailing on the date of the 1954 Act. The first right, which the petitioners had in respect of their pensions, though it has been varied by the 1954 Act, has not been varied to the disadvantage of the petitioners. Assuming that the petitioners also had the second right to receive their pension in sterling, it was quite competent for Parliament to convert this right into one of receiving their pension in rupees. As already observed, the conversion of a right to receive pension in sterling into a right to receive

pension in rupees cannot be said to be to the disadvantage of an Indian citizen. Even if there is a variation of the right of the petitioners to receive their pension in sterling that right has not been varied by the 1954 Act to the disadvantage of the petitioners. Once the right to receive the pension in sterling is legally converted into a right to receive pension in rupees, the further right, even if it existed, to receive the pension in U.K. would automatically disappear. The petitioners have not succeeded in establishing that the 1954 Act varies their rights in respect of pension to their disadvantage. The Act, therefore, cannot be said to be violative of the proviso to Article 221 of the Constitution and is a perfectly valid piece of legislation. It has now completely superseded paragraph 10(4) of the second schedule. After the Act came into force, the rights of the petitioners in respect of their pensions have to be determined in accordance with the provisions of this Act.

35. One more contention of Sri K. L. Misra on behalf of Sri Desai may be noticed. The contention is that neither Part I nor Part II of Schedule I of the 1954 Act applies to Sri Desai and as such the Act is inapplicable to him and his pensionary rights are still governed by the 1937 Order. It is said that Sri Desai was entitled to pension under the 1937 Order under paragraph 18(a) as a Chief Justice of a High Court, other than the Chief Court of Oudh, who was a member of the I.C.S. in accordance with the scale and rules in Part I of the Third Schedule of that Order and that, under the 1954 Act, he is entitled to his pension under Section 15(a) as a member of the I.C.S. in accordance with the scale and provisions in Part II of the First Schedule of the Act. It is contended that the provisions of Part II of Schedule I of the 1954 Act are less advantageous to Sri Desai than the provisions of Part I of Schedule III of the 1937 Order and, therefore, by virtue of the provisions of Section 25 of the Act, Part II of Schedule I of the Act is inapplicable to him.

It is further contended that Part I, on its own terms, does not apply to I.C.S. Judges and does not apply to Sri Desai, thus neither Part I nor Part II of the First Schedule of the Act applies to him. There is no foundation for this argument. There is no allegation in the writ petition of Sri Desai, alleging that the provisions of Part II of the First Schedule of the 1954 Act are less advantageous to Sri Desai than the provisions of Part I of the Third Schedule of the 1937 Order; nor is there any material on the record to substantiate this. Under the 1937 Order, Sri Desai was entitled to a pension under paragraph 18(a) in accordance with Part I

of the Third Schedule of the Order and he was given an election by paragraph 19(2) to receive his pension under paragraph 18(a) or paragraph 19(3). Under paragraph 19(3), the basic pension is the pension admissible to I.C.S. officers. Under the 1954 Act, Sri Desai is entitled under Section 15 to a pension in accordance with Part II of the First Schedule under which his basic pension would be the pension as an I.C.S. officer. The pension under Part II of Schedule I of the Act is comparable to the pensions under paragraph 19 (3) of the Order. Under the Act, he has been given a right to elect to receive the pension payable to him either under Part I of the First Schedule or under Part II. There was thus a similar election available to Sri Desai both under the 1937 Order and the 1954 Act. In his application for pension to the President of India made under the 1954 Act, Sri Desai elected to receive his pension under Part I of the First Schedule of the Act. There is nothing on the record to show that the pension, to which Sri Desai was entitled under the 1937 Order, was, in any way, more advantageous to him than the pension available to him under the Act.

36. There is no force in any of the points raised by the petitioners. Their pensions have been correctly determined in rupees under the 1954 Act. The writ petitions are accordingly dismissed. There will be no order as to costs.

37. GANGESHWAR PRASAD, J.:— I have had the benefit of reading the judgment of my learned brother G. C. Mathur and I agree that both these writ petitions be dismissed. I would, however, like to state my reasons for the proposed order in a separate judgment.

38. The circumstances in which the petitioner, Sri B. Malik and Sri M. C. Desai, filed their respective writ petitions and the reliefs claimed by them have been set out in the judgment of my learned brother and it is unnecessary for me to repeat them. I may only note that Sri B. Malik was appointed Additional Judge of the Allahabad High Court on March, 13, 1944, was made a permanent Judge on May, 1, 1944 and retired as Chief Justice of this Court on January 11, 1955, and Sri M. C. Desai was appointed Additional Judge of the Allahabad High Court on December 13, 1943, was made a permanent Judge on January 24, 1950 and retired as Chief Justice of this Court on January 23, 1960. The position thus is that both the petitioners were appointed Judges of High Court before and retired after the commencement of the Constitution of India and that by the time of their retirement the High Court Judges (Conditions of Service) Act, 1954 (hereinafter referred to as the 1954 Act) had come into force.

39. The first contention raised on behalf of the petitioners was that despite

the enactment of the 1954 Act their rights in respect of pension are governed by the provisions of the Government of India (High Court Judges) Order, 1937 (hereinafter referred to as the 1937 Order) because rights of a High Court Judge in respect of pension were governed by the said Order at the time of their appointment. For judging the soundness of this contention it is necessary to examine first the legal position in regard to the appointment and conditions of service of a High Court Judge at the time of the appointment of the petitioners and then the effect of subsequent changes in the constitutional structure of the country on that legal position. Sri B. Malik was appointed by His Majesty the King of Britain under Section 220 of the Government of India Act, 1935. Upon his appointment, he became entitled to such salaries and allowances and to such rights in respect of leave and pension as were fixed in the 1937 Order which was made by His Majesty in Council in exercise of the power mentioned in Section 221 of the said Act and of all other powers enabling him in that behalf. He had also a guarantee provided by Section 221 of the aforesaid Act that neither his salary nor his rights in respect of leave of absence or pension would be varied to his disadvantage after his appointment. With the coming into force of the Indian Independence Act, 1947, however, the position was radically altered. The changes brought about by the Indian Independence Act have been explained at length by their Lordships of the Supreme Court in *State of Madras v. K. M. Rajagopalan*, AIR 1955 SC 817 and I need only mention briefly such of them as were fundamental and pertained to High Court Judges. The basic change effected by the Indian Independence Act, in the words of their Lordships, was that "a completely independent Dominion of India was set up with a wholly independent legislature and with a completely independent Government free from any kind of fetters as regards their functioning either from the British Parliament or from the British Government although the Government of the Dominion "was still to be carried on in the name of His Majesty, the King of Great Britain by the Governor-General of India to be appointed by His Majesty." The Government of India Act and the Orders in Council made thereunder certainly remained operative, but that was not by their own force but because of sub-section (2) of S. 8 of the Indian Independence Act which was a part of the temporary provision made for the Government of the Dominion, and their operation also became subject to the conditions mentioned in that sub-section. In respect of the High Court Judges who had been appointed before the enforcement of the Act

provision was made in Section 10 (2) of the Indian Independence Act which was as follows:

"10(2) Every person who—

- (a) Having been appointed by the Secretary of State or Secretary of State in Council, to a civil service of the crown in India continues on and after the appointed day to serve under the Government of either of the new Dominions or any province or part thereof; or
- (b) Having been appointed by His Majesty before the appointed day to be a judge of the Federal Court or of any Court or of any Court which is a High Court within the meaning of the Government of India Act, 1935 continues on and after the appointed day to serve as a Judge in either of the new Dominions

shall be entitled to receive from the Governments of the Dominions and Provinces or parts which he is from time to time serving or, as the case may be, which are served by the Court in which he is from time to time a Judge, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or, as the case may be, as respects the tenure of his office, or rights as similar thereto as changed circumstances may permit, as that person was entitled to immediately before the appointed day."

Neither in Cl. (a) which dealt with persons who had been appointed to a civil service of the Crown in India by the Secretary of State or Secretary of State in Council nor in Cl. (b) which dealt with Judges of the Federal Court and High Courts appointed by His Majesty was there any indication as to who would continue to serve after the enforcement of the Act, and that was left to be provided by Orders of the Governor-General under Section 9 (1) (a) of the Act. The above feature of Cl. (a) of Section 10 (2) was pointed out in AIR 1955 SC 817 (Supra) and what is true of Cl. (a) is equally true of Cl. (b). Provision as to who would be entitled to the benefit of Section 10 (2) was made in Art. 7 (1) of the India (Provisional Constitution) Order, 1947 (hereinafter referred to as the 1947 Order) which was in the following terms.

"7(1) Subject to any general or special order or arrangements affecting his case, any person who immediately before the appointed day is holding any civil post under the Crown in connection with the affairs of the Governor-General or Governor-General in Council or of a Province other than Bengal or the Punjab, shall as from that day be deemed to have been duly appointed to the corresponding post under the Crown in connection with the

affairs of the Dominion of India or, as the case may be, of the province."

A High Court Judge appointed under the Government of the India Act certainly held a civil post under the Crown and, if this was not so, it was not at all necessary to provide in Section 253 of the Act that the provisions of Chapter 11 of Part X would not apply to High Court Judges. The result, therefore, was that subject to any general or special order or arrangements affecting his case a person appointed as a High Court Judge before the enforcement of the Indian Independence Act was deemed to have been appointed a High Court Judge upon the enforcement of the Act. Sri B. Malik thus held the office of a High Court Judge in the Dominion of India not under the appointment made in 1944 but under an appointment deemed to have been made upon the creation of the Dominion; and the conditions of his service became determinable in accordance with the Govt. of India Act and the 1937 Order as they stood after the enforcement of the Indian Independence Act and subject to the conditions laid down in S. 8 (2) of the said Act, and not in accordance with the Govt. of India Act and the 1937 Order as they stood in 1944.

40. So far as Sri M. C. Desai is concerned, he was appointed a High Court Judge in the interval between the enforcement of the Indian Independence Act and the commencement of the Constitution of India. At the time of his appointment as a High Court Judge, Section 220 of the Government of India Act as modified by the 1947 Order vested the power of appointing High Court Judges in the Governor-General and the appointment of Sri M. C. Desai as a High Court Judge was made by the Governor-General. The conditions of his service as High Court Judge, like those of Sri B. Malik after his appointment deemed to have been made upon the creation of the Dominion, had to be determined on the basis of the Government of India Act and the 1937 Order as they operated after the enforcement of the Indian Independence Act.

41. When the Constitution of India came into force and India became a Sovereign Democratic Republic and the break with the constitutional past which had been substantially effected by the Indian Independence Act became complete. The Government of India Act and the Indian Independence Act ceased to have effect and Art. 395 of the Constitution specifically repealed them. Under Art. 376 Judges of a High Court in any Province holding office immediately before the commencement of the Constitution "became" Judges of the High Court in the corresponding State on the commencement of the Constitution and "thereupon" became entitled to such salaries and allowances and to such rights in respect of

leave of absence and pension as are provided for under Art. 221. The appointment of such Judges under the Government of India Act was thus replaced by an appointment under the Constitution, and their rights in respect of salaries, allowances, leave of absence and pension as provided in Section 221 of the aforesaid Act were replaced by those provided in Article 221 of the Constitution. In Art. 221 as well there is a guarantee that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment, but the appointment spoken of in the Article is obviously an appointment under the Constitution and it cannot be construed as meaning, in relation to persons who became High Court Judges under Art. 376, their appointment under the provisions of the Government of India Act. Upon the commencement of the Constitution, therefore, the petitioners were appointed Judges of the High Court under the Constitution and on the terms mentioned in Art. 221. Article 221 lays down that Judges of each High Court shall be paid such salaries as are specified in the Second Schedule and each Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until, so determined, to such allowances and rights as are specified in the Second Schedule. Paragraph 4 of the Part 'D' of the Second Schedule as it originally stood provided that the rights in respect of leave of absence and pension of the Judges of High Court shall be governed by the provisions which immediately before the commencement of the Constitution, were applicable to the Judges of the High Court in the corresponding Province. It, therefore, followed that until the rights of High Court Judges in respect of pension were determined by or under law made by Parliament they were governed by the 1937 Order, but subject to the conditions mentioned in Section 8 (2) of the Indian Independence Act because immediately before the commencement of the Constitution, the operation of the Government of India Act and of the Orders in Council made thereunder was subject to those conditions. With the enactment of 1954 Act such a law came into existence and the rights of pension of High Court Judges became determinable thereafter in accordance with the provisions of the said Act. The operation of the 1954 Act is, however, subject to the guarantee provided by Art. 221 that the rights of the High Court Judge shall not be varied to his disadvantage after his appointment (which, as I have said above, means appointment under the Constitution) and its operation is also controlled by Section 25 of the Act itself

which says that nothing contained in it shall have effect so as to give to a Judge who is serving as such at the commencement of the Act less favourable terms in respect of his rights in respect of pension than those to which he would be entitled if the Act had not been passed. The result, therefore, is, that the rights of the petitioners in respect of pension are governed not by the 1937 Order but by the 1954 Act, unless it is shown that the said Act violates Art. 221 of the Constitution or that its application to their case is precluded by S. 25 of the Act.

42. It was urged on behalf of the petitioners that immediately before the commencement of the Constitution the petitioners had the right to receive pension in sterling and if this right of theirs was taken away by the 1954 Act there was a variation of their rights to their disadvantage. On behalf of Sri M. C. Desai it was also urged that he had the right to receive such pension in the United Kingdom as well and if the 1954 Act had the effect of depriving him of that right there was again a variation to his disadvantage. To me it appears that the right to receive pension in sterling and the right to receive it in the United Kingdom went together and they could not be dissociated from each other. Indeed, the former right depended on the latter and could be claimed only as long as the latter existed. Let us first find out the exact nature of the rights that High Court Judges had in the above respects before Independence.

43. For well known reasons, pensions of High Court Judges used to be fixed in sterling during the British rule. In the High Court Judges (India) Rules, 1922 pensions were fixed only in sterling and Rule 25 (b) provided that pensions paid in India shall be issued in rupees and converted at such rate of exchange as the Secretary of State in Council may by order prescribe. In the 1937 Order injury gratuities and pensions mentioned in the Fourth Schedule were expressed both in sterling and in rupees but the pensions mentioned in the Third Schedule, which is the relevant Schedule, were expressed in sterling only; and paragraph 21 of the Order provided that pensions expressed in sterling only shall, if paid in India, be converted at such rate of exchange as the Governor-General may from time to time prescribe. At the time when the 1937 Order was made India was a Dependency of the British Crown and a High Court Judge in India held his office under an appointment made by His Majesty the King of Britain. A High Court Judge had therefore, the right to receive his pension in the United Kingdom as well unless the right was expressly denied to him by the

law governing his pension. That right was implicit in the very nature of his appointment and the right to receive payment in sterling when the payment was claimed in the United Kingdom was its necessary incident. These rights were postulated and not conferred by the 1937 Order, unless Paragraph 933-A of the Civil Service Regulations, which will be dealt with later, is deemed to have been made a part of it by virtue of paragraph 26 of the Order. In any view of the matter, however, the Third Schedule to the Order only provided the measure of the pensions in terms of sterling and not the currency in which they were payable. In *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, 1934 AC 122, Lord Russell of Killowen emphasized the distinction between a unit of account and a legal tender which corresponds to the unit. The question in that case was whether the debt involved therein had to be paid in English or in Australian currency. Lord Russell said:

"The question then is, how can the Company discharge that indebtedness? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account."

In *Ottoman Bank of Nicosia v. Ohanes Chakarian*, AIR 1938 PC 26 the Privy Council observed that the principles laid down by the House of Lords in *Adelaide's* case were of general application and, after quoting the above statement of Lord Russell, proceeded to say:

"The same view was expressed by this Board in a similar case, (1937) AC 587 at p. 605 = (AIR 1937 PC 54 at p. 59) where it is stated:

'Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connecting the appropriate currency.'

'The unit of account must accordingly be applied to the appropriate currency which may vary from time to time. In the *Adelaide's* case Lord Wright in his speech, p. 160, quoted as a correct statement of the law what was said by Maugham, J. in (1933) 1 Ch 373 at p. 391."

'A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is *prima facie* a contract to pay money according to the currency of the country where payment has to be made.'

These words are equally true of a case like the present where the question does not turn on a conflict between the currency of one country and another, the

unit of account being identical in both, but where there has been a change in the currency of the country concerned. That type of case was dealt with in (1923) 2 Ch 466, where a mortgage debt in German reichsmarks contracted while Germany was on gold was held by Russell, J. and by the Court of Appeal to be dischargeable in depreciated German reichsmarks without reference to what country was the place of payment. Lord Sterndale said at p. 478, 'if their (i.e. the mortgagees') rights are to be defined by German law, it must be that law as it exists from time to time.'

It is true that *Adelaide's* case and the other cases referred to in the above passage dealt with contracts and not with statutory provisions, but there seems no reason why the principle laid down in the above cases should not also apply to statutory provisions, and it will be seen that in *Ottoman Bank* case the Privy Council applied the principle to the interpretation of pension regulations of the Imperial Ottoman Bank established by a Turkish Imperial Firman. In the light of these decisions it seems clear that the Third Schedule to the 1937 Order fixed the unit of account in terms of the Sterling but it did not have the effect of making the pensions payable only in sterling. The pensions were payable in the currency of the United Kingdom if paid in the United Kingdom and in the country of India if paid in India. Sterling was certainly a currency of His Majesty the King of Great Britain but it was not an Indian currency. Even in absence of paragraph 21 of the 1937 Order, therefore, the pensions would not have been payable in sterling in India, and the object behind the paragraph essentially was to lay down how the rate of exchange was to be determined at the time of the payment, if made in India. Reference in this connection may be made to *Dekhri T. Co. Ltd. v. Assam Bengal Rly. Co., Ltd.*, AIR 1921 Cal 239 which suggests that even before independence Courts in India could give judgment in terms of only one currency i.e. rupees. However, the paragraph made it clear that the pensions, if paid in India, would be payable only in rupees and at the rate of exchange indicated therein. The position, therefore, was that the right to receive in sterling the pensions mentioned in the Third Schedule to the 1937 Order was entirely dependent upon the right to receive them in the United Kingdom and the latter right flowed from the facts that India was a Dependency of the British Crown, a High Court Judge was appointed by His Majesty and King of Great Britain and the pensions were fixed by an Order of His Majesty in Council. Of course, if paragraph 933-A of the Civil Service Regulations is deemed to have been a part of the 1937 Order there was a

specific provision conferring the right to receive the pensions in sterling at the Home treasury.

44. Ignoring for the time being Paragraph 933-A of the Civil Service Regulations, let us see whether the right to receive pension in sterling survived the enforcement of the Indian Independence Act and the creation of the Dominion of India. In AIR 1955 SC 817 (supra) it was observed by their Lordships of the Supreme Court that the question as to whether the Indian Independence Act brought about a full Sovereign State for each and every purpose is one of considerable importance and is not free from difficulty and their Lordships did not think it necessary to decide the question in that case, but whatever the answer to that question might be, it cannot be disputed that the Dominion of India was "completely independent" with wholly independent legislature and with a completely independent Government free from any kind of fetters as regards their functioning either from the British Parliament or from British Government." Appointment of High Court Judges made by His Majesty and the King of Great Britain therefore, ceased to be effective and the Judges appointed by His Majesty, if they continued in services derived their office not from the appointment made by His Majesty but from the appointment deemed to have been made under Art 7 (1) of the 1947 Order. Their rights in respect of pension could, under Section 221 of the Government of India Act as modified by the 1947 Order, be fixed by the order of the Governor General and, under Art. 5 of the 1947 Order, the 1937 Order was to be deemed as having been made by the Governor General. As to High Court Judges appointed after the enforcement of the Indian Independence Act and the creation of the Dominion of India, they were appointed by the Governor-General and their rights in respect of pension, like those of High Court Judges deemed to have been appointed as aforesaid, were governed by the 1937 Order deemed to have been made by the Governor-General. Thus the basis on which the right to receive pensions in the United Kingdom rested or could rest completely disappeared. Payment of the pensions could therefore, no longer be claimed in the United Kingdom and naturally it could not then be claimed in sterling. It is true that the government of the Dominion continued still to be carried on in the name of His Majesty the King of Great Britain by the Governor-General of India appointed by His Majesty but this, as their Lordships of the Supreme Court said in Rajagopalan's case, "was no more than a symbol of the continued allegiance to the Crown."

45. Section 7 (a) of the Indian Independence Act said that after the setting up of the Dominion of India His Majesty's Government in the United Kingdom had no responsibility as respects the Government of the territories of the Dominion, and proviso (b) to sub-section (2) of Section 8 of the Act said that nothing in the sub-section would be construed as continuing in force after the setting up of the Dominion any form of control by His Majesty's Government in the United Kingdom over the affairs of the said territories. It is, therefore, manifest that after Independence the right to receive pension under the 1937 Order from His Majesty's Government terminated and, with the termination of that right, the right to receive pension in the United Kingdom and in sterling, also terminated, because the latter right was founded only on the former. It is true that Sch. III of the 1937 Order which expressed pensions in sterling only still remained a part of the Order without any modification, but, as I have said above, the Schedule only fixed the unit of account in terms of sterling, and since quite a number of retired High Court Judges were paid their pensions in the United Kingdom because they lived there after retirement that unit of account was left unchanged.

46. We may then consider whether the right to receive the pensions in sterling was enforceable through court before Independence and, if so, whether it remained so enforceable after Independence. In India not only were the pensions, not payable in sterling by reason of paragraph 21 of the 1937 Order but no kind of suit relating to the pensions could be entertained by Civil Court on account of the bar imposed by Section 4 of the Pensions Act, 1871. Even if any matter connected with the pensions went before Civil Court on a certificate as provided by Section 6 of that Act no decree directing payment of the pensions in sterling could be passed. Indeed, it appears that under Section 6 only a declaration of right could be obtained but not an order for payment of the pensions either in sterling or in rupees vide Secy. of State v. Parashram Madhavrao, AIR 1934 PC 108. The remedies provided by the Constitution of India were not then available, and the position thus was that the right to receive the pensions in sterling was not enforceable through Indian Courts. The only means of enforcement of the right to receive the pensions in sterling before Independence could, therefore, be a legal proceeding in the United Kingdom. The Crown Proceedings Act, 1947, came into force on January, 1, 1948 i.e. after the enforcement of the Indian Independence Act, but from what has been observed in the State of Bihar v. Abdul Majid, AIR 1954 SC 245. Punjab Province v. Tara Chand,

AIR 1947 FC 23 and *Reilly v. The King*, 1934 AC 176 it may be concluded that an action was maintainable in the United Kingdom for the recovery of the pensions. The right to receive the pensions was a statutory right conferred by Section 221 of the Government of India Act read with the 1937 Order as such, it may be said, on the authority of the above mentioned cases, that it was enforceable through a Court of law in the United Kingdom. The considerations on which, the unpaid salary of an Indian Civil Servant was not held to be a debt "owing or occurring" from the Crown in *Lucus v. Lucas* and High Commr. for India, (1943) 2 All ER 110 a case which was not regarded in the AIR 1954 SC 245 (Supra) and AIR 1947 FC 23 (Supra) as having been correctly decided could have no application to such a right. In any case the remedy of a Petition of Right was available in the United Kingdom. After Independence, however, the situation completely changed.

46-A. In India the right to receive the pensions in sterling was, as has been seen unenforceable even before Independence. After Independence unenforceability of the right became still clearer. Whatever might have been the position in regard to the power of an Indian Court to pass a decree in terms of sterling prior to Independence, it seems undeniable that no such decree could be passed after Independence. Dicey's Conflict of Laws (Seventh Edition) contains the following statement at page 909:

"Irrespective of the currency in which a debt is expressed or damages are calculated (money of account), the currency in which the debt or liability can and must be discharged (money of payment) is determined by the law of the country in which such debt or liability is payable, but (semble) the rate of exchange at which money of account must be converted into a money of payment is determined by the proper law of the contract or other law governing the liability".

Again we find the following statement at page 914:

"English Court cannot give judgment for the payment of an amount in foreign currency. A debt which is expressed and damages which are calculated in a Foreign currency must, therefore, be converted into sterling for the purposes of litigation in England irrespective of the place at which they are payable and irrespective of the law governing the substance of the obligation."

In Cheshire's Private International Law (Sixth Edition) the position has been stated in the following words at page 708:

"Again, the view taken in England, though not shared by several foreign countries, is that an English Court cannot order payment except in English currency."

47. Performance of an obligation to pay the pensions in sterling in the United Kingdom, became all the more incapable of being enforced through an Indian court after Independence. Apart from the fact that such an obligation no longer existed, the Dominion of India could not be compelled by an Indian court to perform an act which became one of extra-territorial nature after Independence. At any rate no decree enjoining performance of such an act could be passed by a Civil Court in India by reason of the provisions of the Pensions Act, 1871. As to enforceability of the right in the United Kingdom, under Section 7(a) of the Indian Independence Act, His Majesty's Government ceased to have any responsibility as respects the government of the territories of the Dominion of India and nothing could thereafter form the basis for the institution of a legal proceeding in respect of the pensions in the United Kingdom. Further, under Section 176 of the Government of India Act as modified by the 1947 Order the authority to be sued in respect of any claim against the Government of India was the Dominion of India or the Province, according as the suit related to the sphere of the one or the other, and no suit was maintainable against the Secretary of State in Council. Even against the Dominion of India or any Province no suit or other legal proceeding was entertainable in a Court in the United Kingdom. In Dicey's Conflict of Laws (Seventh Edition) it has been stated at page 129 as a general rule of jurisdiction that the English Court "has no jurisdiction to entertain an action or other legal proceeding against any foreign State, or the head, or government or any department of the government of any foreign State", and the comments on the above rule at pages 133 and 134 show that the Dominion of India was a foreign State for the purpose of jurisdictional immunity. Reference in this connection has to be made to *Kahan v. Federation of Pakistan*, (1951) 2 K.B. 1003, where the question whether the Federation of Pakistan was a foreign State for the purpose of a suit in English Courts arose for consideration. Slade, J. against whose judgment appeal was taken to the Court of Appeal had, in accordance with the practice long recognized in cases in which the status of a defendant claiming to be a Sovereign State was in question, sought the advice of the Secretary of State for Commonwealth Relations. The advice that had been received was that under the provisions of the Indian Independence Act, 1947 and by reason of the Constitutional Conventions, "Pakistan is a self-governing country within the British Commonwealth of Nations, Sovereign both in internal and in external affairs, linked with the United Kingdom

through a common allegiance to the Crown, but in other respects independent of it", and the advice had been finally summed up by saying: "In the view of the Secretary of State, therefore, Pakistan is an independent Sovereign State. Slade J., again following the recognized practice had accepted the advice or certificate as conclusive evidence for the purpose of that case and had dismissed the appeal preferred before him against an order of the Master. Before the court of Appeal the counsel for the appellant accepted the conclusiveness of the certificate issued by the Secretary of State and the appeal was decided on the footing that the status of the Federation of Pakistan was equivalent to that of a foreign State. Dealing with this aspect of the case Jenkins L. J. observed.

"No convincing reasons were adduced before us why such a certificate should not be just as conclusive in the present case as it would be in the case of a foreign sovereign State; but the matter was not fully argued and it is not necessary for the purpose of the present appeal to express any concluded opinion upon it, for ultimately both parties agreed that for the purposes of this appeal the Federation of Pakistan could be taken to be in the position of a foreign sovereign State so far as the question of immunity is concerned."

Thus there seem to be no doubt about the fact that payment of the pension in sterling could not be enforced after Independence, either through an Indian Court or through a Court in the United Kingdom.

48. We now proceed to examine whether as contended by Sri Kanhaya Lal Misra, learned counsel for Sri M. C. Desai paragraph 933-A of the Civil Service Regulations should be deemed to have been incorporated in the 1937 Order by virtue of paragraph 26 of the Order.

The relevant portion of Paragraph 933-A of the Regulations was in the following terms:

"When a pension is stated in sterling, it is payable at the Home treasury, or at the option of the pensioner, if he be residing in India at any treasury in India, converted into rupees at such rate of exchange as the Secretary of State in Council may by order prescribe".

Paragraph 26 of the 1937 Order which, according to the learned counsel, made the aforesaid paragraph of the Civil Service Regulations a part of the 1937 Order ran as follows:

"26. Subject to the provisions of this order and of any other order in council made under the Act, the conditions of service of a Judge shall be determined by the rules for the time being applicable to a member of the Indian Civil Service holding the rank of Secretary to the Gov-

ernment of the Province in which the principal seat of the High Court is situated:

Provided that nothing in this paragraph shall have effect so as to give to a Judge who is a member of a civil service of the Crown in India less favourable terms in respect of any of his conditions of service than those to which he would be entitled as a member of his civil service if he had not been appointed a Judge his service as Judge being treated as service for the purpose of determining those terms."

The above paragraph of the Order was placed under the heading 'Subsidiary Conditions of Service' and not under the heading 'Pension' which contained paragraphs 17 to 24. It will be noticed that Section 221 of the Government of India Act did not speak of conditions of service although it cannot be denied that provisions relating to salaries, allowances, leave and pension would certainly constitute conditions of service. What meaning, then the words subsidiary conditions of service bear? While answering that question it will be useful to refer to the relevant provisions of the Indian Constitution and the 1954 Act first. Article 221 of the Constitution too does not use the words "condition of service" and the things which, according to the Article were left to be determined by law made by Parliament, were allowance and rights in respect of leave of absence and pension. The 1954 Act which has been called the High Court Judges (Conditions of Service) Act deals not only with allowance and right in respect of leave of absence and pension but also with other conditions of service i.e., provident fund (Section 20) and facilities for medical treatment (Section 22). Further, it empowers the Central Government to make rules not only in regard to other conditions for medical treatment but also in regard to other conditions of service and any other matter which may be prescribed (Section 24). In enacting the 1954 Act Parliament did not, therefore, confine itself to matters mentioned in Article 221 of the Constitution and provided for other conditions of service as well. For ascertaining the condition of the things prevailing at the time of the enactment, reference may be made to Objects and Reasons attached to the Bill, relating to the Act. In clause (c) of paragraph 3 of the Statement it was said.

"Special provision has been made to govern certain other subsidiary conditions of service, such as medical attendance facilities which are enjoyed by all Government servants and which, upto the commencement of the Constitution were admissible also to High Court Judges under paragraph 26 of the Government of India (High Court Judges) Order, 1937."

This clause indicates that conditions of service in regard to matters other than allowances, leave of absence, and pensions were treated as 'other subsidiary conditions of service' and provisions in regard to such subsidiary conditions of service were intended to be a substitute for the provision in Paragraph 26 of the 1937 Order. Going back to the 1937 Order, it would be seen that the Order was made by His Majesty not merely in exercise of the power mentioned in Section 221 of the Government of India Act but also in exercise of "all other powers enabling him in that behalf". It cannot, therefore, be said that the provisions made in the Order must be construed as provisions relating only to salaries, allowances, leave and pensions. The question then is whether Paragraph 26 was intended to provide only for matters other than salaries, allowances, leave and pensions or embraced the above matters as well. The answer to the question is not free from difficulty. The words "subject to the provisions of this order" in paragraph 26 and the proviso to the paragraph may be construed as lending support to the argument that unless the Order and rules applicable to members of the Indian Civil Service were to operate to some extent in the same sphere the words quoted above and the proviso were unnecessary. The words might, however, also have been used only to mark out the separate spheres in which Order in Council and rules referred to in paragraph 26 were to respectively operate, and the proviso might have been intended to ensure to the members of the service mentioned therein the conditions of that service. It will be noticed that wherever the 1937 Order intended to provide that the provisions in regard to any matter specifically dealt with by it should be supplemented by rules in that behalf governing another service the order explicitly said so. In regard to pensions too this was done in paragraphs 20 and 23. It is significant in this connection that the High Court Judges (India) Rules, 1922, contained no provision corresponding to paragraph 26 of the 1937 Order. It, therefore, appears that paragraph 26 was really intended for matters other than salaries, allowances, leave and pensions. In any case, in view of the specific provision, made in paragraph 21 of the Order, paragraph 933-A of the Civil Service Regulations could not, in my opinion, be read as a part of the 1937 Order by aid of paragraph 26 of the Order.

49. But even if paragraph 933-A of the Civil Service Regulations were to be regarded as having been incorporated in the 1937 Order the effect only was that the right to receive in sterling at the Home treasury pensions mentioned in sterling was explicitly conferred by the

1937 Order, and the question would still be whether that right remained available after the Indian Independence Act. Sec. 8(2) of the Act would, I think, furnish a clear answer to that question. The relevant portion of the Section 8(2) ran as follows:

"8(2). Except in so far as other provision is made by or in accordance with a law made by the Constitution Assembly of the Dominion under sub-section (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935, and the provisions of that Act and of the Orders in Council, rules and other instruments made thereunder, shall so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in Orders of the Governor-General under the next succeeding section, have effect accordingly."

In the above provision, the words "as nearly as may be" and "as far as applicable" carried much more than their usual significance because the Indian Independence Act completely changed the political status of the country and its constitutional structure. The aforesaid words had the effect of bringing laws made in a different setting into harmony with the new situation, and rendered such provisions thereof as were inconsistent with or unworkable or inappropriate in the changed political and constitutional frame, automatically inapplicable or applicable with modifications, without having been formally deleted or modified. If the 1937 Order did not confer the right to receive, pensions in sterling and only presupposed the existence of such a right the basis of that presupposition was destroyed in consequence of the changes brought about by the Indian Independence Act. And if the Order is to be interpreted as having been supplemented by paragraph 933-A of the Civil Service Regulations the aforesaid paragraph became inconsistent with the provisions of the Indian Independence Act and inapplicable to the new situation. Obviously the pensions could not be payable "at the home treasury" after Independence. But what is more important and goes to the root of the matter is that upon the enforcement of the Indian Independence Act the Indian Civil Service automatically came to an end. In *Tarakanath Ghose v. State of Bihar*, AIR 1968 S.C. 1372, their Lordships of the Supreme Court held:

"When Independence was achieved by India, the Secretary of State and the Crown ceased to have any authority in India, so that no service of the Secretary of State or the Crown could continue

thereafter. Under the agreement that was entered into by the new Indian Government with the British Government, provision was made that members of the previous Secretary of State Service could continue to serve the Government of India or a Provincial Government and certain rights were preserved to them if they continued to do so. There was, however, no provision that the old Secretary of State Service would continue so that with the passing of States, Services like the Indian Civil Service and the Indian Police Service ceased to exist."

Their Lordships also referred to the following observations made in AIR 1955 S.C. 817:—

"Thus the essential structure of the Secretary of State Services was altered and the basic foundation of the contractual-cum-statutory tenure of the service disappeared. It follows that the contracts as well as statutory protection attached thereto came to an automatic and legal termination."

The Indian Administrative Service, as observed in the majority judgment delivered by Wanchoo, J. (as his Lordship then was) in *R. P. Kapur v. Union of India*, AIR 1964 S.C. 787, was legally and formally constituted in 1951. The unsettled condition of things relating to All India Service obtaining even after the commencement of the Constitution may be gathered from Statement of Objects and Reasons appended to the Bill which resulted in All-India Services Act, 1951. It was to remove those conditions which were described as "neither satisfactory nor quite justifiable" and "to fill a constitutional lacuna without proceeding to incorporate any detailed provisions" that the Bill was introduced. The Indian Administrative Service (Recruitment) Rules were, however, made in 1954 and till then the members of former Indian Civil Service were not, to use the words of their Lordships of the Supreme Court in AIR 1963 S.C. 1372 (supra), members of "any Regularly constituted Service". The result, therefore, was that after the enforcement of the 1947 Act paragraph 933-A of the Civil Service Regulations could not constitute a part of the 1937 Order and Sri M. C. Desai (who was a member of the Indian Civil Service before Independence) was not a member of any regularly constituted service at the time of his appointment as High Court Judge.

50. The effect of Section 10(2) of the Indian Independence Act, which has been referred to earlier, has to be considered in this connection as well. Under that provision Sri Desai, as a member of the former Indian Civil Service was, upon his appointment which will be deemed to have been made by the Government of India after Independence, vide AIR 1964

S.C. 787 (supra), entitled to receive from the Dominion of India the same conditions of service as respects remuneration, leave and pension as he was entitled to on August 14, 1947. But so long as he was not a member of any regularly constituted service those provisions of the Civil Service Regulations which related to the Indian Civil Service did not apply to him. It is another matter altogether that for the purpose of ascertaining what rights in respect of pension were secured to Sri Desai by Section 10(2) of the Indian Independence Act the Civil Service Regulations had to be seen, but they had ceased to be actually operative in his case. When Sri Desai was appointed a High Court Judge his rights in respect of pension changed; and since at that time the rights were not governed by the Civil Service Regulations (so far as they were applicable to the Indian Civil Service), and paragraph 933-A thereof could not on any reading of paragraph 26 of the 1937 Order, then supplement the Order, the right mentioned in paragraph 933-A was never available to him as a High Court Judge.

In the case of Sri Malik it may be said that if paragraph 933-A of the Civil Service Regulations had to be read with the 1937 Order and regarded as supplementing it he was entitled to the benefit of that provision on August 14, 1947. But the question is whether he "received" a different condition of service as respects his pension. The 1937 Order still governed his rights in that matter, and his right to receive pension in sterling ceased to exist not because the right was taken away or not granted by the Government of India but because such a right could not in the very nature of things, continue after the transfer of power by the British Government and it also became unenforceable.

51. The result of the foregoing discussion is that neither Sri Malik nor Sri Desai had the right to receive pension in the United Kingdom or in sterling at the time of their respective appointments, and the provision which, immediately before commencement of the Constitution, governed their rights in respect of pension did not entitle them to such a right. It is true that even after Independence payment of pensions in sterling continued to be made to retired High Court Judges residing in the United Kingdom and desiring payment to be made there but this became only a matter of international comity and a concession to suit the convenience of persons who had served as High Court Judges and as it ceased to be a matter of any legal obligation.

52. By virtue of paragraph 10(a) of Part D of the Second Schedule to the

Constitution the position in respect of the right of pension of High Court Judges as existing immediately before the commencement of the Constitution continued till the enforcement of the 1954 Act. The pensions payable under Part I of the First Schedule of the Act were expressed in rupees, and the pensions payable under Part II of the Schedule still remained expressed only in sterling because of the reference therein to rules of the Indian Civil Service. Section 18 of the Act corresponding to paragraph 21 of the 1937 Order was enacted to provide that pensions expressed in sterling only shall if paid in India, be converted into rupees at such rate of exchange as the Central Government may from time to time specify in that behalf. The section did not have the effect of creating a right to receive such pensions outside India or in any other currency nor did it postulate the existence of such a right. The unit of account in respect of pensions payable to a certain class of High Court Judges having continued to be expressed in sterling it was necessary to provide the mode of determining the rate of exchange and that was done by section 18. The pensions that remained expressed in sterling were, however, neither payable in the United Kingdom nor in sterling. It is true that paragraph 933-A of the Civil Service Regulations was not formally deleted from the Regulation till 1956, but for the reasons that I have already given lost its force and become inapplicable upon the enforcement of the Indian Independence Act. I may here mention that even though a law determining the allowance of a High Court Judge and his rights in respect of leave of absence and pension was enacted by Parliament in 1954, it was not until 1956 that sub-paragraph (4) of paragraph 10 in Part D of the Second Schedule to the Constitution was deleted by the Constitution (Seventh Amendment) Act. Even after the commencement of the Constitution and the 1954 Act pensions to High Court Judges residing in the United Kingdom are being paid there in sterling. This is, however, being done not by reason of any legal obligation or in recognition of any legal right, but only by way of concession. It may be pertinent to mention here that Government of India's decisions noted at pages 563 and 564 of Chaudhri's Compilation of the Civil Service Regulations (Fourth Edition) indicated that even in respect of persons governed by the Regulations payment has been made in the United Kingdom in sterling only by way of concession to suit the convenience of persons residing there. I have referred to these decisions of the Government of India only as explaining the conduct of the Government. I may, however, point out that at page 564 of the above Compilation there is a refer-

ence to some decision of the President also which show that payment of pensions in the United Kingdom in sterling has been only in the nature of a concession.

53. Now paragraph I of Part II of the First Schedule to the 1954 Act provides that provisions of that part apply to a Judge who is a member of the Indian Civil Service and who has not elected to receive the pension payable under Part I, and provision for making an election has been made in S. 15 of the Act. Sri Desai availed of the election provided for in Section 15 and was receiving pension in accordance with Part I in rupees. Sri Malik to whom Part I alone applies was also receiving his pension in rupees as provided in that Part.

54. The argument on behalf of the petitioners was that by converting pensions in sterling into pensions in rupees the 1954 Act had varied the rights of the petitioners to their disadvantage and had infringed Article 221 of the Constitution. I have already dealt with the question whether the petitioners had a right to receive pension in sterling before the commencement of the Constitution and I have found that the answer should be in the negative. What Part I of the First Schedule to the Act did was that it changed the unit of account which was expressed in a foreign currency into a unit of account expressed in the Indian currency and gave fixity to the pensions mentioned therein. If on the date of the 1954 Act the pension fixed in Part I of the First Schedule to the Act were not below the amount into which the pensions expressed in sterling in the 1937 Order were convertible on that date there was no variation in the rights of High Court Judges in respect of pension to their disadvantage. It has not been shown by the petitioners that the pensions payable under Part I were less than the amount which would have been payable in rupees on the date of the enforcement of the 1954 Act, and so far as Sri Malik is concerned it was also admitted that his pension fixed in rupees under Part I was a little higher than the amount into which the pension expressed in sterling in the 1937 Order was convertible on the said date. The contention on behalf of the petitioner was that if on any occasion of payment of pension the amount to which a High Court Judge is found entitled under Part I of the First Schedule to the 1954 Act is less than what, under the 1937 Order, he would have been entitled to receive in rupees at the prescribed or prevalent rate of exchange, the Act should be regarded as having made a variation in the rights of pension to his disadvantage and since this has actually happened in the case of the petitioners as a result of the devalua-

tion of the rupee such a variation has taken place. The contention appears to me to be wholly misconceived.

35. Article 221 of the Constitution prohibits variation in "the rights in respect of pension" and the prohibition is, therefore, in respect of a law determining the rights and not in respect of payments which may from time to time be made in accordance with that law. Variation of the rights in respect of pension takes place when a change in the rights is brought about by a law relating thereto and payments made from time to time according to the law that has made the variation would not be variation of "rights in respect of pension" because such rights have already been varied by the law. If the variation made by the law was a permissible variation when made, it cannot become an impermissible variation at any later point of time by reason of the fact that if it were made at such later point of time it would be impermissible. It is obvious that whether or not a law regulating the rights infringes Article 221 has to be judged with reference to the state of things at the time of its making and its constitutionality would not be for ever hanging in the balance or be perpetually subject to being judged in the light of rates of exchange that prevail from time to time. If on the date of the enforcement of the 1954 Act the pensions fixed in Part I of the First Schedule did not effect a variation in the rights of a High Court Judge to his disadvantage the Act cannot be said to have become violative of Article 221 because of the subsequent devaluation of the rupee. What Article 221 of the Constitution guaranteed was that primary right which was determined by fixing the measure of the pensions a right which became vested in the person entitled to it on the date of his appointment — and not what may be called those secondary rights of receiving payment which would accrue as and when the pensions recurrently become due. Some variation in the primary right may certainly be said to have been made by the 1954 Act but it has not been shown that it was to the disadvantage of the persons entitled to that right. Under the 1937 Order too the pensions were not actually payable in sterling, and their payment in sterling could not be enforced. The variation in the manner of expressing the pensions brought about a definiteness in the amounts of pension which would otherwise have been subject to the fluctuations in the rate of exchange. The variation may, therefore, be said as having possessed some advantageous features. At any rate, the 1954 Act cannot be said to have varied the rights of High Court Judges in respect of pension to their disadvantage. The right that Article 221 guarantees is not the right to

such advantages of chance as might occasionally become available, and the Article does not give its protection against a disadvantage which amounts to no more than the possibility of not being able to gain at some future time some advantage from a change in the exchange rate.

56. As to the other disadvantage pointed out in the course of argument on behalf of Sri Desai, namely, the disadvantage of not being able to receive pension in the United Kingdom it should be sufficient to say that the question of any disadvantage on that score does not arise because the right to receive pension in the United Kingdom was never available to High Court Judges after the enforcement of the Indian Independence Act. I may, however, add that "disadvantage" can have no fixed positive or negative content, and the answer to the question whether the absence of a particular benefit constitutes a disadvantage would vary with circumstances. Loss of the right to receive pension in the United Kingdom was a necessary consequence of India ceasing to be a part of the British Empire or, in any case, of India becoming a Sovereign Democratic Republic, and that loss could not be a disadvantage if the achievement of Independence and the attainment of the status of a Sovereign Democratic Republic were advantaged.

57. The change introduced by Part I of the First Schedule to the 1954 Act was, therefore, valid and rights of pension of Sri Malik are governed by it. Sri Desai elected, under Section 5 of the Act, to receive pension in accordance with Part I and his rights too are, therefore, governed by that Part. Sri Kanhaiya Lal Misra urged that Sri Desai cannot be regarded as having exercised any election if Part I infringed Article 221 and was therefore invalid. As Part I did not, in my opinion, infringe Article 221, I find no force in this argument.

58. The effect of Section 25 of the 1954 Act on Part I of the First Schedule to the Act remains to be seen. The relevant portion of the section is as follows:

"25(1). Nothing contained in this Act shall have effect so as to give to a Judge who is serving as such at the commencement of this Act less favourable terms in respect of his allowances or his rights in respect of leave of absence (including leave allowances) or pension than those to which he would be entitled if this Act had not been passed"

This provision, therefore, subjected the operation of the Act to the condition to which it was already subject under Article 221 of the Constitution. It prevents such provisions of the Act from operating as given "less favourable terms" in respect of pension and, therefore, it virtually provides that those provisions which vary

the rights of High Court Judges in respect of pension to their disadvantage will not operate. For the reasons given by me for holding that Part I of the First Schedule to the 1954 Act does not infringe Article 221 of the Constitution I also hold that its operation is not precluded by Section 25 of the Act,

59. In the result I find that both the writ petitions are devoid of force and the petitioners are not entitled to any of the reliefs claimed by them. Both the petitions are accordingly dismissed. I do not, however, make any order as to costs.

(BY THE COURT)

The petitions are dismissed. But there shall be no order as to costs.

Petitions dismissed.

AIR 1970 ALLAHABAD 289 (V 57 C 46)

FULL BENCH

S. D. KHARE, S. N. SINGH AND
J. S. TRIVEDI, JJ.

Qadir Bux, Appellant v. Ramchand and others, Respondents.

Second Appeal No. 500 of 1959, D/- 19-3-1969, from judgment and decree of 2nd Addl. Civil J., Agra, D/- 22-12-1958.

(A) Limitation Act (1908), Arts. 142, 144 — Applicability — Dispossession and adverse possession — Distinction — Burden of proof — Suit for possession — Title established but tenancy not proved — Art. 144 and not Art. 142 applies — Failure of defendant to prove adverse possession — Plaintiff is entitled to decree. AIR 1946 All. 389, Overruled.

No suit can be governed both by Articles 142 and 144. Where Article 142 is applicable, the residuary Article 144 cannot apply. The residuary Article 144 can apply only if none of the Articles 123 to 143 (including Article 142) is applicable. (Para 22)

Where a plaintiff is suing for possession on the basis of dispossession, Art. 142 applies and the burden lies on him to show that the date of his dispossession or discontinuance of possession was within twelve years of the suit, while if the suit is for possession of immovable property not specially provided for in any other article of the Act then Article 144 would apply and on proof of title the plaintiff's suit cannot be dismissed until the defendant further establishes his adverse possession for more than twelve years.

(Para 9)

There is obviously some distinction between the mere dispossession or discontinuance of the possession of the plaintiff and the adverse possession of the defendant. Ordinarily an owner of property is presumed to be in possession of it and

such presumption is in his favour where there is nothing to the contrary. But where the plaintiff himself admits or it is proved that he has been dispossessed by the defendant the court cannot start with the presumption in his favour that the possession of the property was with him.

(Para 10)

No doubt in many cases the distinction is very fine and the line of demarcation between possession and adverse possession is thin, but the question in each case is one of burden of proof.

(Para 11)

Where a plaintiff claimed possession against a defendant alleging him to be his tenant and failed to prove the tenancy set up by him, Article 142 will not apply, and the only Article that can apply is Article 144. AIR 1946 All. 389, Overruled; AIR 1919 All. 403(2), Approved. (Para 36)

The plaintiff's suit could not be dismissed merely on the ground that he failed to prove that the defendant was his tenant. The court had to consider whether or not Article 142 applied to the facts of the case, and in case it did not, the plaintiff's suit, on the proof of his title, could not fail unless the defendant was able to prove the adverse proprietary possession. When the dispossession or discontinuance of possession of the plaintiff as envisaged by Art. 142 was neither mentioned in the plaint nor established by the findings of the courts below, from the circumstances that the plaintiff failed to give any satisfactory evidence that he had exercised any act of possession over the land within twelve years of suit and that he failed to prove that he had let out the same at any time within that period, it could not be inferred that the defendant's possession must have been adverse to that of the plaintiff nor could the plaintiff's dispossession or discontinuance of possession be presumed. Hence, when adverse possession of more than twelve years was not established, the suit could be decreed. (Paras 4, 18, 35)

(B) Limitation Act (1908), Arts. 142, 144 — Suit for possession of immovable property — Adverse possession of defendant established — Suit must fail regardless of consideration whether Art. 142 or Art. 144 is applicable.

Once the adverse possession of the defendant for over twelve years before the date of the institution of the suit is established, the suit has to fail regardless of the consideration whether Article 142 or Art. 144 is applicable. In such a case it would be said that the defendant has become the owner of the property because of his adverse proprietary possession. From that finding it could also be apparent that the plaintiff had not been in possession of the property in suit at any time within twelve years of the date of the institution of the suit. (Para 15)

(C) Limitation Act (1908), Art. 142 — Terms "dispossession" and "discontinuance"— Meaning— (Words and Phrases — Terms "dispossession and discontinuance.")

The term "dispossession" applies when a person comes in and drives out others from the possession. It imports ouster: a driving out of possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" implies a voluntary act and abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession, but this cannot be assumed. It must be either admitted or proved. (Para 30)

Cases Referred: Chronological Paras

- (1965) AIR 1965 S.C. 1553 (V 52) =
(1905) 3 SCR 63, Gurbinder Singh v. Lal Singh 30, 33
(1946) AIR 1946 AIL 389 (V 33) =
ILR (1946) AIL 178, Sangam Lal v. Ganga Din 29, 33
(1939) AIR 1939 Nag. 7 (V 26) =
ILR (1941) Nag. 655, Meherban Lalli v. Yusuf Khan Kallu 32
(1935) AIR 1935 Mad. 754 (V 22) =
42 Mad. L. W. 593, Sulaiman Rowther v. Dawood Khan Sahib 31
(1934) AIR 1934 AIL 993 (V 21) =
1934 AIL L. J. 973 (FB), Bindhyachal Chand v. Ram Gbarib Chand 12, 19, 24, 27, 28
(1933) AIR 1933 AIL 775 (V 20) =
ILR 55 AIL 209, Kallan v. Mohammad Nabi Khan 19, 26, 27, 28
(1931) 134 Ind. Cas. 461 (AIL), Mohammad Ishaq v. Zindi Begum 25, 27
(1929) AIR 1929 AIL 753 (V 16) =
ILR 51 AIL 1042, Kanhaiya Lal v. Girwar 24, 27
(1928) AIR 1928 P.C. 146 (V 15) =
55 Ind. App. 212, Kamakhya Narayan Singh v. Ram Raksha Singh 19
(1928) AIR 1928 AIL 467 (V 15) =
26 AIL L. J. 1041 (FB), Rustam Khan v. Janki 23
(1919) AIR 1919 AIL 403 (2) (V 6) =
17 AIL L. J. 814, Jaichand v. Girwar Singh 20, 21, 27
(1916) AIR 1916 P.C. 21 (V 3) =
ILR 39 Mad. 617, Secy. of State of India v. Chellikani Rama Rao 19, 21

- (1903) 1903 AIL W. N. 18 = ILR 25 AIL 256 (FB), Abdul Ghani v. Mt. Babni 16, 33
(1903) 1903 AIL W. N. 112 = ILR 25 AIL 498 (FB), Balmakund v. Dalu 16
(1898) ILR 20 AIL 182 = 1898 AIL W. N. 19, Inayat Husen v. Ali Husen 21
(1889) ILR 16 Cal. 473 = 16 Ind. App. 23 (PC), Mohim Chunder Mozoomdar v. Mobesh Chunder Neoghi 21

Jagdish Swarup and Bashir Ahmad, for Appellant; V P. Misra, for Respondents.

S. D. KHARE, J.:— A learned single Judge of the Court hearing this second appeal framed the following question and referred it to a Division Bench:—

"If a plaintiff claims possession against the defendant alleging him to be his tenant and fails to prove the tenancy set up by him, whether in such a case Art. 142 of the Limitation Act will apply or Article 144 of the Limitation Act?"

2. It was noticed by the Division Bench that there was apparent conflict between two Division Bench decisions of this Court as to how the aforesaid question be answered, and, therefore, it referred the same for the consideration of this Full Bench.

3. The suit giving rise to the second appeal was instituted on the allegations that the defendant was the tenant of the plaintiff of a small portion of the land in dispute and had, after obtaining his permission and promising to pay rent, built a thatched construction on it six or seven years before the institution of the suit. It was further alleged that the defendant had stopped paying rent to the plaintiff from the year 1950 and when notice was sent to him in the year 1952 he denied the plaintiff's title. Another notice was, therefore, given to the defendant in the year 1954 terminating his tenancy. The plaintiff, therefore, sought the reliefs of possession and rent and damages for use and occupation. The suit was contested on the ground that the defendant was not the tenant of the plaintiff but had made the constructions on the land after obtaining permission from one Sm. Ram Kaur, the owner of the land.

The trial Court held that the plaintiff was the owner of the land in dispute and Sm. Ram Kaur had no interest in that land and decreed the suit. The lower appellate Court did not disturb the finding of the trial Court on the point of the title of the plaintiff to the land in suit. It however, arrived at the conclusion that the plaintiff had failed to prove the alleged tenancy and had also failed to prove that he had been in possession of the land in suit at any time within twelve years of the date of the suit and the defendant's contention that he had been in possession over that land for a period much exceed-

ing twelve years could be true. The suit was, therefore, dismissed on the ground that it was barred by Art. 142 of the First Schedule to the Limitation Act.

4. In the circumstances of the case it has become very important as to which Article of the First Schedule to the Limitation Act would apply. In case Art. 144 applies, the burden of proof would lie on the defendant to establish adverse proprietary possession of more than twelve years. No such proof was furnished and, therefore, the suit could be decreed. On the other hand, if Art. 142 applies, there can be no doubt that the lower appellate Court was fully justified in dismissing the suit.

5. Article 142 of the First Schedule to the Limitation Act provides for suits:

"for possession of immoveable property when the plaintiff while in possession of the property has been dispossessed or has discontinued the possession."

The period of limitation is twelve years and the starting point of the limitation is

"the date of the dispossession or discontinuance."

6. Article 144 is the residuary Article, and provides for

"suits for possession of immoveable property or any interest therein not otherwise specially provided for in the Limitation Act."

The period of limitation is twelve years and the starting point of limitation is

"when the possession of the defendant becomes adverse to the plaintiff."

7. The scheme of the Limitation Act is to provide for a special rule of limitation in as many classes of cases as possible and then to provide a residuary Article for cases which are not governed by the specially provided for rules. In the case of suits for possession the provisions start with Art. 124 and, with some exceptions, go up to Art. 143 providing special rules. They are followed by the residuary Article, viz., Article 144. If there be any Article specially applicable to a suit then the residuary Article 144 cannot apply. A perusal of Articles 124 to 143 would show that a suit for possession of immoveable property could be regarded to be governed by Article 142 if it could be inferred from the facts of the case (primarily from the allegations made in the plaint and ultimately from proved facts) that the plaintiff had been dispossessed or had discontinued possession. In case Article 142 is held inapplicable to the facts of the present case the only Article applicable would be Article 144 of the First Schedule to the Limitation Act.

8. A perusal of the plaint would show that the plaintiff has nowhere alleged that he had been dispossessed or had discontinued the possession of the land in suit. As

stated earlier, the allegations made by him in the plaint were that he had purchased the land in the year 1946 and obtained proprietary possession over it, that a portion of the land had been let out by him to the defendant for building a thatched construction and that the defendant had stopped paying rent to him from the year 1950 and had denied his title in the year 1952. The suit was originally brought on the ground that the premises had been let out to the defendant but later the plaint was amended at the request of the plaintiff and he was allowed to sue in the alternative on the basis of his title, on payment of the requisite court-fees. The material allegations in the plaint remained unaltered. Thus there is nothing in the plaint from which it can be inferred that the defendant had been in possession over any part of the land in suit for more than 12 years or had ever dispossessed the plaintiff.

9. Where a plaintiff is suing for possession on the basis of dispossession the burden lies on him to show that the date of his dispossession or discontinuance of possession which gave him the cause of action for the suit was within twelve years of the suit, while if the suit is not for possession based on the ground of dispossession or discontinuance of possession but is a suit for possession of immoveable property not specially provided for in any other Article of the Act then Art. 144 would apply and on proof of title the plaintiff's suit cannot be dismissed until the defendant further establishes his adverse possession for more than twelve years.

10. There is obviously some distinction between the mere dispossession or discontinuance of the possession of the plaintiff and the adverse possession of the defendant. Ordinarily an owner of property is presumed to be in possession of it and such presumption is in his favour where there is nothing to the contrary. It would, therefore, follow that an owner of property starts with the presumption in his favour that he is in possession of his property, but where the plaintiff himself admits or it is proved that he has been dispossessed by the defendant and, therefore, is no longer in proprietary possession of the property in suit, at the time of the institution of the suit, the Court cannot start with the presumption in his favour that the possession of the property was with him.

11. No doubt in many cases the distinction is very fine and the line of demarcation between dispossession and adverse possession is thin but the question in each case is one of burden of proof and it is incumbent on the plaintiff when he has been dispossessed or has discontinued his possession to establish the date of dispossession or discontinuance of possession and to show that it was within twelve

years of the institution of the suit (vide Article 142 of the First Schedule to the Limitation Act).

12. Primarily the Article to be applicable has to be chosen with regard to the facts stated in the plaint. There may, however, be cases in which the plaintiff's suit would be quite within limitation if the allegations made in the plaint were correct, but on a trial it is found that the allegations made by him are either not proved or proved to be false. In such circumstances the Court, after finding the correct facts, will have to find out which Article of the First Schedule to the Limitation Act would apply to those facts, and having got the right Article to find out whether the suit is within time or not. The Full Bench case of Bindhyachal Chand v. Ram Gharib Chand, 1934 All LJ 973 = (AIR 1934 All 993 (FB)) fully supports this view.

13. The findings of fact recorded by the lower appellate Court were as mentioned below:—

- (a) The plaintiff and the predecessor-in-interest of the plaintiff had title to the land in suit.
- (b) There had been some litigation between the plaintiff on the one hand and Smt. Ram Kaur on the other regarding land lying to the south of the land in suit. The thatched construction of the defendant was not on the land regarding which there had been some litigation before.
- (c) The plaintiff had failed to prove that he had let out a portion of the land in suit to the defendant at any time within twelve years of the date of the institution of the suit.
- (d) The plaintiff had also failed to prove that he or his predecessor-in-interest had been in actual or constructive possession over the land in suit within twelve years from the date of the institution of the suit.
- (e) The suit was, therefore, barred by Art. 142 of the Limitation Act.

14. The plaintiff's case was that the defendant was in possession of a portion of the land in suit from six or seven years before the date of the institution of the suit and the defendant's case was that he was in possession of the land for more than 20 years. Since the plaintiff had failed to prove his possession within twelve years of the date of the suit it was inferred that the defence case appeared to be quite correct. No definite finding was, however, recorded by the lower appellate Court regarding the plea of adverse possession taken by the defendant.

15. Once the adverse possession of the defendant for over twelve years before the date of the institution of the suit is established, the suit has to fail regardless of the consideration whether Art. 142 or

Art. 144 of the First Schedule to the Limitation Act is applicable. In such a case it could be said that the defendant has become the owner of the property because of his adverse proprietary possession for more than twelve years. From that finding it could also be apparent that the plaintiff had not been in possession of the property in suit at any time within twelve years of the date of the institution of the suit. However, the difficulty arises in cases where there is no clear finding on the point of adverse possession and also there is no averment in the plaint that the plaintiff had been dispossessed or had discontinued his possession. In such a case it cannot be said that the averments made in the plaint have been proved to be false.

It may be that the plaintiff had not been able to prove the facts of the tenancy. However, it cannot be said merely because of that failure that the averments made by the plaintiff in the plaint had been disproved and were false. The allegations regarding tenancy were merely "not proved" and not "disproved". It is, therefore, clear that the findings arrived at by the Court could not compel it to apply Art. 142 of the First Schedule to the Limitation Act to the facts of the case.

16. The suit out of which the second appeal arises was originally instituted on the basis of tenancy only, although it was mentioned in the plaint that the plaintiff was the owner of the land in suit. Subsequently the plaint was amended, with the leave of the Court and the plaintiff paid full Court-fees, basing his claim on title. This was permissible because it was held in the Full Bench case of Abdul Ghani v. Mst. Babul, 1903 All WN 18 (FB) that where the plaintiff alleged that the defendant was the tenant but it was subsequently found that the plaintiff was the owner and the defendant though not a tenant was occupying the premises with his permission the plaintiff's suit should be decreed on the basis of title. The case of Abdul Ghani, 1903 All WN 18 (FB) (Supra) was considered by this Court again in the same year in the Full Bench case of Balmakund v. Dalu, 1903 All WN 112 (FB). In that case the plaintiff came to Court alleging that he was the proprietor of a certain building and that he had leased a part of the said building to the defendant who, however, refused to pay the rent agreed upon and he sought to have the defendant ejected and to recover possession of the portion of the building occupied by him. No specific issue dealing with the plaintiff's title was framed, but evidence as to title was given on both sides. It was held that even though the plaintiff had failed to make out his case as to letting, he nevertheless was entitled to a decree on his title unless the defendant could show a better one.

17. It was because of the authority of these cases that the amendment to the plaint was allowed and the suit was converted into a suit based on title.

18. From what has been stated above it is evident that the plaintiff's suit could not have been dismissed merely on the ground that the plaintiff had come to Court on the allegation that the defendant was his tenant but had failed to prove that the defendant was his tenant. The Court had to consider whether or not Article 142 of the Limitation Act applied to the facts of the case, and in case it did not, the plaintiff's suit, on the proof of his title, could not fail unless the defendant was able to prove the adverse proprietary possession of himself or of some one through whom he claimed, for twelve years preceding the date of the institution of the suit.

19. There is no clear authority of the Privy Council or of the Supreme Court on the question of law which has been referred to this Full Bench. At one time the view taken was — Vide *Kallan v. Mohammad Nabi Khan*, AIR 1933 All 775 — that certain observations made by the Privy Council in two of the reported cases lent support to the view that Art. 142 did not apply to suits based on title. However, those decisions of the Privy Council, namely, *Secy. of State for India v. Chellikani Rama Rao*, ILR 39 Mad 617 = (AIR 1916 PC 21) and *Kamakhyia Narayan Singh v. Ram Raksha Singh*, AIR 1928 PC 146 were examined by a Full Bench of this Court in 1934 All LJ 973 = (AIR 1934 All 993 (FB)) (supra) and it was held that no such inference could be drawn and Art. 142 can apply not only to suits based on possessory title but to suits based on title pure and simple also. We respectfully agree with that view.

20. The earliest case decided by this Court to which a reference need be made is that of *Jai Chand v. Girwar Singh*, 17 All. L. J. 814 = (AIR 1919 All 403 (2)). The plaintiff, a zamindar, had sued for ejectment of the defendant on the ground that the latter was a licensee. The defendant denied the licence and set up adverse proprietary possession. The finding recorded by the lower appellate Court was that the plaintiff was a zamindar of the land in suit but the defendant had been in its possession for a very long time. It was held that the defendant having set up an adverse right the question whether the licence was ever given or revoked was immaterial and it was for the defendant to prove adverse possession. It is obvious that Art. 144 of the First Schedule to the Indian Limitation Act was applied to the facts of the case.

21. It is significant to note that in the case of *Jai Chand*, 17 All LJ 814 = (AIR

1919 All 403 (2)) (supra) the lower appellate Court had relied upon the case of *Enayat Husen v. Ali Husen*, (1898) ILR 20 All 182 for the proposition that even in a case governed by Art. 144 the plaintiff must not only prove a legal title to possession but a subsisting title, not barred by the law of limitation. However, when the case came to High Court a Division Bench of this Court observed that in a case governed by Art. 144 it was not at all necessary for the plaintiff to establish a subsisting title not barred by the law of limitation and the burden was on the defendant to prove adverse possession. The learned Judges, while overruling the case in (1898) ILR 20 All 182 (supra) rightly observed if we may say so with respect, that the decision in that case was inconsistent with the Privy Council decision in *Mohim Chunder Mozoomdar v. Mohesh Chunder Neoghi*, (1889) ILR 16 Cal 473 (PC) and ILR 39 Mad 617 = (AIR 1916 PC 21) (supra).

22. It is now well settled that no suit can be governed both by Arts. 142 and 144 of the First Schedule to the Limitation Act. Where Art. 142 is applicable, the residuary Art. 144 cannot apply. The residuary Art. 144 can apply only if none of the Arts. 123 to 143 (including Art. 142) is applicable.

23. The next case of this Court of which a passing reference need be made is of *Rustam Khan v. Janki*, 26 All LJ 1041 = (AIR 1928 All 467 (FB)). It is, however, clearly distinguishable. The suit was by a Mahomedan heir against his co-heirs and their transferees. It was held that the case was not governed by Article 123, and to deprive one heir of his share the co-heirs must prove adverse possession for twelve years under Art. 144 of the First Schedule to the Indian Limitation Act. The question whether the case was to be governed by Art. 142 or Art. 144 was not, in fact, considered because the main question to be decided by the Full Bench was whether or not Article 123 could apply to the facts of the case.

24. Next comes the case of *Kanhaiya Lal v. Girwar*, AIR 1929 All. 753, the view taken by a Division Bench in that case was that Article 142 of the First Schedule to the Indian Limitation Act would apply only to those suits which were based on possessory title. The case of *Kanhaiya Lal*, AIR 1929 All. 753, need not detain us because the view expressed therein, that Article 142 applied only to suits based on possessory title was overruled in the Full Bench case of 1934 All. L. J. 973 = (AIR 1934 All. 993 (FB)) (supra).

25. Then comes the case of *Mohammad Ishaq v. Mst. Zindi Begum*, (1931) 134 Ind. Cas. 461 (All.). The plaintiff had sued for possession alleging that some six or seven years prior to the institution of

the suit the premises had been let out to the defendant for rent and that the period for which the lease had been given had expired. The defence was that the suit was barred by limitation. It was found that the plaintiff was the owner of the premises in suit and his title thereto was established. Applying Article 144 of the First Schedule to the Limitation Act it was held that it was for the defendant to prove that he had been in adverse possession of the property for more than twelve years prior to the date of the institution of the suit. It was also held that though the plaintiffs' allegations could not be substantiated so far as the alleged tenancy was concerned, the title being with the plaintiffs they were entitled to succeed unless the defendant could prove that the plaintiff's title had been lost on account of adverse possession on the part of the defendant. It was also held that there being no proof that the defendant had been in adverse possession for more than twelve years the suit was bound to be decreed.

26. Next comes the case of AIR 1933 All. 775 (supra). The plaintiff had sued the defendant for possession on the ground that he was the owner of the premises in suit which had been let out to the defendant, who had denied his title. The defendant claimed adverse proprietary possession for more than seventeen years. It was held that both on the facts of the case, the earlier case law on the subject and for the reason that Article 142 of the First Schedule to the Limitation Act did not apply to suits based on title, Article 144 of the First Schedule to the Limitation Act would apply.

27. As mentioned earlier, the view taken in the cases of Kanhaiya Lal, AIR 1929 All. 753 (supra) and Kallan, AIR 1933 All. 775 (supra) that Article 142 of the First Schedule to the Indian Limitation Act applied only to those suits which were based on possessory title was overruled by the Full Bench decision in the case of 1934 All. L. J. 973=(AIR 1934 All. 993 F.B.) (supra). All the earlier cases decided by this Court and referred to above were considered by the Full Bench. It is however, significant to note that the cases of 17 All. L. J. 814=(AIR 1919 All. 403 (2)) (supra) and (1931) 134 Ind. Cas. 461 (All.) (supra) were not overruled. On the other hand it was observed by Sulaiman, C. J. that—

"The two reported cases of this Court, which also were relied upon, are those of (1931) 134 Ind. Cas. 461 (All.) and 17 All. L. J. 814=(AIR 1919 All. 403 (2)). In neither of these cases the plaintiff was suing for possession on the ground that he had been dispossessed. In the former case the plaintiff had alleged that the premises had been let out to the defendant on rent; in the latter case the

plaintiff was a zamindar who was seeking to eject the defendant treating him as a mere licensee who had set up adverse possession against the zamindar. The plaintiff being the zamindar of an agricultural village, the presumption of title as well as of possession was in his favour."

Mukerji, J. who was also a member of the Full Bench, commenting on Kallan's case, AIR 1933 All. 775, observed as follows:—

"On the facts of the case stated above, and as pointed out in the judgment of the case itself, there was no allegation of previous possession or dispossession. It was on that account that Article 144 applied.....".

28. Till the case of AIR 1933 All. 775 (supra) the consistent view of this Court was that in a suit brought against a tenant for his ejection where the plaintiff's title was also pleaded but there was no specific allegation made in the plaint that the plaintiff had been dispossessed the proper Article to be applied was Article 144. In the Full Bench case of 1934 All. L. J. 973=(AIR 1934 All. 993 F.B.) (supra) it was observed that the plaintiff could not merely by clever drafting of the plaint make a case which should have normally been governed by Article 142 of the Limitation Act to fall under Article 144 and, therefore, the findings of the court have also to be taken into consideration in determining which particular provision of the Indian Limitation Act would apply.

29. The next important case that came up for consideration of a Division Bench of this Court was that of Santam Lal v. Ganga Din, AIR 1946 All. 389. It was this case which unsettled the view taken in all the cases decided up to the year 1933. It was held that in the circumstances of the present case the correct Article applicable was Article 142 of the First Schedule to the Limitation Act. The plaintiff had filed a suit for possession of a certain house alleging that the defendants were the plaintiffs' tenants and had not paid rent from one year before the institution of the suit. It was also alleged that the plaintiffs' title had also been denied by the defendants. The finding of fact recorded by the court was that the plaintiff had succeeded in proving his title to the house and that the defendants had been in uninterrupted possession of the house for more than twelve years before the date of the institution of the suit.

It was also held that the defendants were not the tenants of the plaintiff as the house was never let out to the defendants by the plaintiff or his predecessor-in-interest. It was held by the court that on these findings the allegations made

in the plaint did as a matter of fact amount to an allegation that the plaintiff had been dispossessed, and, therefore, Article 142 was applied and the plaintiff's suit was thrown out merely on the ground that he had failed to come to the court within twelve years of the date of his dispossession.

30. The main point for consideration is whether in such circumstances it can be said that the plaintiff had been dispossessed or had discontinued his possession within the meaning of Article 142 of the First Schedule to the Indian Limitation Act. The term "dispossession" applies when a person comes in and drives out others from the possession. It imports ouster: a driving out of possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" implies a voluntary act and abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession, but this cannot be assumed. It must be either admitted or proved.

So strong in fact is the position of the rightful owner that even when he has been dispossessed by a trespasser and that trespasser abandons possession either voluntarily or by vis major for howsoever short a time before he has actually perfected his title by twelve years' adverse possession the possession of the true owner is deemed to have revived and he gets a fresh starting point of limitation—vide *Gurbinder Singh v. Lal Singh*, AIR 1965 S.C. 1553. Wrongful possession cannot be assumed against the true owner when according to the facts disclosed by him he himself had voluntarily handed over possession and was not deprived of it by the other side.

31. The Madras and Nagpur High Courts have also taken the view that in cases where tenancy was alleged but could not be proved and the plaintiff fell back on his title, Art. 144 should apply. In the case of *Sulaiman Rowther v. Dawood Khan Sahib*, AIR 1935 Mad. 754, the plaintiff, though he had come to court on the allegation that the defendant was his tenant, also relied upon his title. His title was held to be proved, though the allegations regarding defendant's tenancy could not be substantiated. The defendant appeared to be in permissive user of the property. It was held that Article 144 of the First Schedule to the

Limitation Act, 1908, applied to the facts of the case.

32. The Nagpur High Court in the case of *Meherban Lalli v. Yusufkhan Kallu*, AIR 1939 Nag. 7, held that in a suit for ejectment of a tenant where the title of the plaintiff was also relied upon and established but it could not be proved that the defendant was the plaintiff's tenant and it was found that the defendant had been in possession of the premises for more than twelve years, Article 142 could not apply for the simple reason that it could not be said to be a case where the plaintiff was dispossessed or had discontinued possession. It was held that Article 144 of the First Schedule to the Indian Limitation Act, 1908, applied.

33. In a suit governed by Article 144 the fact that the plaintiff has failed to establish that he has been in possession of the property in suit at any time within twelve years of the suit is by no means material, as was found in the case of 1903 All. WN 18 (FB) (supra). Even where the defendant could prove that he was in adverse proprietary possession of the property and his position was that of a trespasser, he had further to establish that he had been in such adverse proprietary possession for more than twelve years. The case of AIR 1965 S.C. 1553 (supra) is a clear authority for the proposition that even in cases where two successive trespassers had kept the plaintiff and his predecessor-in title out of possession for more than twelve years, the burden lay on the defendant to establish positively that he or the person through whom he claimed had been in adverse proprietary possession for more than twelve years before the date of the institution of the suit, because one trespasser could not tack on to his benefit the adverse proprietary possession by a different trespasser.

34. Where Article 144 of the First Schedule to the Indian Limitation Act, 1908, applies the question whether or not the plaintiff has been able to prove his possession within twelve years of the suit or the defendant had remained in possession for over twelve years before the date of the institution of the suit becomes immaterial, because in such cases it is for the defendant to prove adverse proprietary possession for more than twelve years preceding the suit.

35. In the suit out of which this second appeal arises the dispossession or discontinuance of possession of the plaintiff as envisaged by Article 142 was neither mentioned in the plaint nor established by the findings of the courts below. From the circumstances—

(1) that the plaintiff had failed to give any satisfactory evidence that he had

exercised any act of possession over the land in dispute within twelve years of the date of the institution of the suit, and

(2) that the plaintiff had failed to prove that he had let out the same to the defendant at any time within twelve years of the date of the institution of the suit, it could not, in our opinion, be inferred that the defendant's possession must have been adverse to that of the plaintiff nor could the plaintiff's dispossession or discontinuance of possession be presumed. With great respect we are of the view that the case of AIR 1946 All. 389 (supra) was not correctly decided.

36. Our answer to the question referred to the Full Bench is as follows:—

If a plaintiff claims possession against a defendant alleging him to be his tenant and fails to prove the tenancy set up by him, Article 142 of the First Schedule to the Indian Limitation Act, 1908, will not apply, and the only Article that can apply is Article 144 of the First Schedule to the Limitation Act.

37. Let the record of the case be laid before the learned single Judge together with the above answer to the question referred to this Full Bench.

Reference answered accordingly.

AIR 1970 ALLAHABAD 296 (V 57 C 47)

FULL BENCH

JAGDISH SAHAI, R. S. PATHAK AND
R. L. GULATI, JJ.

Kripa Ram Gupta, Petitioner v. R. K. Talwar and others, Respondents.

Civil Misc. Writ No. 1254 of 1968 connected with Civil Misc. Writs Nos. 3938, 4033, 4349 and 4400 of 1968 and Special Appeals Nos. 307 and 320 of 1968, D/- 26-9-1969.

(A) Civil Services — Fundamental Rules (as amended in 1963), R. 56(a), Paragraph (1) of Proviso — Paragraph (1) of proviso to R. 56(a) violates Arts. 14 and 16 — AIR 1966 All. 560, Overruled.

Per Majority (Jagdish Sahai J. Contra): Paragraph (1) of the proviso to clause (a) of Fundamental Rule 56, which gives option to the Government to prematurely retire any Government servant at the age of 55 years, violates Arts. 14 and 16 of the Constitution. AIR 1966 All. 560, Overruled. (Paras 4, 7, 55)

Compared with the parent provision in clause (a) of Fundamental Rule 56, there is nothing in Paragraph (1) of the proviso to indicate what is the group of persons sought to be isolated within the ambit of that Paragraph. Any such guiding consideration is conspicuous by its absence. The power to retire a government servant prematurely must be exer-

cised only in the public interest or on account of inefficiency or dishonesty or some similar consideration. No such factor of control is included in the constitution of paragraph (1) of the proviso to R. 56(1). As it stands, R. 56 gives to the appointing authority an undefined and uncontrolled discretion in deciding whether one government servant should be retired prematurely while another is allowed to run his normal span. (Paras 5, 34, 35)

Even assuming that the authority will always act honestly, there is nothing in the impugned provision itself, or for that matter in any part of R. 56 to indicate to the authority what is the kind of Government servant to whom the impugned provision can be applied. The presumption that the authority will act in accordance with the rules of law can be sustained only if there is a rule of law to guide him. Moreover, it is not necessary for a person to show that the offending provision has been misused in order to succeed in his complaint based upon Art. 14. It is enough for him to show that the offending provision is capable of such a misuse. In other words, it is not necessary for a petitioner to show that any discrimination has been actually practised against him. (Paras 35, 6)

Moreover, while the power of appointing a government servant is generally, controlled by a complex detailed procedure involving, in some cases, consultation with the Public Service Commission, it will be anomalous to assume that a government servant, appointed in accordance with that procedure and enjoying by virtue of his appointment the valuable right to continue in service, is intended to be exposed to a wholly arbitrary termination of his service. The doctrine of absolute power in the sovereign which then held sway has now lost its validity. Increasingly, down the years, expression has been given to the need to assure the government servant in his security of service. (Case law discussed.)

(Paras 37, 38)

(B) Civil Services— Fundamental Rules (as amended in 1963), R. 56 — (Per Full Bench) — Age of retirement under R. 56 is 58 years and not 55 years.

(Paras 7, 17, 55)

(C) Constitution of India, Arts. 14, 16 — Statute creating different classes — Validity — Principle of reasonable classification.

Per Pathak, J.—

Article 14 guarantees the general right of equality, while Art. 16 is an instance of the same right in favour of citizens in certain special circumstances. To conform to the "equality" provisions in the Chapter on Fundamental Rights in Constitution, a group of persons may be treated differently from the general, provided the group falls into a classification which

bears a reasonable relationship to the object of the statute. There must be classification, and the classification must not be arbitrary. The test of permissible classification necessarily presupposes a classification already. The classification is defined by something in the statute which separates the members of the group from the rest. There must be something in the statutory provision indicating clearly who will form members of the group and who will fall outside it. Where it is not possible to determine that, it is clear that while one person may be governed by the general rule, another similarly situated may be exposed to discriminatory treatment under the impugned provision. The provision imposing the burden complained of must, as the first step in the series of considerations safeguarding its validity, contain a standard, policy or guideline sufficient to define the group which it seeks to involve. In the absence of any sufficiently defined guiding considerations, the door will be left open to arbitrary action, and whim or humour will find play under a constitutional system scrupulously devised to protect and safeguard the rule of law. Case law discussed. (Para 33)

Cases Referred: Chronological Paras

(1968) AIR 1968 Punj. 189 (V 55)= 1968 Lab. L. C. 657 (F.B.), Pritam Singh v. State of Punjab	20, 24, 51
(1967) AIR 1967 S.C. 1427 (V 54)= (1967) 2 SCR 703, Jaisinghani v. Union of India	53
(1966) AIR 1966 All. 560 (V 53)= 1966 All. L. J. 153, Sridhar Prasad Nigam v. State of Uttar Pradesh	3, 18, 19, 21, 32, 51, 54
(1965) AIR 1965 S.C. 280 (V 42)= (1967) 2 Lab. L. J. 246, Shivcharan Singh v. State of Mysore	47
(1965) AIR 1965 S.C. 1567 (V 52)= (1965) 1 SCR 693, Bishun Narain Misra v. State of Uttar Pradesh	24, 48
(1964) AIR 1964 S.C. 370 (V 51)= (1964) 4 SCR 869, Gopal Narain v. State of Uttar Pradesh	36, 46
(1964) AIR 1964 S.C. 600 (V 51)= (1964) 5 SCR 683, Moti Ram v. N. E. Frontier Rly.	50
(1964) AIR 1964 S.C. 1585 (V 51)= 1964 (2) Cri. L. J. 481, Gurdev Singh v. State of Punjab	23, 38
(1962) AIR 1962 All. 328 (V 49)= ILR (1962) 1 All. 793 (FB), Ram Autar Pandey v. State of Uttar Pradesh	24
(1961) AIR 1961 S.C. 564 (V 48)= (1961) 2 SCR 931, Dasaratha Rama Rao v. State of Andhra Pradesh	33
(1961) AIR 1961 S.C. 1602 (V 48)= (1962) 2 SCR 125, Jyoti Pershad v. Union Territory of Delhi	35

(1960) AIR 1960 S.C. 1305 (V 47)= (1961) 1 SCR 88, Dalip Singh v. State of Punjab	23, 49
(1959) AIR 1959 S.C. 942 (V 46)= (1959) Supp. (2) SCR 563, Moti Das v. S. P. Sahi	33
(1958) AIR 1958 S.C. 232 (V 45)= 1958 SCR 1052, P. Balakotaiah v. Union of India	36
(1957) AIR 1957 S.C. 397 (V 44)= 1957 SCR 233, Pannalal Binjraj v. Union of India	36, 52
(1957) AIR 1957 S.C. 892 (V 44)= 1958 SCR 571, State of Bombay v. Subhagchand M. Doshi	22, 42
(1954) AIR 1954 S.C. 369 (V 41)= 1955 SCR 26, Shyamlal v. State of Uttar Pradesh	23, 41, 43, 44
(1952) AIR 1952 S.C. 123 (V 39)= 1952 SCR 435=1952 Cri. L. J. 805, Kathi Raning Rawat v. State of Saurashtra	36
(1951) 342 U.S. 98=96 Law Ed. 113, United States v. Wunderlich	53
(1770) 4 Burr 2528=98 E. R. 327, Rex v. John Wilkes	53
Asif Ansari, for Petitioner; Standing Counsel, for Opposite Parties.	

GULATI, J.:— In this bunch of cases comprising five writ petitions and two Special Appeals, the following two questions concerning the interpretation of Rule 56(a) of the Fundamental Rules have been referred for the opinion of this Full Bench:

"1. Whether under Fundamental R. 56, the age of compulsory retirement is 55 or 58 years?

2. Whether the proviso to clause (a) of Fundamental Rule 56 violates Articles 14 and 16 of the Constitution?"

2. The answer to question No. 1, in my opinion, is plain from the language of the rule itself and does not need any elaborate discussion. The material part of Rule 56(a) reads:—

"Except as otherwise provided in other clauses of this rule the date of compulsory retirement of a government servant other than a government servant in inferior service is the date on which he attains the age of 58 years."

When the rule itself declares that the age of compulsory retirement is 58 years, it is not possible to interpret it to mean that the age of retirement is 55 years.

3. The contrary view expressed in Shridhar Prasad Nigam v. State of U. P., 1966 All. L. J. 153=(AIR 1966 All. 560), in my opinion, proceeded upon the fallacy that the proviso attached to clause (a) of Rule 56 were "the other clauses" referred to in the opening part of that clause. There are four provisos. The last two are not relevant. Only provisos (i) and (ii) are material for our purposes. Proviso (i) reserves to the government the right to retire a government servant after he attains the age of 55 years by giving him

three months' notice or pay in lieu thereof. Likewise, proviso (ii) confers a right upon the government servant to voluntarily retire by giving three months' notice after he attains the age of 55 years.

Reading these two provisos along with the main clause (a), the Division Bench which decided the case of Shridhar Prasad Nigam, 1966 AIL L. J. 153 = (AIR 1966 All. 560) (supra) came to the conclusion that the age of compulsory retirement of a government servant continued to be 55 years as before, because a government servant after he attained the age of 55 years had no right to continue in service upto the age of 58 years and the government servant also could not be compelled to continue in service upto the age of 56 years. Clearly these two provisos are not the 'other clauses' referred to in clause (a) of Rule 56. The other clauses to which reference was intended were clauses (b) and (c) of rule 56 which provided for different ages of compulsory retirement for different categories of government servants. Clause (b) relates to the compulsory retirement of a government servant in an inferior service. Clause (c) is in three parts. Part (1) talks of the age of compulsory retirement of Civil Engineers of the Public Works Department, while parts (2) and (3) of clause (c) provided for extension of service of a Chief Engineer. The two provisos do not affect the age of compulsory retirement mentioned in clause (a) which has been fixed at 58 years instead of 55 years which was the age of retirement prior to the amendment of this rule in 1963. I am, therefore, of opinion that the age of compulsory retirement is 58 years. As there is no difference of opinion between us on this point, nothing further need be said about it.

4. As regards question No. 2, I am in respectful agreement with the answer proposed by my brother Pathak and hold that the proviso (i) to clause (a) of Fundamental Rule 56 violates Articles 14 and 16 of the Constitution.

5. From the history of this rule it appears that the age of retirement of a government servant was raised from 55 years to 58 years in order to bring about parity on this point between the State employees and the employees of the Central Government. It is true that the Government has purported to retain the power to retire a government servant prematurely, but some indication should have been given in the rule to show the circumstances under which a government servant could be deprived of the benefit of the enhanced age of retirement. In the absence of such an indication, the power retained by the government becomes arbitrary and unguided.

6. It is argued that such a power would be exercised for good and sufficient reasons and any misuse of the power

would always be open to scrutiny by the High Court under Article 226 of the Constitution. This argument has no meaning in view of the language in which the offending proviso has been couched. The proviso states: "the appointing authority may at any time without assigning any reason, require the government servant to retire on three months' notice.....". If the power to retire a government servant prematurely can be exercised without assigning any reason, it is idle to contend that such a power would be exercised for good and sufficient reasons or that such reasons would be open to scrutiny by the High Court. Moreover, it is not necessary for a person to show that the offending provision has been misused in order to succeed in his complaint based upon Article 14 of the Constitution. It is enough for him to show that the offending provision is capable of such a misuse. In other words, it is not necessary for a petitioner to show that any discrimination has been practised against him.

7. I, therefore, answer the two questions in the manner they have been answered by brother Pathak. This would be enough to dispose of this reference to this Full Bench so far as it relates to the five writ petitions.

8. With regard to the two Special Appeals Nos. 307 and 320 of 1968, the position is slightly different. There the appellants were actually served with notices retiring them prematurely and formal orders for their retirement were also passed. The appellants had prayed for writs of certiorari and mandamus. Now, it appears that so far as the petitioners' prayer for writs of mandamus is concerned, the same cannot be allowed because of the efflux of time. The two appellants would have retired in due course on January 1, 1969, and January 11, 1969, respectively. Both these dates have already passed. It is not possible, therefore, to grant them any relief by way of mandamus or prohibition. But so far as their prayer for writs of certiorari is concerned, I see no reason why the same should be refused. The impugned orders retiring the two appellants prematurely were passed in pursuance of that part of Fundamental Rule 56(a) which has been found to be ultra vires. Any order passed in pursuance of such a provision can be quashed, leaving it open to the appellants to take such steps as they may be advised to seek redress for their wrongful retirement. To this limited extent, I find myself unable to agree with brother Pathak, J.

8-A. I would, therefore, direct that,

(i) in Spl. Appeal No. 307 of 1968, a writ of certiorari shall issue quashing the impugned notice dated June 1, 1967 and the order dated June 5, 1967, copies whereof

have been annexed as Annexures 'I' and 'J' respectively to the writ petition giving rise to the Special Appeal.

(ii) in Special Appeal No. 320 of 1968, a writ of certiorari shall issue quashing the impugned notice and the order both dated June 7, 1967, copies whereof have been filed as Annexures 'L' and 'M' respectively to the writ petition giving rise to the Special Appeal.

9. JAGDISH SAHAI, J.:— Writ Petition No. 3958 of 1968 has been filed by Tejpal Singh. Writ Petition No. 4033 of 1968 by Rajendra Prasad Saxena, Writ Petition No. 4394 of 1968 by Ram Ratan Kaushik, Writ Petition No. 4400 of 1968 by S. P. Roy and Writ Petition No. 1254 of 1968 by Kripa Ram Gupta. Special Appeal No. 320 of 1968 has been filed by Dr. Prakash Bhan Saxena and Special Appeal No. 307 of 1968 by Dr. B. B. L. Gupta.

10. Sarvasri Tejpal Singh, Rajendra Prasad Saxena, Ram Ratan Kaushik and S. P. Roy are District Judges in this State. Kripa Ram Gupta is a Probation Officer Incharge, Intensive Probation Scheme, Moradabad. Dr. B. B. L. Gupta was Superintendent, Lala Lajpat Rai Associated Hospital, Kanpur. Dr. Prakash Bhan Saxena was Medical Officer (Epidemic) in a travelling dispensary.

11. On 24-8-1968 on the basis of an order passed by the Governor of U. P., the Home Secretary issued the following notice to Sri. Tej Pal Singh.

"Under Paragraph (i) of the first proviso to clause (a) of Fundamental Rule 56.

Whereas the Governor has ordered under paragraph (i) of the first proviso to clause (a) of Fundamental Rule 56, contained in the Financial Hand Book, Volume II, Parts II to IV, as amended from time to time, that you Sri Tej Pal Singh, Officiating Additional District and Sessions Judge, Moradabad, should be required to retire from service on the expiry of three months from the date of service of this notice on you.

Now, therefore, you shall retire from service accordingly.

By order of the Governor,
Sd. A. K. Mistafy
(A. K. Mistafy)
SACHIV."

Similar notices of different dates were served upon other petitioners and the appellants. Rule 56(a), as it stands today or as it stood at the time when the notices mentioned above were given, reads:

"56(a) Except as otherwise provided in other clauses of this rule the date of compulsory retirement of a government servant, other than a government servant in inferior service is the date on which he attains the age of 58 years. He may be retained in service after the date of compulsory retirement with the sanction

of the Government on public grounds, which must be recorded in writing but he must not be retained after the age of 60 years except in very special circumstances.

Provided that:

(i) the appointing authority may at any time, without assigning any reason, require the government servant to retire on three months' notice or pay in lieu of the whole or part thereof, after he attains the age of 55 years or such lesser age as together with the period of notice in lieu of which the pay is substituted would aggregate to 55 years, so, however, that in the case of pay being given in lieu of the whole or part of such notice the said period shall stand added to the government servant's qualifying service for the purposes of calculating the pension and death-cum-retirement gratuity due to him and for no other purpose; or

(ii) the government servant may, after attaining the age of 55 years, voluntarily retire after giving 3 months' notice to the appointing authority.

Provided further that:

(i) the notice of voluntary retirement given under the first proviso by a government servant against whom a disciplinary proceeding is pending or contemplated shall be effective only if it is accepted by the appointing authority subject to the condition that, in case of a contemplated disciplinary proceeding, the government servant is so informed before the expiry of the notice.

(ii) the notice once given by a government servant under the first proviso shall not be withdrawn by him except with the permission of the appointing authority;

(b) The date of compulsory retirement of a government servant in inferior service is the date on which he attains the age of 60 years. He must not be retained in service after that date, except in very special circumstances and with the sanction of the government.

(c) (1) Civil Engineers of the Public Works Department must retire on reaching the age of 58 years. They may, however, be required by the government to retire on reaching the age of 50 years, if they have not attained to the rank of Superintending Engineer.

(2) Subject to the requirements of this clause as to reappointment the Government may, in the special circumstances which should be recorded in writing, grant an extension of service not exceeding three months to a Chief Engineer.

(3) No Chief Engineer of the Public Works Department shall, without reappointment, hold the post for more than five years, but reappointment to the posts may be made as often, and in such case for such period not exceeding five years, as the government may decide

provided that the term of re-appointment shall not extend beyond the date on which the government servant attains the age of 58 or more than three months beyond that date."

12. These writ petitions came up for hearing before a Bench consisting of Mathur and Satish Chandra, JJ. The learned Judges referred the following two questions of law for the opinion of a Full Bench:

1. Whether under Fundamental Rule 56, the age of compulsory retirement is 55 or 58 years?

2. Whether the proviso to clause (a) of Fundamental Rule 56 violates Articles 14 and 16 of the Constitution?

13. Special appeals of Dr. B. B. L. Gupta and Dr. Prakash Bhan Saxena came up before a Bench consisting of Pathak and Gulati, JJ. They referred the two special appeals to a larger Bench. Learned counsel for the parties are agreed that the two questions that will require determination in the special appeals mentioned above are also the same as referred to by Mathur and Satish Chandra, JJ.

14. I proceed to consider the two submissions made before us, serially.

15. I have reproduced Fundamental Rule 56 in its entirety. Clearly, the petitioners' case will be covered by sub-rule (i) read with the proviso to that sub-rule.

16. In 1961 Fundamental Rule 56(a) provided that:

"56(a) Except as otherwise provided in other clauses of this rule the date of compulsory retirement of a government servant other than a government servant in inferior service is the date on which he attains the age of 55 years."

In 1963 Fundamental Rule 56 was amended and instead of 55 years, 58 years was provided as the date of compulsory retirement in clause (a) of the rule. If clause (a) of Rule 56 stood in isolation and there were no provisos to it, the position would have been clear that the age of compulsory retirement is 58 years. However, the proviso to this provision is to the effect that notwithstanding that clause (a) declares the age of retirement of a government servant as 58 years, the appointing authority may, at any time, without assigning any reason, retire a government servant, on three months' notice or pay in lieu of the whole or part thereof, after he attains the age of 55 years or such lesser age as together with the period of notice in lieu of which the pay is substituted would aggregate to 55 years and the government servant may, also, after attaining the age of 55 years, voluntarily retire after giving three months' notice to the appointing authority. If Rule 56(a) is read along with the proviso, the result that follows is that, as of

right, a government servant can continue in service only upto the time that he attains the age of 55 years. His continuance, thereafter and until he attains the age of 58 years, is subject to the will of the government or the appointing authority. Similarly, the government cannot insist upon a government servant to serve upto the age of 58 years, after he has attained the age of 55 years, without the consent of the government servant concerned.

Clause (a) of Rule 56 must be read along with the proviso. Simultaneously with the amendment of the age of superannuation the proviso was added. A critical analysis of this rule, therefore, leads to the conclusion that after a government servant attains the age of 55 years, he cannot, as of right, continue upto the age of 58 years nor can the government make him continue until he attains that age. For the continuance of a government servant beyond the age of 55 years consent of both i.e., the appointing authority and the government servant concerned is required. The consent need not be express, it may be implied by the circumstance that neither of the two parties exercises its option. Therefore, for all practical purposes, the age of compulsory retirement is 55 years. Clause (a) of Rule 56, however, declares that the age of compulsory retirement of a government servant is 58 years though the effect of that provision is whittled down and narrowed to this extent that after attaining the age of 55 years, the government servant cannot, as of right, continue until he attains the age of 58 years nor can the government insist that he should so continue.

17. Inasmuch as clause (a) of R. 56 clearly provides that the age of compulsory retirement is 58 years, and that figure has been brought in after substituting the original figure of 55 years, it must be held that as a proposition of law the age of compulsory retirement is 58 years. I have already said that notwithstanding the declaration that the age of superannuation is 58 years, government can unilaterally retire a public servant after he attains the age of 55 years as the public servant may go on retirement by taking an unilateral action on attaining that age.

18. In 1966 AIL L. J. 153=(AIR 1966 All 560) a Division Bench of this Court, of which I was a member, while dealing with Rule 56 held:—

"It is true that if only the first clause of Rule 56 is read an impression may be created that the age of retirement is 53 years, but if all the clauses are read harmoniously together, it is clear that the intention of the rule-making authorities was to fix the age of superannuation at 55, leaving it to the Government to per-

mit, with their consent good officers to continue in service until they attained the age of 58 years. It is clearly provided in the rule that after a Government servant has attained the age of 55 years, the Government cannot force him to continue in service and he cannot force the Government to retain him in service, until he attains the age of 58 years. It is true that normally a Government servant can expect to serve until he attains the age of 58 years, but after 55 years, he has no legal right to continue nor can the Government force him to continue. Rule 56 had to be drafted in that manner so as to bring it in line with the rules of the Central Government relating to the superannuation of its employees. Nothing turns upon the manner in which a provision is drafted nor is the use of the words 'age of compulsory retirement' in connection with 58 years conclusive."

19. In this decision it was not noticed by the Bench which decided the case that the effect of amendment of Rule 56 in 1961 was to raise the age of retirement from 55 to 58 years. The position, therefore, was that before 1961 a government servant had to retire at the age of 55 years. In other words, he could not go beyond 55 years, except by way of extension or re-employment. Now he can continue in service upto the age of 58 years, without there being any extension of his service or without being re-employed, though at the age of 55 years, the government can retire him or he himself can retire at that age. In this view of the matter, the decision in *Sridhar Prasad Nigam*, 1966 All. L. J. 153=(AIR 1966 All. 560) (supra) cannot be considered to be quite correct.

20. While dealing with a similar rule, a Full Bench of the Punjab High Court in *Pritam Singh v. State of Punjab*, AIR 1968 Punj. 189 has held that the age of retirement is 58 years. With great respect I agree with that decision.

21. The next question, however, is whether the provisos to clause (a) of Rule 56 of the Fundamental Rules are violative of Articles 14 and 16 of the Constitution. In *Sridhar Prasad Nigam*, 1966 All. L. J. 153=(AIR 1966 All. 560) (supra) the Division Bench took the view that those provisions were not bad for being discriminatory. The submission at the bar is that there is no guiding principle provided in the rule on the basis of which the Government can act. In *Sridhar Prasad Nigam*, 1966 All. L. J. 153=(AIR 1966 All. 560) (supra) the Bench dealt with the matter in the following words:

"In any case the guiding principle on which the Government is expected to act is implicit in the provision. The guiding factor is whether or not the Government

servant concerned is fit to be kept in service after he has attained the age of 55 years. Even if we hold that the rule fixes the age of superannuation at 58 years, we are unable to hold that the provision is discriminatory. As the opening words of the notification dated 19th October 1963 would show, the change was made in view of "the decision of the Government of India raising the age of compulsory retirement from 55 to 58 years of the Central Government servants." As said earlier, a Government servant in the employment of this State would normally continue in service until he attained the age of 58 years, but the Government servant and the Government have an option in the matter which may or may not be exercised. Nothing has been shown to us to justify the conclusion that the Government cannot frame a rule under which while retaining the age of retirement at 58 years, they have the option to retire Government servants three years earlier."

The argument that the provisos are discriminatory inasmuch as they lay down a different rule for retirement than the one contained in CL (a) of R. 56 is not correct because there is a rational basis behind the rule. It was contended that the rule creates classification, one class being of the government servants who would retire at the age of 58 years and the other of those who would be made to retire at the age of 55 years. In my opinion, assuming that there is a classification and there are two classes of government servants there is a reasonable and rational basis for the same, one class being of those whose continuance in service the government thinks is in public interest and the other of those whose continuance is not considered to be for public benefit. Besides both the parties have an option in the matter. The Government has no greater advantage than the public servant. The provisos lay down a rule of public policy that even though the age of superannuation has been raised to 58 years both the parties should have an equal right and opportunity to terminate the service after attaining the age of 55 years. The rise in age of superannuation is made subject to this condition.

22. In the *State of Bombay v. Saubhagchand M. Doshi*, AIR 1957 SC 892 the validity of the provisions contained in R. 165-A which authorised the Government to terminate the services of a government servant, without assigning any reason on his completing 25 years qualifying service or attaining the age of 50 years was upheld by the Supreme Court.

23. In *Dalip Singh v. State of Punjab*, AIR 1960 SC 1305 an order for compulsory retirement made under the provisions of R. 278 of the Patiala State Regulations was upheld by the Supreme Court. In *Shyam Lal v. State of U. P.*,

AIR 1954 SC 369 the validity of the rule requiring a government servant, after he had put in 25 years service, without assigning any cause, was upheld. A similar case is *Gurdev Singh Sidhu v. State of Punjab*, AIR 1964 SC 1585.

24. In *Bishun Narain Misra v. State of Uttar Pradesh*, AIR 1965 SC 1567 it was held that a rule could be validly framed so as to reduce the age of superannuation of a government servant. The same view was taken by a Full Bench of this Court in *Ram Autar Pandey v. State of Uttar Pradesh*, AIR 1962 All 328. In my opinion, there is nothing discriminatory in the two provisos mentioned above. The view that I am taking finds support from AIR 1968 Punj 189 (FB) (Supra).

25. In the five writ petitions only two questions of law have been referred to us and I answer them as stated above,

26. In the two special appeals not a question of law but the special appeals themselves were referred to us. I am of opinion that for the reasons mentioned above, the notices terminating the services of the two appellants mentioned above were valid and the learned single Judge was right in dismissing their writ petitions. I would, therefore, dismiss the special appeals but direct the parties to bear their own costs.

27. **PATHAK, J.:**— I greatly regret my inability to agree with my brother Jagdish Sahai.

28. I am clear in my mind that the age of compulsory retirement of a government servant under Cl. (a) of Fundamental R. 56, as it read at the relevant time and as it reads today, is the date on which the government servant attains the age of 58 years. It is not the date on which he attains the age of 55 years. The language of the rule points to this conclusion and its earlier history confirms it. From 1922 onwards, and especially after 1942, the language of the rule has remained substantially the same and the age of compulsory retirement alone has varied. Until before the amendment in 1957, the rule stated that the date of compulsory retirement is the date on which the government servant attains the age of 55 years. In 1957 the age of compulsory retirement was raised to 58 years. Nothing like the proviso to the present rule was brought in at the time. As it stood then, there cannot be the remotest doubt that the age of 58 years was the age of compulsory retirement. That age was in the year 1961 reduced to 55 years. In the year 1963, it was again raised to 58 years. Since then it has continued to be the same. Had the age of compulsory retirement been intended to remain at 55 years, there was no need for amending the rule in 1963. Viewed against the background of its history, I

find it impossible to say that Cl. (a) of Fundamental R. 56 contemplates any age other than 58 years as the age of compulsory retirement.

29. The age of compulsory retirement under Cl. (a) of Fundamental R. 56 is 58 years. But paragraph (1) of the proviso thereto vests power in the appointing authority to retire a government servant after he attains the age of 55 years. All that it amounts to is that upon the exercise of that power a government servant can be retired before he reaches the age of superannuation. That does not mean that the age of superannuation ceases to be 58 years. That has been fixed by the rule at 58 years. But by an express act of the appointing authority the period of service of the Government servant can be abridged by retiring him before he reaches the age of superannuation. It is urged that the age of 58 years as the age of superannuation is subject to the exercise of power by the appointing authority under paragraph (1) of the proviso, and that upon the appointing authority exercising that power the age of superannuation is reduced to 55 years. I am unable to accept the contention. We have been referred to the opening words of Cl. (a) of Fundamental R. 56, which reads:—

"Except as otherwise provided in the other clauses of this rule."

But that, I think, refers to the relevant clauses of Fundamental Rule 56 so as to exclude the subject matter of those clauses from the operation of Cl. (a) para. (1) of the proviso is not a clause of Fundamental R. 58 but merely a paragraph of the proviso to Cl. (a) of Fundamental R. 56. Apart from this it is possible upon the language of paragraph (1) to the proviso to say that the appointing authority is not confined to retiring a Government servant at the age of 55 years but it may do so at any time after the Government servant attains that age. The clause does not say that the Government servant may be retired on the date on which he attains the age of 55 years. In contrast to the language employed in the parent provision of Cl. (a) of Fundamental Rule 56 paragraph (1) of the proviso treats with a point of time after the age of 55 years. It may be any day after that age is attained. It could not have been intended to make the age of superannuation or compulsory retirement an indefinite point of time depending upon the will of the appointing authority. A Government servant is entitled to know, as an essential requisite for ensuring his sense of security in service, what is the date on which he is ordinarily liable to retire. The age of compulsory retirement must be a definite date and not one which varies according to the decision of the appointing authority.

30. In my opinion, a Government servant is entitled as of right to continue in

service until he attains the age of 58 years unless he is retired by an act of the appointing authority under paragraph (1) of the proviso. Where the appointing authority in the exercise of that power requires a government servant to retire after he attains the age of 55 years, his right to continue until the age of superannuation is curtailed accordingly. There is great difference between the position of a Government servant entitled to continue in service until the age of 58 years, unless that right is abridged by the exercise of the power vested in the appointing authority to retire him after he attains the age of 55, and the position of a government servant entitled until the age of 55 years merely, and thereafter to continue only upon an order expressly enlarging his age of retirement. In the first case, the order of the appointing authority affects the curtailment of a right vested in the government servant, in the latter case the order of the appointing authority is in the nature of a concession permitting a government servant to continue beyond the span ordinarily allotted to him under the rule.

31. Paragraph (2) to the proviso entitles a government servant to retire voluntarily after attaining the age of 55 years and, it is said, the right granted to a government servant to retire voluntarily at the age of 55 years establishes that the date of compulsory retirement is also 55 years. I do not think that is so. It is always open to the State Government, or for that matter, any employer to provide for the voluntary retirement of an employee even before the contracted age of compulsory retirement.

32. In this view of the matter I am unable to agree with the observations in 1966 All. L. J. 153=(AIR 1966 All. 560) that the age of superannuation under Fundamental Rule 56 (a) has been fixed at 55 years leaving it open to the appointing authority to permit, with its consent, an officer to continue in service until the age of 58 years.

33. The next question is whether paragraph (1) of the proviso to Fundamental Rule 56 (a) violates Articles 14 and 16 of the Constitution. Article 14 guarantees the general right of equality, while Article 16 is an instance of the same right in favour of citizens in certain special circumstances. *Dasrath Ram Rao v. State of Andhra Pradesh*, AIR 1961 SC 564. It is now well settled that, to conform to the "equality" provisions in the Chapter of Fundamental Rights in our Constitution, a group of persons may be treated differently from the general, provided the group falls into a classification which bears a reasonable relationship to the object of the statute. It was pointed out in *Moti Das v. S. P. Sahi*, AIR 1959 SC 942 that:

"While Art. 14 forbids class legislation,

it does not forbid reasonable classification for the purposes of legislation, and in order to pass the test of permissible classification, two tests must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from the others left out of the group and (2) that the differentia must have a rational relation to the objects sought to be achieved by the statute in question."

There must be classification, and the classification must not be arbitrary. The test of permissible classification necessarily presupposes a classification already. The classification is defined by something in the statute which separates the members of the group from the rest. There must be something in the statutory provision indicating clearly who will form members of the group and who will fall outside it. Where it is not possible to determine that, it is clear that while one person may be governed by the general rule, another similarly situated may be exposed to discriminatory treatment under the impugned provision. The provision imposing the burden complained of must, as the first step in the series of considerations safeguarding its validity, contain a standard, policy or guideline sufficient to define the group which it seeks to involve. In the absence of any sufficiently defined guiding considerations, the door will be left open to arbitrary action, and whim or humour will find play under a constitutional system scrupulously devised to protect and safeguard the rule of law.

34. Compared with the parent provision in Cl. (a) of Fundamental R. 56, there is nothing in paragraph (1) of the proviso to indicate what is the group of persons sought to be isolated within the ambit of that paragraph. Any such guiding consideration is conspicuous by its absence. It is not usual in measures of this nature to find a "carte blanche" given to executive authority. In the case-law cited before us, almost all the systems codifying the rights and obligations between the State and its servants invariably contain the controlling consideration that the power to retire a Government servant prematurely must be exercised only in the public interest or on account of inefficiency or dishonesty or some similar consideration. It is difficult to appreciate why such a factor of control was not included in the constitution of the impugned provision when it was framed.

35. It is said that the only purpose of the impugned Paragraph of the proviso could be, and is, the retirement of Government servants whose mental or physical ability had become so impaired as to materially affect the proper discharge of their functions of office, and to retire Government officers who could be said

to be corrupt but against whom no formal proceeding in a Court of law would succeed. It may be that that was the object in enacting the impugned provision. But we are concerned with the provision as it is, not with what it should have been. As it stands, it gives to the appointing authority an undefined and uncontrolled discretion in deciding whether one Government servant should be retired prematurely while another is allowed to run his normal span. In *Jyoti Prasad v. Union Territory of Delhi*, AIR 1961 SC 1602, while formulating the tests in respect of Art. 14, the Supreme Court observed:—

"The enactment or the rule might not in terms enact a discriminatory rule of law but might enable an unequal or discriminatory treatment to be accorded to persons or things similarly situated. This would happen when the Legislature vests a discretion in an authority, be it the Government or an administrative official acting either as an executive officer or even in a quasi-judicial capacity, by a legislation which does not lay down any policy or disclose any tangible or intangible purpose, thus clothing the authority with unguided and arbitrary power enabling it to discriminate

.....In such circumstances the very provision of the law, which enables or permits the authority to discriminate, offends the guarantee of equal protection afforded by Article 14."

It is contended that we should presume that the power conferred will not be abused and that official authority will discharge its duties honestly and in accordance with law. Here again, it is forgotten that even assuming that the authority will always act honestly, there is nothing in the impugned provision itself, or for that matter in any part of the Fundamental Rule, to indicate to the authority what is the kind of Government servant to whom the impugned provision can be applied. The presumption that the authority will act in accordance with the rule of law can be sustained only if there is a rule of law to guide him.

36. Not infrequently cases arise where the question is whether a statute has laid down a policy for the guidance of the authority exercising power under it. It is a question which must be resolved in the light of one test or another. Concerning this, the following comment of the Supreme Court in *Gopal Narain v. State of U. P.*, AIR 1964 SC 370 is especially pertinent:

"In this context, because of a Legislature's reluctance or inadvertence to express itself clearly of its policy, a heavy and difficult burden is often placed on Courts to discover it, if possible, on a fair reading of the provisions of the Act. Some Acts expressly lay down the policy to guide the exercise of discretion of an

authority on whom a power to classify is conferred. Some Acts, though they do not expressly say so, through their provisions may indicate clearly by necessary implication, their policy affording a real guidance for the exercise of discretion conferred on an authority thereunder. While a Court should be on its guard not to enter into the domain of speculation with a view to cover up an obvious deficiency in a legislation it may legitimately discover such a policy, if it is clearly discernible on a fair reading of the relevant provisions of the Act. This Court, in 1952 SCR 435 = AIR 1952 SC 123 found the clear policy of the Legislature on the basis of the preamble of the Act taken along with the surrounding circumstances; in *P. Balakotaiah v. Union of India*, AIR 1958 SC 232, on an examination of the Act read as a whole; and in *Pannalal Binraj v. Union of India*, AIR 1957 SC 397 at p. 410 from the preamble itself. This view was accepted in later decisions. But it is neither possible nor advisable to lay down precisely how a Court should cull out such a policy from an Act in the absence of an express statutory declaration of policy. It would depend upon the provisions of each Act, including the preamble. 'But what can be posited is that the policy must appear clearly either expressly or by necessary implication from the provisions of the statute itself.' (Emphasis here in mine).

Can it be said that there is anything in the impugned provision itself or any thing in the context in which it appears which can be said to clearly show, either expressly or by necessary implication, that the power to prematurely terminate the services of a Government servant is controlled by some pertinent consideration? I think not. The language of the impugned provision and its contextual surrounding do not clearly point to any pertinent principle in conformity with which the services of a Government servant may be terminated. There is also nothing in the history of the rule from which assistance can be derived in this respect.

37. There is the further consideration that while the power of appointing a government servant is generally, controlled by a complex detailed procedure involving, in some cases, consultation with the Public Service Commission, it will be anomalous to assume that a Government servant, appointed in accordance with that procedure and enjoying by virtue of his appointment the valuable right to continue in service, was intended to be exposed to a wholly arbitrary termination of his service. If the suitability of a candidate for appointment is required to be processed through a system which guards against arbitrary exercise of power, there is equally good reason why the termination of his service should (not?) be controlled by some ad-

the debtors without resorting to legal action then for the recovery of the debt.

16. Our attention was invited to the decision in *Crears v. Hunter*, (1887) 19 QBD, 341, where the facts were that the defendant signed a promissory note making himself jointly and severally liable along with his father, for the purpose of inducing the promisee to give time to the defendant's father for payment of a debt. The forbearance of the creditor was held sufficient to support the promise made by the defendant, although there was no contract made by the plaintiff to forbear from suing. The Master of the Rolls Lord Esher pointed out that the promissory note that was drawn up, on its face, did not provide for any delay in payment because the father's liability on the note arose instantaneously after the note was drawn up and signed, and then made observations which are very aptly applicable to the instant case:

"The note does nevertheless indicate on the face of it that, though there was no binding agreement to forbear, the parties did contemplate that the note might not be sued on for some time".

and further it was said:

"It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forbear to sue the father, but what was the substance of the transaction contemplated in the minds of the parties?"

17. The observations extracted above are directly in point in this case. The situation in the case on hand is exactly identical with the one dealt with in that case. There is no recital in the deed of guarantee that it was given in consideration of the forbearance of the creditor. The letter, on its face, did not say, so. But the facts bear no other construction than that time would be given and the obligation was not to be instantly enforced by a suit. The guarantee was given as an integral part of that transaction. There was in fact the forbearance of the creditor although there was no express promise to that effect made by him to do so. To adopt what was said by Lord Esher, M. R. in that case,

"The question is whether, if the guarantor requests the creditor to forbear from suing and the creditor on such request, although he does not at time bind himself to forbear does in fact forbear to sue, there is a good consideration for the guarantee."

The answer should be in the affirmative. It scarcely admits of any doubt that, if at the request of the guarantor, express or implied, the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor. The contention that the request to forbear must be express is not warranted by any principle. The precedent to the contrary is well established.

18. The observations made by Lindley, L. J., in the case also bear quotation:

"Looking at the document and the history of the transaction, I cannot invent any rati-

onal theory by which to account for the defendant's giving the note except that it was for the purpose of benefiting his father by procuring for him time to pay the debt. To say otherwise appears to me inconsistent with human nature and the whole character of the transaction."

The letter of guarantee in the present case is inexplicable on any other hypothesis except that it was the inducement for the granting of time by the creditor to the principal debtors. The promissory note was no doubt, payable on demand. But, as pointed out by the Court of appeal in the decision cited above, the creditor in fact gave time for payment and such forbearance is valid consideration though it did not emanate from an express promise to forbear.

19. This principle has received wide recognition, and, in 18, Halsbury's Laws of England, at pages 420 and 421, it is stated that actual forbearance at the request, express or implied, of the surety affords valid consideration for the surety's promise. Forbearance need not even be for a definite period. Even if it is for an indefinite period, the parties will be presumed to have contemplated forbearance for a reasonable period.

20. The learned counsel for the appellant placed reliance on a passage in 18, Halsbury's Laws of England, at page 419, which expresses the principle that the mere existence of the debt of another person is not sufficient to support the surety's promise to the creditor. It is sufficient to point out, that in the present case there was in fact something done or refrained from being done by the creditor, which sustains the promise of the guarantor. It is unnecessary for us to consider the question whether the further statement of law in paragraph 781 of 18, Halsbury's Laws of England, "that a surety's promise to the creditor must in all cases be founded on a new consideration" is to be taken as unexceptionable in view of the well-settled rule that the existence of a preceedent debt is sufficient consideration for a subsequent promise to pay that debt. We may, however, refer to the decision in *Wigan v. English & Scottish Law Life Assurance Association*, 1909-1 ChD 291 though it was not cited before us. In that case, the principle that mere existence of a debt is not sufficient valuable consideration for the debtor giving the creditor security to secure the debt, was coupled with the modification that if circumstances exist from which the Court can infer an agreement of forbearance on the part of the creditor, the obligation will be sustained at law. In *Fullerton v. Provincial Bank of Ireland*, 1903 AC 309 at 313, Lord Macnaghten observed:—

"In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for for-

bearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it."

Several other authorities had been referred to by Parker, J., in 1909-1 ChD 291 Supra. There is clear and abundant authority that a surety's promise or security given by the debtor could be validly enforced if there is an agreement, express or implied, to give time, or if there is an actual forbearance which, ex post facto, may become the consideration to support it.

21. We have, therefore, no hesitation in holding that the letter of guarantee given by the 10th defendant and another person was supported by adequate and valuable consideration. A finding to the same effect has been concurrently recorded by the Courts, below. We are, therefore, of opinion that the second appeal must fail because of the conclusion that in fact there was in existence a debt of the father which the sons were bound to discharge. As the plaintiffs' plea that there was no debt in existence has to be negatived on merits, there is no need to express any opinion on the question whether the existence of an operative and conclusive decree against the father is not an impediment to the enquiry into the question as to whether the precedent debt was in existence or supported by consideration. We, therefore, refrain from going into that question.

In support of the contention that it is open to a son to attack the validity of a decree on the ground that it was based upon an unenforceable debt or on a debt which did not in fact exist, the learned Counsel for the appellant relied on the observations of the Supreme Court in *Faquir Chand v. S. Hamam Kaur*, (1967) 2 SCJ 811 = (AIR 1967 SC 727). There is, no doubt, an observation of the Supreme Court that the son is bound by an execution sale unless he showed that the debt was non-existent or was tainted with immorality or illegality. But on an examination of the facts and contentions in that case, it is apparent that the controversy in that case did not turn on the question whether the debt of the father on which the decree was based, did in fact exist.

22. In conclusion, the learned counsel for the appellant submitted, relying on a passage at page 351 of the Principles of Hindu Law by Mulla, 13th Edition, that the liability of the surety in this case is purely personal and does not extend to the sons. The argument is that according to the text of *Yajnavalkya*, a distinction is to be drawn between cases where a father as surety binds himself personally to pay the loan and cases of another category where a father gives a security for the performance of the obligation. It is said that the obligation in the former category is entirely personal.

We are unable to accept this argument in view of the authority in *Thangathammal v. Arunachalam Chettiar*, ILR 41 Mad 1071 = (AIR 1919 Mad 831). In that case, a Hindu father executed a surety bond stating that he

would make the debtor pay within two months the amount due on a promissory note already executed by the latter and that, in default of payment by the debtor, he would pay. The decision of a Division Bench of the Madras High Court was to the effect that the surety was one for payment and that the sons of the surety were liable under Hindu Law for the payment. It was also laid down that it made no difference to their liability that the money had already been lent to the creditor before the surety bond was executed. The text of *Yajnavalkya* has been understood in the sense that where the suretyship is one for payment, the surety's sons are also bound to pay the debts. We are unable to hold that the present case is distinguishable on principle from the decision in ILR 41 Mad 1071 = (AIR 1919 Mad 831) supra. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

AIR 1970 ANDHRA PRADESH 162
(V 57 C 23)

P. JACANMOHAN REDDY, C. J. AND
KUPPUSWAMI, J.

Hyderabad Co-operative Commercial Corporation Ltd., Appellant v. Syed Mohiuddin Khadri and others, Respondents.

A. A. O. Nos. 210 and 374 of 1967, D/-23-1-1968 from order of 2nd Addl. Chief J., City Civil Court, Hyderabad, D/-11-7-1967.

(A) Civil P. C. (1908), O. 21, Rr. 52, 53 to 63 and 46 and S. 60 — Amount provided in budget for payment to particular institution — Does not by itself become property of institution in hands of public officer nor is it debt due to institution and cannot be attached — Denial by public officer that he had any amount in his custody or denial of debt by garnishee — Provisions of Rr. 58 to 63 are not attracted — (Constitution of India, Arts. 202 and 112 — Evidence Act (1872), S. 115).

The respondent obtained a decree against a society by name H.C.C.C. Ltd., whose assets and liabilities were taken over by the Government. A provision for the Civil Supplies Department (Telangana) was made in the budget for 1959-60 under Major head "85-A. Capital outlay of the Scheme of Government (A) Civil Supplies". One of the items under this head was payment to H. C. C. C. Ltd. of Rs. 4,50,000. Coming to know of the Budget provision the respondent decree-holder filed an execution petition for attachment of this sum of Rupees 4,50,000 in the hands of the Commissioner, Civil Supplies Department. On the question whether the sum of Rs. 4,50,000 thus reserved could be construed as the property of the H. C. C. C. Ltd., in the hands of the Government or the Commissioner of Civil Supplies and hence Order 21, Rule 52, Civil P. C. applied:

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Held, "Appropriation" was defined in the Budget Manual as the amount provided in the Budget estimate for a unit of appropriation or the part of that amount placed at the disposal of a disbursing officer. Though it may be intended to be paid for a particular purpose or to a particular institution it does not, by reason of the appropriation, become the property of the institution in the hands of the Officer. The mere fact that the Commissioner of Civil Supplies directed the Treasury Officers to make payments to H. C. C. C. Limited, as and when occasion arose did not mean that the amount as a whole became the property of the H. C. C. C. Limited, in the hands of the disbursing officer, namely Commissioner of Civil Supplies. Until and unless the bills were drawn and paid to H. C. C. C. Limited, the amount or any part thereof could not be treated as property of the H. C. C. C. Limited. Therefore, Order 21, R. 52, Civil P. C. had no application. (1898) ILR 22 Bom 39 and AIR 1915 Mad 236 (1) and AIR 1917 Cal 13, Foll.

(Para 22)

The decree-holder before he can apply for attachment under O. 21, R. 52, Civil P. C., has to satisfy the Court not only that the amount sought to be attached belongs to the judgment-debtor but is in the hands of an officer. The Public Officer concerned can only produce the amount if it is in his custody. If it ceases to be in his custody for some reason or other, there is no question of his being directed to produce the amount.

(Para 28)

The order of the Commissioner of Civil Supplies directing the Treasury Officers to make payments to H. C. C. C. Limited did not clothe the H. C. C. C. Limited with the right to be paid. It was always open to the Government or the Commissioner to withdraw the direction before any bill was presented to them by the H. C. C. C. Limited or on the behalf of H. C. C. C. Limited. Therefore, the contention that the amount of Rs. 4,50,000 was in the nature of a debt owing to H. C. C. C. Limited, which was liable to be attached under O. 21, R. 46, Civil P. C. was also without substance.

(Para 27)

There is no distinction in principle between the denial of amount in the custody of an officer when an attachment is made under O. 21, R. 52, Civil P. C. and the denial of a debt when the attachment is made under O. 21, Rule 46, Civil P. C. In either case the provisions of O. 21, Rr. 58 to 63 are not attracted. There was, therefore, no necessity for the officer or the Government to make any claim under Order 21, Rule 58, Civil P. C. It was no doubt true that the Government filed a claim petition which was dismissed and thereupon filed a suit under Order 21, Rule 63, Civil P. C. These proceedings were misconceived and the mere fact that the Government took proceedings which did not lie did not preclude them from contending that the case

was not covered by O. 21, Rr. 58 to 63, Civil P. C. and that, any decision in the claim petition did not prevent them from questioning the validity of the attachment in spite of the fact that they filed a suit which was later withdrawn. (Para 34)

(B) Co-operative Societies — Multi-Unit Co-operative Societies Act (1942), Ss. 5A, 5B, 4 (2) — Power under S. 5B refers to power under S. 5A and not to power under S. 4 (2).

Section 4 (2) read with Sections 2 and 3 of the Act clearly point to the conclusion that the power which the Central Registrar exercises under that section is a power exercisable by the State Registrar under the Act in force in the State which is applicable to particular Society. The power so exercised by the Central Registrar cannot be a power exercised or exercisable by the Central Registrar under this Act. In view of the fact that Sections 5-A and 5-B of the Act were enacted together by way of amendments under S. 105 of the States Reorganisation Act and in view of the fact that Sec. 5-B refers only to the entrustment of powers exercisable by the Central Registrar, under this Act to the State Registrar, there can be no doubt that the power referred to in Section 5-B can have only reference to the power of the Central Registrar under Section 5-A which is the power exercisable under this Act and cannot have reference to the power of the Central Registrar under Section 4 (2) where he is exercising only the power of a State Registrar under the provisions of the State Act, (Para 45)

Cases Referred:	Chronological	Paras
(1965) AIR 1965 SC 1150 (V 52) =		
(1965) 1 SCR 586, Devilal v. Sales Tax Officer		49
(1965) AIR 1965 SC 1153 (V 52) =		
(1965) 2 SCR 547, Gulabchand v. State of Gujarat		49
(1964) AIR 1964 SC 1013 (V 51) =		
(1963) Supp 1 SCR 172, Amalgamated Coalfields Ltd. v. Janapada Sabha Chhindwara		49
(1964) AIR 1964 SC 1329 (V 51) =		
(1964) 6 SCR 857, Hukumchand Mills Ltd. v. State of Madhya Pradesh		46
(1957) AIR 1957 Andh Pra 61 (V 44) =		
(1956) 2 Andh WR 1137 (FB), Chimpiramma v. Subrahmanyam		30
(1957) 1957-3 All ER 344 = 1957-1 WLR 1102, Dunlop and Ranken v. Hendall		26
(1955) AIR 1955 Mad 660 (V 42) =		
1955-2 Mad LJ 376, Anjaneya Motor Transport v. State of Madras		46
(1954) AIR 1954 Trav-Co 243 (V 41) =		
ILR (1954) Trav-Co 281 (FB), Govt. of U. S. of Trav-Co v. Bank of Cochin Ltd.		31
(1949) AIR 1949 Mad 586 (V 36) =		
1949-1 Mad LJ 593 (FB), Seethamma v. Kotareddi		30

- (1943) AIR 1943 Mad 36 (V 30) =
ILR (1943) Mad 40, Akkammal v.
Komarasami 30
- (1942) AIR 1942 Pat 508 (V 29) =
ILR 21 Pat 287, Kameswar Singh
v. Kulesbwar Singh 31
- (1936) AIR 1936 Mad 152 (V 23) =
ILR 59 Mad 966, Butchayya v.
Krishnamachari 31
- (1932) AIR 1932 Mad 169 (V 19) =
61 Mad LJ 863, Alwar Aiyangar
v. Subramania Disksbathar 31
- (1926) AIR 1926 Rang 175 (V 13) =
ILR 4 Rang 100, Ma Saw Yin v.
Hock To 31
- (1924) AIR 1924 Mad 92 (V 11) =
45 Mad LJ 156, Secy. of State for
India v. Apparao 46
- (1924) AIR 1924 Nag 98 (V 11) =
20 Nag LR 11, Panna Lal v.
Bhagirathbhai 31
- (1917) AIR 1917 Cal 13 (V 4) = ILR
44 Cal 1072, Thakurdas v. Joseph
Iskander 24
- (1915) AIR 1915 Mad 236 (1) (V 2) =
26 Mad LJ 364, K. Tiruvangadial
v. R. Chinnarwami 24
- (1911) 11 Ind Cas 422 = 16 Cal
WN 14, Padmanand Singh v. Rama
Prosad 24
- (1900) ILR 27 Cal 38 = 4 Cal WN
87, Haridas Acharjia Chowdhry v.
Baroda Kishore Chowdhry 26
- (1898) ILR 22 Bom 39, Tulaji v.
Balabhai 24
- (1895) ILR 18 Mad 236 = 5 Mad
LJ 114 (FB), Rajam Chettai v.
Seshayya 46

Advocate General, for Appellant, In both the Appeals; A.Venkataramana, (for Nos. 2 to 10) in A.A.O. No. 210 of 1967 and (for Nos. 2 to 4 and 6 to 9) in A. A. O. No. 374 of 1967, and K. Madhava Reddy (for No. 11) in A. A. O. No. 210 of 1967 and (for No. 12) in A.A.O. No. 374 of 1967, for Respondents.

KUPPUSWAMI, J.: These are two appeals, the first by the Hyderabad Co-operative Commercial Corporation Limited (hereinafter referred to as "H.C.C.C. Ltd.") through the Director of Civil Supplies, Hyderabad and the second by the State of Andhra Pradesh, represented by the Dy. Secretary to the Government of Andhra Pradesh, Civil Supplies Department, against the same order D/-11-7-1967 of the second Additional Chief Judge, City Civil Court, Hyderabad, in E. A. 54/62 in E. P. No. 95/59 in O. S. No. 2 of 1959 on his file.

2. Respondents 1 to 10 in these appeals are the same, respondent 1 being Syed Mohiuddin Khadri, the decree-holder in the above suit, who having died is now represented by his legal representatives, respondents 2 to 10. Respondent 11 in C.M.A. No. 374/67 is the H.C.C.C. Ltd. represented by the Director of Civil Supplies, who, as stated above, is the appellant in C.M.A. No. 210 of 1967. Later applications were filed to add the Liquidator, H.C.C.C.

Ltd. which is now under liquidation as a respondent in the two appeals and the said applications have been ordered.

3. The order under appeal is passed in execution proceedings in O.S. No. 2 of 1959, City Civil Court, Hyderabad. Though the decree was passed on 24-8-1959, the execution proceedings have been going on ever since and have come up to the High Court on several occasions. In order to appreciate the contentions raised by both the sides in these appeals, it is necessary to set out in detail the various events that have culminated in the passing of the impugned order.

4. A company called "The Hyderabad Commercial Corporation Ltd." was registered under the Hyderabad Companies Act 4 of 1340 F. on the 23rd Farwardi, 1352 Fasli. Sometime later on 12th Rajabul Murajab, 1365 Hijri by a Firman of H.E.H. the Nizam it was converted into Hyderabad Co-operative Commercial Corporation Ltd. The bye-laws of the Society were duly registered. The H.C.C.C. Ltd. was carrying on its business according to bye-laws. On 26th February, 1952, Notifications Nos. 18 to 20 were published in the Gazette. Under Notification No. 18, the godowns of the H.C.C.C. Ltd. were requisitioned in exercise of the powers conferred under Section 3 of the Requisition of Immovable Property (Continuance of Temporary Powers) Regulation, 1957 F. and the Managing Director was ordered to hand over the possession thereof to the Commissioner of Civil Supplies on 1-3-1952. By Notification No. 19, certain articles belonging to H.C.C.C. Ltd. were requisitioned and the Managing Director was directed to hand over the same to the Commissioner of Civil Supplies on 1-3-1952. By Notification No. 20, the whole of the stock of the food supplies referred to therein held by the Corporation was ordered to be sold and delivered possession of to the officers authorised in this behalf at the prices entered in the books of the H.C.C.C. Ltd.

The legal effect of these notifications is one of the questions that arises in these appeals. The respondent contends that the entire assets and liabilities of the H.C.C.C. Ltd. were taken over by the Government, with the result that the Government became the representative-in-interest of the Corporation. On the other hand, it is contended by the Government that the notifications have only the effect of transferring the godowns, stocks, etc., but do not have the effect of the Government becoming entitled to all the assets and being subject to all the liabilities of the Corporation. At this stage, however, it is sufficient to note that the entire management became vested in the Department of Civil Supplies and the Director of Civil Supplies began to represent the company in all its affairs.

5. Disputes seem to have arisen between Syed Mohiuddin Khadri, since deceased (though deceased he is described as the first

respondent) and the H.C.C.C. Ltd. in respect of a contract entered into between them. The dispute was referred to arbitration and ultimately two arbitrators, Sri Sadashiv Rao and Sri Venkatarangam Iyengar, passed unanimous award dated 23-5-1958 directing the H.C.C.C. Ltd. to pay Syed Mohiuddin Khadri, a sum of Rupees 6,91,293-10-11 (O.S.) with interest. Syed Mohiuddin Khadri thereupon filed O.S. No. 2 of 1959 before the Chief Additional Judge, City Civil Court, Hyderabad, praying that a decree may be passed in terms of the award. The H.C.C.C. Ltd. represented by the Director of Civil Supplies objected, inter alia, on the ground that the award was passed against a wrong person and, therefore, no decree could be passed in terms of the award. It was contended that H.C.C.C. Ltd. was not in existence on the date of award as the Corporation was taken over by the Government with effect from 1-3-1952 with all its assets and liabilities. This objection was, however, overruled by the learned Judge who found that there was no evidence to show that the H.C.C.C. Ltd. ceased to exist. It was held that H.C.C.C. Ltd. was still in existence with the change that the management was taken over by the Government and, therefore, it cannot be said that the award had been passed against a dead or wrong person. The award was, therefore, made a rule of Court and a decree was passed in terms of the award on 24-8-1959.

6. Meanwhile, a provision for the Civil Supplies Department (Telangana) was made in the budget for 1959-60 under Major head "85-A—Capital Outlay of the Scheme of Government (A) Civil Supplies". One of the items under this head was payment to H.C.C.C. Ltd. Rs. 4,50,000. On 12-6-1959, the Assistant Chief Accounts Officer addressed a communication to all the District Treasury Officers, Civil Supplies, Telangana region, drawing attention to this and other provisions in the Budget and adding that they are requested to kindly make the payments under the above head as per rules and intimate to this office the full particulars of amounts of expenditure incurred in the districts every fortnight on the 5th and 20th of succeeding month to which they relate for watching the expenditure as a whole against the above provision. Coming to know of the Budget provision and the above communication, the decree-holder in O.S. No. 2 of 1959 filed E.P. No. 95 of 1959 for attachment of "certain money in the hands of the Commissioner of Civil Supplies, namely, Rs. 4,50,000, vide p. 662 of the Budget for the year 1959-60 and letter No. A/Cs.K.1/520/59 dated 12-6-1959" referred to above.

On 27-11-1959 the Additional Chief Judge, City Civil Court, Hyderabad, issued a prohibitory order to the Commissioner of Civil Supplies requesting him to hold the said sum or such portion of it as is available

with him, subject to further orders of the Court. A copy of it was forwarded to the Accountant-General with a similar request. The Accountant-General, Hyderabad, wrote to the Commissioner a letter dated 2-12-1959 stating that in view of the above orders, no payment relating to H.C.C.C. period will be made by this office without the concurrence of the Court. A copy of the letter was forwarded to the Court for information. On 4-12-1959 the Court passed another order to send the attached amount of Rs. 4,50,000 or such portion of it before 7-12-1959 to that Court and a communication was sent to this effect to the Commissioner of Civil Supplies with a copy to the Accountant-General. To this the Accountant-General replied as follows by his letter dated 9-12-1959:—

"As regards the remitting of the amount it is stated that the amount mentioned in your office letter referred to above is only a budget provision for meeting the liabilities of H.C.C.C. period. Payment from this provision is made by this office on presentation of bills by the drawing officer, subject to sanction of Government for time-barred claims."

7. On 5-12-1959 the Additional Government Pleader filed an application requesting the Court to postpone the calling of this amount from the Commissioner of Civil Supplies till the disposal of the E.P. as the Government was contemplating to contest the same. The Court, thereupon, postponed the calling of the amount attached. The decree-holder then filed a petition to withhold the communication of the order passed on 5-12-1959. This was allowed. On 10-12-1959 a claim petition was filed on behalf of the Government. In the claim petition filed by the Government under O. 21, R. 58, Civil P. C., it was contended that though the assets and liabilities of the Corporation were taken over by the Government, by reason of such taking over, the Government did not itself become liable to the creditors of the Corporation. The Government was in the position of a third party unaffected by the decree of the suit. It was itself a creditor to an extent of eight crores and had first charge on the assets of the Corporation and was, therefore, entitled to file the claim petition relying upon the first charge. It was also pointed out in that petition that there was no actual amount in the hands of the Commissioner of Civil Supplies, but only a Budget provision which was not attachable. Payment of amounts is always subject to the approval and sanction of the Government. There was actually no such amount in the hands of the Commissioner of Civil Supplies. It was, therefore, prayed that the Court may be pleaded to raise the attachment and recall the prohibitory order and in any case declare that any amount or asset belonging to or payable to the Corporation can be paid towards the decree until the claims of the

Government as the first lien holder are satisfied.

The decree-holder filed his counter to the claim objection and further filed a petition pointing out that the Government was adopting unjust, obstructive and dilatory tactics and though the Accountant-General had intimated that he will not dispose of the amount of Rs. 4,50,000 until orders of the Court, this would not be sufficient to safeguard his interests as the Budget provision might lapse at the end of the year and the Government may not make any provision in the next year just to harass and deprive him of the fruits of his decree. He, therefore, requested the Court to order the Commissioner of Civil Supplies and the Accountant-General to deposit the said sum of Rs. 4,50,000. In spite of the order dated 7-12-1959 directing to deposit the amount, the sum does not seem to have been deposited by the Accountant-General having explained the position by his letter dated 9-12-1959. On 6-7-1960 the Accountant-General wrote to the Court stating that with the close of the financial year 1959-60 the balance of the provision mentioned in the previous letters from the Court had lapsed to the Government.

8. The claim petition came up for hearing on 4-11-1960. The Court rejected the contention that the amount attached was a mere budget provision and, in fact, did not exist and was not available for attachment. It also held that it was not possible in a summary proceeding of the nature to go into the question whether the Government had lien or a first charge over the amounts that were due to them and that would be decided only in a regular suit. It, therefore, refused to raise the attachment and dismissed the petition. The Government, thereupon filed O.S. No. 21 of 1960 before the Additional Chief Judge, City Civil Court, Secunderabad, under O. 21, R. 63, Civil P. C., to set aside the order in claim petition dated 4-11-1960. This was transferred to the High Court and numbered as C.S. No. 1 of 1962.

9. Meanwhile on 6-9-1960 an order was passed by the Registrar of Co-operative Societies under Section 56 (1) of the Hyderabad Co-operative Societies Act, cancelling the registration of the H.C.C.C. Ltd. The order stated that an enquiry under Section 42 of the Act was ordered into the affairs of the Corporation by the Deputy Registrar and the Enquiry Officer and the Deputy Registrar recommended that it may be liquidated. The order was to take effect after expiry of two months from that date, i.e., after 6-11-1960. The decree-holder thereupon filed W.P. No. 763 of 1960 questioning the said order of liquidation. As he did not recognise the liquidation, in the cause-title, he described the second respondent as the H.C.C.C. Ltd. represented by the Director of Civil Supplies. The first respondent was the Registrar of Co-opera-

tive Societies. In that petition the decree-holder contended, inter alia, that on and from 1-3-1952 there was no society at all in existence as it ceased to be such and became a Department of the Government as it was merged in the Civil Supplies Department of the Government. Therefore, no question of cancelling the registration of the society or appointing a Liquidator for the same can arise. This Court rejected that contention and observed that as the decree-holder had made a claim against the society only as a corporate body and obtained award only against the society and not against the Government, he could not be permitted to contend that the Government and the society are one and the same. It further observed that there is no devolution of any liability on the part of the Government.

It was further contended by the petitioner that the liquidation was illegal as the Registrar had not acted independently but to the dictation of the Government, that it was vitiated by bias as H.C.C.C. Ltd. was formed under a Firman issued by the Nizam it was not governed by the provisions of the Hyderabad Co-operative Societies Act. These contentions were also rejected by this Court. In the result, the writ petition was dismissed.

10. The suit C.S. No. 1 of 1962 filed under O. 21, R. 63, Civil P. C., came up for hearing on 29-3-1963. Before it was taken up, an application 107 of 1963 dated 18-3-1963 was filed under O. 23, R. 1, Civil P. C., praying that the High Court may be pleased to permit the plaintiff to withdraw the suit with liberty to press its claim to a lien or charge before the liquidator in liquidation proceedings. In the affidavit, in support of that application, it was stated that the Government was advised to go before the liquidator to press their claim and hence they would like to withdraw the suit. Our learned brother Kumarayya, J., who heard the application pointed out that the said request to withdraw the suit, subject to the reservation that the plaintiff may be at liberty to press his claim as a secured creditor in the liquidation proceedings cannot be granted. If the plaintiff had any subsisting right and a remedy in law, the withdrawal may not affect him. This was, however, a matter to be decided having regard to the particular remedy sought. In view of these observations, the learned Advocate-General did not press the latter part of the application. The suit was, therefore, dismissed as withdrawn.

11. Meanwhile on 21-4-1962, after the dismissal of the claim petition, the petitioner filed E.A. No. 57 of 1962 dated 21-4-1962 to call for the attached amount. This was again resisted by the H.C.C.C. Ltd. The Personal Assistant to the Director of Civil Supplies who filed the counter-affidavit, averred that the Registrar of Co-operative Societies had ordered liquidation in September, 1960 and the same order had been

upheld by the High Court in W.P. No. 763 of 1960 and as the decree-holder had not obtained leave of the Registrar to file the execution petition, it should be dismissed. The application was heard by the Second Additional Chief Judge, City Civil Court, Hyderabad, on 23-7-1962. He took the view that the amount was attached prior to the liquidation proceedings and the Director of Civil Supplies had to send the amount first to the Court and it was only after this, the Director or the Liquidator, as the case may be, can apply to Court to hear their objections. He, therefore, directed the Civil Supplies Department to deposit the amount immediately in obedience to the order of his learned predecessor and it is only after the amount is credited that the objection, if after the property is vested in liquidator, the decree-holder will be entitled to draw the amount, will be heard giving full opportunity to all concerned.

As against this order, H.C.C.C. Ltd. represented by the Director of Civil Supplies preferred C.M.A. No. 304 of 1962 to this Court. The liquidator preferred C.M.A. No. 343 of 1963. C.M.A. No. 304 of 1962 was heard by Chandra Reddy, Chief Justice and Gopalrao Ekbote, J., on 13-11-1963. Before them it was conceded that the learned Judge cannot give a direction to the Director to bring the money to Court without considering the objections. They, therefore, sent back the matter to the learned Judge to decide first the objections before compelling the Director to bring the money to the Court. In the result, the appeal was allowed and the order of the Second Additional Chief Judge, City Civil Court, was set aside and the case was sent back to him for a decision on the objections raised.

12. C.M.A. No. 343 of 1963 filed by the Liquidator, however, was not heard until 23-11-1967. A Bench of this Court consisting of one of us Jaganmohan Reddy, Chief Justice and Kumarayya, J., observed that the appeal filed by the Director of Civil Supplies had already been allowed and the matter remanded to the lower Court. If the Liquidator had any objection he can raise the same in the lower Court. His right to raise objections in the lower Court is subject to any objections which the respondent may have. With these observations the appeal was dismissed.

13. After this order, E.A. No. 54 of 1962 was enquired into by the Second Additional Judge, City Civil Court, Hyderabad. Notwithstanding the order of the High Court in C.M.A. No. 343 of 1963 the Liquidator does not seem to have applied to the lower Court to make him a party. There are some observations in the order of the lower Court, however, which seem to indicate that the Court was under the impression that the arguments were advanced both on behalf of Government and Liquidator. In more than one place, the Court below refers to the objections of the Government

and the Liquidator and the arguments addressed on behalf of the Government and the Liquidator. The advocate for the respondents who appeared in the lower Court says that the Government Pleader was being assisted by the employees of the Liquidator and the accounts and the documents were produced by the Liquidator. In any event, as we have permitted the Liquidator also to be added as a party to these appeals and heard fully the contentions urged on behalf of the Government represented by the Advocate-General and the Liquidator represented by Sri K. Madhava Reddy, it is unnecessary to consider whether in view of the order of this Court it was the duty of the decree-holder's representative to make the liquidator a party or whether the liquidator should have come on record as a party and raise his objections.

We may, however, add that as a responsible officer, who was appointed as liquidator, it was the duty of the Dy. Registrar of the Co-operative Societies, without relying on technicalities, to appear before the Court and assist the Court without finding fault with the decree-holder in not adding him as a party. The order of the High Court was made in his presence and at his instance and it appears to us that the proper course in those circumstances would have been for the Liquidator to appear in the Court and raise any objections, if he wanted to.

14. Before the lower Court it was contended that since the society was under liquidation and a Liquidator was appointed in Liquidation proceedings, no legal proceedings can be taken or proceeded against the judgment-debtor without previous permission of the Registrar. The Court below, however, took the view that as H.C.C.C. Ltd. was a multi-unit co-operative society, the State Registrar had no power to direct the dissolution and as the order of the dissolution in the instant case was passed by the State Registrar, it was void and of no effect. The learned Government Pleader then contended that the High Court had held in W.P. No. 763 of 1960 that the dissolution was proper and, therefore, it was not open to the decree-holder to contend that the State Co-operative Registrar had no jurisdiction to pass the order of dissolution.

But the Court below held that the grounds on which the dissolution was challenged in the writ petition were different from the grounds urged now before him. He also observed that it was not canvassed before him that the decision of the High Court operated as res judicata. He, therefore, held that the said decision did not prevent or stop the decree-holder from contending that the State Registrar had no jurisdiction to order dissolution. In the result, he dismissed the objection that the execution petition was not maintainable, by reason of the order of liquidation. He, therefore, directed that further execution should proceed and that the Government should deposit the attached

amount within fifteen days from the date of the order.

15. H.C.C.C. Ltd. thereupon represented by the Director of Civil Supplies, filed C.M.A. No. 210 of 1967 and also applied for stay of operation of the order passed by the Court below, in C.M.P. No. 6406 of 1967. Our learned brother, Sharfuddin Ahmed, J., by an order dated 25-8-1967, directed the Government to deposit a sum of Rs. 50,000 in the first instance within three months from the date of the order and the balance of four lakhs should be paid in instalments to be spread over a period of two years. The H.C.C.C. Ltd., through the Director of Civil Supplies, thereupon preferred L.P.A. No. 743 of 1967. When the L.P.A. came up for bearing, it was argued that the decree was against H.C.C.C. Ltd. and in execution of that decree the Government could not be directed to deposit any sum. It was then pointed out by us that if the direction is to the Government and not to the H.C.C.C. Ltd., that could be urged only in an appeal preferred by the Government and inasmuch as C.M.A. No. 210 of 1967 and the L.P.A. were preferred by the H.C.C.C. Ltd., it would not be possible for us to consider any objection by the Government in an appeal by the H.C.C.C. Ltd. in view, especially of the contention of the Government that H.C.C.C. Ltd. was a distinct entity different from the Government. The Government thereupon filed C.M.A. No. 374 of 1967 as a third party affected by the order of the lower Court and applied for leave to prefer that C.M.A. which was granted by us.

16. The first contention of the learned Advocate-General is that the attachment of a mere Budget provision is illegal and the Court below erred in issuing, in the first instance, the prohibitory order and subsequently the order to deposit the amount in question. The application was made under O. 21, R. 52, Civil P. C., for the attachment of certain money, namely, Rs. 4,50,000 said to be in the hands of the Commissioner of Civil Supplies (vide p. 662, Budget for the year 1959-60 and the letter No. A/C.S.K.1/520/59 dated 12-6-1959 addressed to the District Treasury Officer by his office. In ordering this application, the Court directed the Commissioner to hold the said amount or such portion of it as was available with him, subject to further orders of the Court. In order to attract the provisions of O. 21, R. 52, Civil P. C., two conditions have to be satisfied: firstly, that there must be property of the judgment-debtor which is sought to be attached; secondly, it should be in the custody of the Court or a public officer.

The contention of the learned Advocate-General is that on the date of attachment, there was only some provision made in the Budget, whereby the Commissioner was authorised to spend the amount to a certain extent in connection with the affairs of HCCC

Ltd. and this can in no sense be construed as the property of the H.C.C.C. Ltd. in the hands of the Government or the Commissioner of Civil Supplies and hence O. 21, R. 52, Civil P. C., has no application.

17. It is to be observed that the decree in O.S. No. 2 of 1959 which is sought to be executed is against H.C.C.C. Ltd. Though some attempt was made in the earlier stages of the proceedings that having regard to the circumstance that the Government had taken over all the assets and liabilities of H.C.C.C. Ltd. in 1952 and H.C.C.C. Ltd. ceased to function on and from that day, the judgment-debtor must be deemed to be the Government, Mr. Venkataramana quite rightly, in our opinion, did not attempt to take up that stand in this appeal, especially in view of the fact that this Court had expressly decided in its judgment D/19-9-1961 in W.P. No. 763 of 1960 that the decree was against the H.C.C.C. Ltd. and not against the Government. Therefore, it remains for us to consider whether the amount sought to be attached was the property of the H.C.C.C. Ltd. in the hands of a Public Officer, namely, the Commissioner of Civil Supplies within the meaning of O. 21, R. 52, Civil P. C. In order to decide this question it is necessary to consider the nature of a Budget provision.

18. Under Art. 202 of the Constitution, the Governor shall, in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that year, called "annual financial statement". It is this "annual financial statement" that is also in short referred to as the 'Budget'. The Finance Department prepares the Budget after requiring the departments of the Secretariat to furnish materials on which to base the estimates. The Departments of the Secretariat depend on the estimates framed by the heads of departments, who in turn depend on the material furnished by district and other officers who collect the revenues or incur expenditure. After estimates are examined by the respective administrative departments and subsequently by the Finance Department, they are placed before the Council of Ministers, for decision as to which of the proposals should be provided for in the Budget with reference to the amount available and the comparative urgency of the proposals. The Finance Department then consolidates the estimates embodying the decision of the Council of Ministers and prepares the statements for consideration by the Houses of the Legislature. The estimates of expenditure which are not charged on the consolidated fund are submitted to the Assembly in the form of Demands for Grants. The Assembly may assent, or refuse to assent to any demand, or assent to a demand, subject to a reduction of the amount specified therein.

19. After the demands for grants are voted by the Assembly, a Bill is introduced

to provide for the appropriation out of the Consolidated Fund of the State of all the monies required to meet the grants made by the Assembly. After the Bill has been passed and assented to by the Governor, it will be published as the Appropriation Act. This, it is seen that the provision made in Budget for any particular expenditure, is only in the nature of a decision made by the Government to spend up to a particular amount in connection with a particular matter for which the approval of the Legislature is obtained in the form of an Appropriation Act. Therefore, the mere fact that in the Budget provision it is shown that a certain amount is considered by the Government as required for payment to H.C.C.C. Ltd. does not mean that it has ceased to be the property of the Government and has become the property of the H.C.C.C. Ltd., in the hands of the Government.

20. The learned Advocate-General further pointed out that even after a Budget provision is made, in respect of a Major Head of expenditure, sanction of the Government must be obtained from time to time before any expenditure is incurred under that head. In this connection he invited our attention to Clause 78 of the Budget Manual. Under this clause, except in regard to the heads of account specified in Appendix D, the amount provided in the Budget Estimates for each unit of appropriation should be regarded as an appropriation placed at the disposal of the Chief Controlling Officer. In the excepted cases, the appropriation is retained in the hands of the Government in the administrative department of the Secretariat entered against each item. Appendix 'D' referred to under this clause gives a list of cases in which appropriations are retained in the hands of the Government. The first item is "Major Heads". In this particular case also, reservation for payment to H.C.C.C. Ltd. is one of the items under the Major Head "85-A—Capital Outlay on Schemes of Government Trading".

It is, therefore, submitted on behalf of the Government that as there is no order of the Government sanctioning payment, the amount continued to be in the hands of the Government. The learned Advocate-General also referred to various other instances evidenced by Exs. P-53, P-54 and P-55, etc., where the Government passed orders sanctioning payment of amounts decreed against H.C.C.C. Ltd. Under Ex. P-53 dated 29-8-1959, they accorded sanction for payment of Rs. 29,346.93 to the T. A. C. A. Bodhan, and stated that the expenditure shall be debited to the provision of Rs. 4.5 lakhs made in the current year's budget for 'payment to H.C.C.C.'. Under Ex. P-54 dated 24-9-1960, the Government sanctioned payment of Rs. 106-32 to Vasant Saw Rice Mill, Mancherial, being the costs awarded to the petitioner as per the orders of the High Court and the expenditure so sanctioned was directed to be

debited to the provision made in the current year's budget under "85-A—Capital Outlay on Schemes of Government Trading (a) Civil Supplies — payment — relating to H.C.C.C. period. Under Ex. P-55 dated 22-6-1961 a similar sanction for payment to Rama Brahmam and Sons was accorded.

21. The learned Advocate-General points out that there is no such order sanctioning payment to H.C.C.C. Ltd. in this case. In answer to this, Mr. Venkataramana submitted that though a mere budget provision in the Budget may not be liable to attachment, the position in this case is entirely different in view of the letter dated 9-12-1959 addressed by the Commissioner of Civil Supplies to all the Treasury Officers drawing their attention to the fact that a provision was made for payment of Rupees 4,50,000 under Major Head "85-A—Capital Outlay on Scheme of Government Trading (a) Civil Supplies" in the Budget Estimates for the year 1959-60 to the H.C.C.C. Ltd. and directed all the Treasury Officers to make payments under the above head as per rules and intimate to the office the full particulars of the amounts of expenditure incurred in the districts every fortnight. This communication was approved by the Commissioner of Civil Supplies. Mr. Venkataramana, therefore, contends that this communication clearly shows that the amount of Rs. 4,50,000 was treated as earmarked for payment to H.C.C.C. Ltd. He also argues that the Commissioner would not have made such a communication if the Government had not accorded its sanction.

It is true, as pointed out by the learned Advocate-General that no order of the Government according sanction for payment of the sum to H.C.C.C. Ltd. was placed before us. On the other hand, documents Exs. P-53, etc., referred to earlier show that the Government was according sanction from time to time for payments out of the total sum of Rs. 4,50,000 to satisfy the various decrees. We are, however, inclined to agree with Mr. Venkataramana's submission that the Civil Supplies Department would not have made a communication which was approved by the Commissioner of Civil Supplies, if the sanction of the Government had not been obtained. It does not, however, follow that on and after the communication that the amount should be treated as the property of the H.C.C.C. Ltd. in the hands of the Commissioner of Civil Supplies and is liable to attachment under Order 21, Rule 52, Civil P. C. In this connection it is necessary to consider certain provisions of the Budget Manual.

22. "Appropriation" is defined as the amount provided in the Budget Estimate for a unit of appropriation or the part of that amount placed at the disposal of a disbursing officer. Thus, it is clear that the amount of appropriation continues to be at the disposal of the disbursing officer. Though it

may be intended to be paid for a particular purpose or to a particular institution, it does not, by reason of the appropriation, become the property of the institution in the hands of the officer.

The mere fact that the Commissioner of Civil Supplies directed the Treasury Officers to make payments to H.C.C.C. Ltd. as and when occasion arose does not mean that the amount as a whole became the property of the H.C.C.C. Ltd., in the hands of the disbursing officer, namely, Commissioner of Civil Supplies. It is for this reason that the Accountant-General when he was directed by the order of the Lower Court dated 4-12-1959 to deposit the amount, replied by his letter dated 9-12-1959 as follows:—

“...As regards the remitting of the amount it is stated that the amount mentioned in your office letter referred to above is only a budget provision for meeting the liabilities of the H.C.C.C. period. Payment from this provision is made by this office on presentation of bills by the drawing officer, subject to sanction of Government for time-barred claims.”

This, according to us, represents the correct position. Until and unless the bills are drawn and paid to H.C.C.C. Ltd., the amount or any part thereof cannot be treated as property of the H.C.C.C. Ltd. We are, therefore, of the opinion that O. 21, R. 52, Civil P. C., has no application and the attachment effected and the prohibitory order made on 27-11-1959 and the subsequent directions to deposit the amount are not valid.

23. In support of his contention, the learned Advocate General referred to a number of decisions which we now proceed to consider.

24. In *Tulaji v. Balabhai*, (1898) ILR 22 Bom 39, it was held that Sec. 272 of the Civil Procedure Code (Act XIV of 1882) which corresponds to O. 21, Rule 52, Civil P. C. does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands. In that case the appellant was in receipt of a monthly allowance of Rs. 500 from the Akalkot State. It was paid to him at Poona through the post office there. The decree-holder sought to attach by a prohibitory order issued on the 6th April, 1895 which was received by the Post Master on the 8th April. The allowance which was sent by M. O. was received on the 13th April. It was held that on the date of attachment there was no money in the hands of the Post Master as the money sought to be attached did not reach his hands until the 13th April and there cannot be an anticipatory attachment of money expected to reach the hands of a public officer but applies only to moneys actually in his hands. This decision was followed in *K. Thiruvangadial v. R. Chinnaswami*, AIR 1915 Mad 236 (1).

In *Thakurdas v. Joseph Iskender*, AIR 1917 Cal 13, it was held that that rule was intended to relate to an officer who has at the time the application is made in his hands the fund which may be the subject of attachment. Their Lordships followed an earlier decision of the Calcutta High Court in *Padmanand Singh v. Rama Prosad*, (1911) 11 Ind Cas 422 (Cal), which had also held that O. 21, Rule 52, Civil P. C. does not allow of an anticipatory attachment.

25. Mr. Venkataramana sought to distinguish these two decisions by arguing that in those cases money sought to be attached was not in the hands of the officer, whereas in this case the money was in the hands of the Commissioner of Civil Supplies and he had, as a matter of fact, by his letter dated 12-6-1959 directed the Treasury Officers to pay the amount to H. C. C. Ltd., when the bills were presented. This argument, however, ignores the vital fact, namely, that even assuming that there was money in the hands of the Commissioner of Civil Supplies, it was not the money of H. C. C. Limited in his hands but the money of the Government which he was authorised to pay to H. C. C. Limited. It is, therefore, clear that there is no money of the judgment-debtor, namely H. C. C. Limited in the custody of an officer which can be the subject-matter of attachment under O. 21, R. 52, Civil P. C.

26. It was then argued by Mr. Venkataramana that in any event once the appropriation is made and the Commissioner himself had directed the Treasury Officers to pay the amount to H. C. C. Limited, it would be in the nature of a debt due to H. C. C. Limited and the Commissioner would be in the position of a Carnishee. It is really not necessary for us to consider this question as the attachment here has not been made on that footing under O. 21, R. 46, Civil P. C. which relates to attachment of debts etc., but was made under O. 21, R. 52 on the footing that the amount was that of the judgment-debtor in the custody of an officer. Even if that submission is open to the decree-holder, we are not inclined to view the amount in the hands of the Commissioner of Civil Supplies as a debt owing to H.C.C.C. Limited. In *Haridas Acharjia Chowdhry v. Baroda Kishore Acharjia Chowdhry*, (1900) ILR 27 Cal 38, it was held that the word “debt” in Section 266 of the Civil Procedure Code (XIV of 1882) which corresponds to O. 21, R. 46, Civil P. C. means an actually existing debt and not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen. In that case, when a person was bound to pay a monthly allowance to the judgment-debtor it was held that the prohibitory order cannot be issued to the person on a date anterior to the time when the amount falls due.

In *Dunlop and Ranken Ltd. v. Hendall*, (1957) 3 All ER 344, the judgment creditors

of sub-contractors, obtained a garnishee order against the principal contractors under the building contract. Under Clause 21 of the contract no payment was due to a sub-contractor until receipt of the architect's certificate under Cl. 24 and the payment was to be made to the sub-contractors in accordance with the certificates. It was held that until the architect's certificate had been given there was no debt due to the sub-contractors and hence the garnishee order should not have been made. It was held that the judgment-debtor did not have a right to be paid. Therefore, there was no debt until the certificate certifying the amount to be paid (sic).

27. In the present case also the order of the Commissioner of Civil Supplies directing the Treasury Officers to make payments to H. C. C. C. Limited does not clothe the H. C. C. C. Limited with the right to be paid. It was always open to the Government or the Commissioner of Civil Supplies to withdraw the direction before any bill was presented to them by the H. C. C. C. Limited or on behalf of H. C. C. C. Limited. We are, therefore, also unable to agree with the contention that the amount of Rs. 4,50,000 is in the nature of a debt owing to H. C. C. C. Limited which is liable to be attached under O. 21, R. 46, Civil P. C.

28. The learned Advocate General further contended that even assuming that the lower Court could have issued the order dated 27-11-1959 requesting the Commissioner of Civil Supplies and the Accountant General to hold the said sum of Rs. 4,50,000 or such portion of it, subject to the further orders of the Court, it could not direct them to deposit the said amount in 1967 long after the Budget provision had lapsed at the end of Financial year 1959-60 that is on 31-3-1960. He contended that even assuming, without admitting, that the amount was available in November, 1959 when the prohibitory order was issued there was no such amount in existence after 31-3-1960 when the Budget provision lapsed. Mr. Venkataramana sought to meet this argument by saying that the Court had directed them to deposit the said amount even on 4-12-1959 and it was their duty to do so and if by reason of their negligence or refusal to do so, the Budget lapsed it was not the concern of the decree-holder and the order of the Court had still to be complied with. He submitted that the Commissioner of Civil Supplies who is a public officer in the employment of the Government must be deemed to be an Agent of the Government and if by reason of the inaction of the Agent, the fund which was in his hands again gets back into the hands of the principal, the principal is liable to bring back the said amount in obedience to the directions of the Court. He cited a number of decisions in support of his contention that Officers are Agents of the Government.

We consider it unnecessary to consider that question as it does not arise in these proceedings. As stated earlier the decree-holder before he can apply for attachment under O. 21, R. 52, Civil P. C., has to satisfy the Court not only that the amount sought to be attached belongs to the judgment-debtor but is in the hands of an officer. The Public Officer concerned can only produce the amount if it is in his custody. If it ceases to be in his custody for some reason or other, there is no question of his being directed to produce the amount. The question whether the Government is liable for the negligence of its officer and if so to what extent, does not arise in these proceedings. The Court below has directed the Government to produce the amount in question. We do not see how such an order can be made in proceedings under O. 21, R. 52, Civil P. C. which relate to funds in the custody of a particular officer belonging to the judgment-debtor. As we have already held that the funds do not belong to the judgment-debtor, the order of the lower Court directing the Government to produce the amount appears to be unsustainable.

29. It is further contended by Mr. Venkataramana that the order of attachment had become final and it could be questioned only in a suit filed under O. 21, R. 63, Civil P. C. Such a suit (C. S. 1/62) was filed by the Government and was withdrawn on 18-3-1963 and this Court has expressly stated in its judgment dated 29-3-1963 that the learned Advocate General did not press the latter part of his request in his application to withdraw the suit, namely, to give his clients liberty to press their claims before the Liquidator. As the suit filed under O. 21, R. 63, Civil P. C. was withdrawn and dismissed, the order of attachment has become final and cannot be questioned.

30. Order 21, R. 58, Civil P. C. relates to the investigation of claims and objections made to the attachment of property on the ground that such a property is not liable to attachment. It is pointed out that when the attachment was sought to be made on 27-11-1959 by issue of a prohibitory order the Government filed a claim petition, E. A. 136/59 in which they raised the contention among others, that there was no actual amount in the hands of the Commissioner of Civil Supplies but only a Budget provision which was not attachable. This objection was enquired into and by its order dated 4-11-1960 the learned Chief Judge, City Civil Court held that he was not in a position to come to the conclusion that the amount attached does not exist or was not available for attachment and ultimately dismissed the claim petition and refused to raise attachment. The Government, thereupon, filed C. S. 1/62 under Order 21, R. 63, Civil P. C. to set aside the order in the claim petition. This suit, as stated earlier was withdrawn and dismissed. Mr. Venkataramana, therefore, contends that under O. 21,

Rule 63, Civil P. C. the order dated 4-11-1960 is conclusive and the attachment cannot be questioned. He invited our attention to decisions in *Akkammal v. Komarasami*, AIR 1943 Mad 36, in which it was held that under O. 21, R. 63, Civil P. C. an order passed on a claim petition is conclusive unless the claimant files a suit within one year to establish the right which he claims. In *Seethamma v. Kotareddi*, (1949) 1 Mad LJ 593 = (AIR 1949 Mad 586), it was held that the provisions of O. 21, R. 63, Civil P. C. are mandatory and the decision in a claim petition is final unless the party aggrieved takes the course indicated in the rule by instituting a suit to supersede it within a year. The specific provisions of O. 21, Rule 63 override the more general principle enunciated in Sec. 11 Civil P. C. In *Chimpiramma v. Subrahmanyam*, (1956) 2 Andh WR 1137 = (AIR 1957 Andh Pra 61 FB), a decision of a Full Bench, it was pointed out that when a claim is dismissed it becomes conclusive against the claimant not because of the principle of *res judicata* but because of the express provision in the Civil P. C., namely O. 21, R. 63.

31. The learned Advocate General could not and did not dispute this proposition. He, however, contended that in a case like this where the existence of a fund in the hands of the Officer is denied, there is no necessity to file a claim petition or to file a suit under O. 21, R. 63, Civil P. C. He argued that the case was analogous to a case of attachment of debt under O. 21, R. 46, Civil P. C., where the existence of a debt is denied by the garnishee and relied upon decisions which held that in such a case the execution Court has no jurisdiction to go into the question of the existence of the debt. In *Butchayya v. Krishnamachari*, AIR 1936 Mad 152 it was held that where the garnishee totally denies the existence of the debt, and consequently of any obligation on his part to the judgment debtor he cannot institute a suit to establish the right which he claims to the property under O. 21, R. 63, Civil P. C. Their Lordships observed as follows:

"In these circumstances it is not explained how if the Court disallows the objection, he can 'institute a suit to establish the right which he claims to the property' under O. 21, R. 63. According to him the property in dispute, namely, the debt or the obligation on his part is non-existent. Therefore, it is not possible for him to claim any right to such non-existing property. In these circumstances, we are of the opinion that the objection that the debt does not at all exist and orders of the executing Court, if any, consequent on such objection do not come within the purview of O. 21, Rr. 58 to 63."

Their Lordships referred with approval to the decision in 61 Mad LJ 863 = (AIR 1932 Mad 169) in which it was held that it was not for the executing Court to determine whether the debt was actually due or not and that it has to attach the alleged debt

and thereafter there are only two courses open to it, either to sell the debt or appoint a receiver to realise it. The same view has been taken in a number of decisions of other High Courts, for instance *Ma Saw Yin v. Hock To*, AIR 1926 Rang 175, *Kameswar Singh v. Kuleswar Singh*, AIR 1942 Pat 508, *Pannalal v. Bhagirathibai*, AIR 1924 Nag 96 and *Govt. of U. S. of Trav-Co. v. Bank of Cochin Ltd.*, AIR 1954 Trav-Co. 243 (FB).

32. It was argued that in the same manner in case of attachment under O. 21, R. 52, Civil P. C. if the Officer denies existence of any amounts in his hands the executing Court cannot go into that question and the provisions of Order 21, Rules 58 to 63, Civil P. C. are not attracted.

33. Mr. Venkataramana, however, points out that there is no analogy between the attachment of a debt under O. 21, R. 46, C. P. C. and attachment of amount under O. 21, R. 52, Civil P. C. He referred us to R. 175 of the Civil Rules of Practice. It is in the following terms:—

"175. If the property sought to be attached is in the custody of a Public Officer, the execution petition shall ask that the property may be brought into Court and realized, and the notice of attachment shall request that the money or property may be brought into Court, or that such officer will state whether he has any and what objection to so doing. If any objection is raised by such officer, notice may be issued, in manner provided by Order XXVII of the Code for issue of summons, for the determination of such objection."

Therefore, it was submitted that there is a provision for raising of objection by the officer as to the existence of the amount and for the determination of such objection.

34. Form 62 of the Appendix in terms of which the notice has to be sent also states that if an officer has any objection he should inform the Court of the grounds thereof. In this case, however, no notice was sent according to this form asking him to inform the grounds of objection. The notice was sent only in form 21 of Appendix 'E' to Civil P. C. asking the officer to hold money subject to the further orders of the Court. Apart from this, we are of the opinion that there is no distinction in principle between the denial of amount in the custody of an officer when an attachment is made under O. 21, R. 52, Civil P. C. and the denial of a debt when the attachment is made under O. 21, R. 46, Civil P. C. In either case we do not think that the provisions of O. 21, Rules 58 to 63 are attracted. There was, therefore, no necessity for the officer or the Government to make any claim under O. 21, R. 58, Civil P. C.

It is no doubt true, that the Government, filed a claim petition which was dismissed and thereupon filed a suit under Order 21, Rule 63, Civil P. C. These proceedings, according to us were misconceived and the

mere fact that the Government took proceedings which do not lie does not preclude them from contending that the case is not covered by O. 21, Rules 58 to 63, Civil P. C. and that, any decision in the claim petition does not prevent them from questioning the validity of the attachment in spite of the fact that they filed a suit which was later withdrawn.

35. Finally it was argued that H. C. C. C. Limited having gone into liquidation by reason of the order of the Registrar dated 6-9-1960, the proceedings in the Court below could not be continued without the leave of the Liquidator and in his absence. The Court below considered this contention but negatived it because it was of the opinion that the order of the Registrar cancelling the registration and appointing the Liquidator was illegal and ultra vires. It took the view that the H.C.C.C. Ltd. is a multi-unit Co-operative Society within the meaning of the Multi-Unit Co-operative Societies Act (Act VI of 1942) and as under Section 5-A of the said Act it is the Central Registrar of Co-operative Societies that is empowered to dissolve the Society and as in this case the dissolution was effected by the State Registrar, the order of dissolution was contrary to the provisions of the said Act and hence invalid.

36. Section 5-A of the said Act deals with any Co-operative Society which, immediately before 1-11-1956 had its objects confined to one State, becomes, as from that day, a multi-unit co-operative society, by virtue of the provisions of Part II of the States Reorganisation Act of 1956. The learned Advocate General contends that Section 5-A of the Act has no application to the instant case, because H. C. C. C. Limited was a multi-unit Co-operative Society even before 1-11-1956 and had not become a multi-unit Co-operative Society after 1-11-1956 by virtue of the provisions of the State Reorganisation Act. He has referred to the following bye-laws of the Society in this connection.

37. Under bye-law 4, the object of the Corporation was to promote the economic interest of its members and to help in carrying on their business successfully and profitably. To achieve this object, the corporation was authorised to carry on the business of buyers, sellers, distributors, suppliers, dealers, exporters and importers of all kinds of agricultural produce, all kinds of finished or semi-finished products, all kinds of farm-yard of chemical manures and other chemicals required in agricultural industry, all kinds of milk, milk produce and farm-cattle etc.

38. Under bye-law 4 (5) it was authorised to set up branches, agencies, shops, sale depots and show-rooms in or outside H.E.H. the Nizam's Dominions for carrying on the business of the Corporation.

39. Under bye-law 4 (9) it was authorised to take or otherwise acquire and hold

shares in any other Co-operative Society or company in or outside the Hyderabad State having objects altogether or in part similar to those of the Society or carrying on any other business capable of being conducted so as to directly or indirectly benefit the society.

40. In view of these bye-laws he argues that H.C.C.C. Limited was a Multi-Unit Co-operative Society even from its inception and did not become one by virtue of the States Reorganisation Act and hence Section 5-A of the Multi Union Co-operative Societies Act has no application.

41. In view of the clear terms of the bye-laws Mr. Venkataramana, very fairly conceded that he could not support the judgment of the lower Court on this aspect based upon sec. 5-A of the Act. He, however, contended that the ultimate decision that the dissolution is illegal is correct even on the footing that the society was a Multi-Unit Co-operative Society from the inception. He argued that under Section 4 of the Act, the Central Government may, if it thinks fit, appoint a Central Registrar of Co-operative Societies and such Central Registrar was appointed on 29-12-1956. On that day by a notification, the Government of India, in exercise of powers conferred under Section 4 (1) of the Act appointed the Joint-Secretary-in-Charge of Co-operation in the Ministry of Agriculture, Government of India, as the Central Registrar of Co-operative Societies.

42. Section 4 (2) of the Act states that such a Registrar, if appointed, shall exercise in respect of any co-operative society to which this Act applies to the exclusion of the Provincial Registrar, the powers and functions exercisable by the Registrars of Co-operative Societies of the State in which the society is actually registered.

43. Mr. Venkataramana, therefore, contends that in view of Section 4 (2) of the Act it is only the Central Registrar that has, after his appointment, the jurisdiction to make the order of dissolution and the order passed by the State Registrar, therefore, contravenes Section 4 (2) of the Act. Reliance however, is placed by the learned Advocate General and Mr. K. Madhava Reddy, the learned Advocate for the Liquidator on Section 5-B of the Act which authorises the Central Government to direct, by a notification, that any power or authority exercisable by the Central Registrar of Co-operative Societies under this Act, shall, in relation to such matters and subject to such conditions as may be specified in that direction, be exercisable also by such Registrar of Co-operative Societies of a State or by such Officer subordinate to the Central Government or to a State Government as may be specified in the notification.

44. It was stated that under Section 5-B of the Act notifications were made on 22-1-1957 and on 19-5-1960 directing that the power or authority exercisable by the Cen-

tral Registrar in relation to the reconstitution, reorganisation or dissolution of the Multi-unit Co-operative Societies, which are deemed to be actually registered in the States concerned shall be exercisable also by the Registrar of Co-operative Societies, Andhra Pradesh and other States mentioned in that notification. It is therefore, contended that though under Section 4 (2) of the Act it is the Central Registrar that is to exercise the powers or authority in respect of this society, after the notifications in question they became exercisable by the State Registrar. We do not agree with this contention.

Sections 5-A and 5-B of the Act were introduced by Section 105 of the States Reorganisation Act, 1956. By reason of Reorganisation of States in 1956, it became apparent that several of the Co-operative Societies which were functioning within the States concerned would thereafter be functioning in more than one State and would therefore, become multi-unit Co-operative Societies under Act 6 of 1942. To cover those cases Section 5-A was enacted which deals with the reconstitution, reorganisation or dissolution of such Societies. Under that section, the Central Registrar is given certain powers. Section 5-B refers to powers or authority exercisable by the Central Registrar under this Act and it is only in respect of such powers that a notification can be made authorising the State Registrars to exercise such powers or authority. The powers exercisable by the Central Registrar under the Act are contained only in Section 5-A which refers to societies which became Multi Unit Co-operative Societies by virtue of provisions of the States Reorganisation Act.

45. Sections 2 and 3 which deal with Co-operative Societies which were Multi Unit Co-operative Societies before the Act 6 of 1942 or which were registered after the Act, merely state that they are subject, for all purposes of registration, control and dissolution to the law relating to Co-operative Societies in force for the time being in the province in which it is actually registered. When a Central Registrar is appointed under Section 4 (1) of the Act he is authorised to exercise in respect of those societies the powers or authority exercisable by the particular State Registrar. Section 4 (2) read with Sections 2 and 3 of the Act clearly point to the conclusion that the power which the Central Registrar exercises under that section is a power exercisable by the State Registrar under the Act in force in the State which is applicable to particular Society. The power so exercised by the Central Registrar cannot be a power exercised or exercisable by the Central Registrar under this Act. In view of the fact that Ss. 5-A and 5-B of the Act were enacted together by way of amendments under Section 105 of the States Reorganisation Act and in view of the fact that Section 5-B refers only to the entrustment of powers exercisable by the Central Registrar under this Act to the

State Registrar, we are of the opinion that the power referred to in that section can have only reference to the power of the Central Registrar under Section 5-A which is the power exercisable under this Act and cannot have reference to the power of the Central Registrar under Section 4 (2) where he is exercising only the power of a State Registrar under the provisions of the State Act. If Section 5-A has no application it follows that it is only the Central Registrar to the exclusion of the State Registrar that can exercise powers under Section 4 (2) of the Act and as such the order of liquidation dated 6-9-1960 made by the State Registrar is not in consonance with the provisions of the Act.

46. It is to be noted that there is no reference in the said order to any delegation of powers under Sec. 5-B of the Multi-Unit Co-operative Societies Act. It is no doubt true, as contended by the learned Advocate General on the authority of decisions in *Hukumchand Mills v. State of Madhya Pradesh*, AIR 1964 SC 1329, *Rajam Chetti v. Seshayya*, (1895) ILR 18 Mad 236 (FB), *Secy. of State for India v. Apparao*, 45 Mad LJ 156 = (AIR 1924 Mad 92) and *Anjaneya Motor Transport v. State of Madras*, 1955-2 Mad LJ 376 = (AIR 1955 Mad 660), that it is not necessary to indicate the source of the power and even if the source of power is wrongly indicated, it will not vitiate the order, if the order is otherwise traceable to a power that is in existence. No exception can be taken to that proposition, but in this case as the entrustment of power by the Central Registrar to the State Registrar under Sec. 5-B is only in relation to such matters and subject to such conditions as may be specified in the notification, one would therefore, expect a reference to the notification indicating the matters and conditions in relation to which and subject to which the power or authority is exercisable by the State Registrar.

The absence of a reference to the notification delegating such powers is a pointer to the fact that even the Government did not consider that Section 5-B was applicable to this society and that the dissolution could be made in pursuance of the powers conferred under that notification. While copies of this resolution were marked to various Officers and Bodies, it is significant to note that no copy was marked to the Central Registrar. If he was exercising powers of the Central Registrar delegated to him under Section 5-B of the Act one would expect that a copy would be marked to the Central Registrar. This also would indicate that even the Government was of the view that Section 5-B has no application to the facts of the case and the order of dissolution was not made in exercise of the powers vested in the State Registrar under Section 5-B of the Act. For these reasons we are of the opinion that the order of liquidation is invalid and opposed to the provisions of the Act.

47. It was next argued by the learned Advocate General that the validity of the Liquidation was considered by the High Court in its judgment dated 19th September, 1961 in W. P. No. 763 of 1960 and as this Court had held that the order of dissolution was valid and that the liquidator was validly appointed, that decision operates as *res judicata* and cannot be questioned in these proceedings.

48. We do not agree with this contention. The grounds on which the liquidation proceedings were attacked in W. P. No. 763 of 1960 are entirely different from the grounds on which they are being attacked in these proceedings. The contentions raised in the Writ Petition were that the Hyderabad Co-operative Societies Act had no application, as H. C. C. Limited was constituted under a Firman of H. E. H. the Nizam, that the Registrar was actuated by bias; and that he had acted to the dictation of the Government. On the other hand the contention at present is that the dissolution is contrary to the provisions of the Multi Unit Co-operative Societies Act. This question was not considered by this Court in the said Writ Petition. Even the Government proceeded on the footing that the dissolution was effected by the Registrar in exercise of the powers under Section 53 of the Hyderabad Co-operative Societies Act. No reference was at all made by either of the parties to the provisions of the Multi Unit Co-operative Societies Act or the powers exercisable thereunder.

49. It was contended by the learned Advocate General that the issue that the liquidation proceedings were invalid, being contrary to the Multi Unit Co-operative Societies Act, might and ought to have been raised by the petitioner in the Writ Petition, and as it was not raised, the principle of constructive *res judicata* will apply. He relied upon a decision of the Supreme Court in *Gulabchand v. State of Gujarat*, AIR 1965 SC 1153 at p. 1167. In that case it was held that the decision of the High Court in a Writ Petition under Art. 226 on the merits on a matter after contest will operate as *res judicata* in a subsequent regular suit between the same parties with respect to the same matter. Their Lordships, however, made it clear that it was not necessary for them to consider and they did not consider whether the principle of constructive *res judicata* can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

In *Devilal v. Sales Tax Officer*, AIR 1965 SC 1150, the Supreme Court had to deal with a case where an assessee challenged the validity of sales tax for a particular year by a petition under Art. 226. The petition was rejected on merits and an appeal was dismissed by the Supreme Court on merits. Subsequently by a Writ Petition he once again challenged the same assessment, on a

ground which previously was not raised in the Writ Petition and which was not permitted to be raised by him afresh in the Supreme Court in appeal. Their Lordships of the Supreme Court held that the second Writ Petition was barred by the principle of constructive *res judicata*. The learned Advocate General requested us to apply this decision to the present case and hold that the decree-holder was barred on the principle of constructive *res judicata* from questioning the validity of the liquidation in these proceedings, by reason of the judgment of the High Court in W.P. No. 763 of 1960. We cannot regard the decision of the Supreme Court as an authority for the proposition that the principle of constructive *res judicata* has to be applied to every decision in a writ petition. The decision relied upon by the learned Advocate-General refers to an earlier decision of the Supreme Court in *Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara*, AIR 1964 SC 1013. In that case in a writ petition in which the petitioner challenged the validity of a tax imposed for one year was ultimately dismissed by the Supreme Court. Some new points were sought to be raised but the Supreme Court did not allow them to be raised. When a similar order was passed against the assessee for subsequent year, the additional points were again raised before the High Court. The High Court held that it was not open to the Company to raise those points on the principle of constructive *res judicata*. The Supreme Court on appeal, however, took the view that the principle of constructive *res judicata* did not apply and observed that constructive *res judicata* was an artificial form of *res judicata* enacted by Section 11 of the Code of Civil Procedure and it should not be generally applied to writ petition filed under Article 32 or Article 226.

In this case the circumstances under which the impugned order of liquidation was passed were peculiarly within the knowledge of the Registrar. The order itself did not disclose that it was made in exercise of the powers conferred on the Registrar under Section 5-B as is sought to be contended now. The petitioner, therefore, proceeded on what was disclosed by the order itself. The order did not make any reference to the fact that the society was a multi-unit co-operative society or that the order of dissolution was being passed in exercise of the powers under that Act. On the other hand, the order referred only to the relevant sections of the Hyderabad Co-operative Societies Act. The petitioner was therefore entitled to assume and had in fact assumed that the order was made under the provisions of the Hyderabad Co-operative Societies Act and, therefore, raised grounds which were relevant to the exercise of the powers under that Act. Even the Registrar of the Co-operative Societies or the Government in their counter-affidavit in the writ petition had not disclosed that the society was a multi-unit co-

operative society and that the order was made in exercise of the powers under that Act.

It cannot, therefore, be stated that the petitioner might and ought to have raised this question in the said writ petition. Even if the principle of constructive res judicata can be invoked in respect of orders made in writ petitions in appropriate cases to meet the ends of justice, we do not consider this as an appropriate case. We, therefore, hold that the petitioner is not barred by the principle of constructive res judicata by contending that the liquidation proceedings violate the principles of Multi-Unit Co-operative Societies Act. As the liquidation proceedings and the order of the Liquidator in our opinion are illegal the petition cannot be attacked as not maintainable on the ground that the permission of the Liquidator was not obtained.

50. It was contended on behalf of the respondents that as the entire assets and liabilities of H.C.C.C. Ltd. have been taken over by the Government, the Government may be treated as a representative of judgment-debtor and, therefore, the direction to the Government to deposit the amount payable by the judgment-debtor can be sustained on that ground. It was pointed out in another case where the H.C.C.C. Ltd. had to recover amounts from third parties, the Government as representing the H.C.C.C. Ltd. filed suits for the recovery of the said amounts and obtained decree which was confirmed by this Court in O.S.A. No. 5 of 1960. It was also pointed out that even in these proceedings the Government has throughout been asserting that it has taken over the assets and liabilities of H.C.C.C. Ltd., and carrying on its affairs and the H.C.C.C. Ltd. ceased to function. Even in the order of liquidation it is stated that the Government took over the functions of the H.C.C.C. Ltd. including its financial affairs with effect from 1-3-1952 and on and after that date H.C.C.C. Ltd. has ceased to function. Other instances are pointed out where in the course of these proceedings themselves the Government has taken up the stand that all the assets and liabilities of H.C.C.C. Ltd. devolved upon them.

On the other hand, the learned Advocate-General contended that the effect of the notifications dated 1-3-1952 set out at the commencement of this judgment was not to substitute the Government in the place of H.C.C.C. Ltd. and their effect was only that the Government took over the management of H.C.C.C. Ltd. Though there is considerable force in the submission made on behalf of the respondents, we do not think that the said question arises in these proceedings. The proceedings arise out of an application for attachment under O. 21, R. 52, Civil P. C., of monies said to belong to H.C.C.C. Ltd., in the hands of a Public Officer, namely, Commissioner of Civil Supplies and the only question we have to consider

in these appeals is whether there is any such amount of the H.C.C.C. Ltd. in the hands of the Public Officer. As we have held that there is no such amount, the consequence is that the judgment and subsequent direction to deposit the amount in such proceedings would be invalid.

51. It is open to the decree-holder to take up execution against the Government for the amount due to him from the H.C.C.C. Ltd. on the ground that the Government has taken over the entire assets and liabilities of the H.C.C.C. Ltd.

52. In the result, the appeals are allowed, but in the circumstances without costs.

53. Before concluding we cannot refrain from expressing our dissatisfaction at the attitude of the Government adopted in this case. The proceedings stated above disclose that the Government has been adopting inconsistent attitudes from time to time in order to delay and defeat the realisation of the decree amount. The decree was passed in 1959 against H.C.C.C. Ltd. and though the Government itself stated in several proceedings that it has taken over the entire assets and liabilities of H.C.C.C. Ltd., it has not chosen to make any arrangements to see that the decree is satisfied. On the other hand, technical objections are being put forward from time to time. If the Government is anxious that all amounts due to it by way of taxes, etc., are paid promptly by its citizens, it should also set an example by seeing that amounts payable by the Government or institutions whose assets and liabilities were taken over by it are also promptly paid. The proper course would have been to pay the amount due to the decree-holder and recover it in its turn from H.C.C.C. Ltd. whose affairs, assets and liabilities were completely under its control, instead of facing execution proceedings.

Appeals allowed.

AIR 1970 ANDHRA PRADESH 176
(V 57 C 24)

ANANTHANARAYANA AYYAR, J.

The Public Prosecutor, Appellant v. Hindustan Motors Ltd., Respondent.

Criminal Appeal No. 500 of 1966, D/-10-4-1968, against order of Munsif Magistrate, Nalgonda, D/-2-11-1965.

(A) Andhra Pradesh Motor Vehicles Taxation Act (5 of 1963), S. 3 — Andhra Pradesh Motor Vehicles Taxation Rules, R. 17 — Chassis taken along public road for building bogies an ultimate sale — Activity is 'use on public roads in the State' — Vehicle liable to tax — Failure to pay tax punishable under R. 17.

Chassis lying on the public roads of Andhra Pradesh State being taken for purpose of building bodies thereon and ultimate

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sale to others amount to use on public roads in the State within the meaning of S. 3 of the Andhra Pradesh Motor Vehicles Taxation Act, and the vehicle is liable to tax. Taking them without paying tax would be offence punishable under R. 17 of the Rules, W.P. Nos. 1456 of 1965 and 66 of 1966, D/-6-10-1967 (Andh. Pra.), Foll. (Para 6)

(B) Criminal P. C. (1898), Ss. 245, 4(v), 262 and 417 — Order of discharge, held, really one of acquittal — (Andhra Pradesh Motor Vehicles Taxation Rules, R. 17.)

The accused was charged with an offence punishable under R. 17 of the Andhra Pradesh Motor Vehicles Taxation Rules under which the maximum punishment which could be awarded was Rs. 50. While so, the Magistrate disposed of the case by discharging the accused.

Held, that the order, though described as 'discharged', was really one of acquittal. The case was a summons case under S. 4(v) of Criminal P. C. and the resultant order could not be one of 'discharge' but 'acquittal'. Hence, an appeal would lie. Section 262, Criminal P. C., provided the procedure for trial of summons cases even in summary trials.

(Paras 3 and 5)

Cases Referred: Chronological Paras

(1967) W.P. Nos. 1456 of 1965 and 66 of 1966 D/-6-10-1967 (Andh. Pra) 6

M. N. Narasimhareddy, for Addl. Public Prosecutor, for Appellant; B. K. Seshu, for Respondent.

JUDGMENT:—The Motor Vehicles Inspector, Nalgonda, filed a petty case charge-sheet against Hindustan Motors Ltd., Uttara Para, Hugli district, West Bengal, alleging that on 30-10-1965 near Korlapad on the National Highway No. 9, he (the Motor Vehicles Inspector) had found eleven chassis being taken along the public road without having paid any tax on any of the chassis and that, therefore, the accused committed an offence under S. 3 of the Andhra Pradesh Motor Vehicles Taxation Act of 1963 read with Ss. 4 and 11 of the said Act.

2. It was admitted by the accused that the eleven chassis were taken without bodies on the public road towards Madras without payment of tax in Andhra Pradesh State. But it was pleaded that the chassis were taken to Madras for purpose of building bodies and for ultimate sale thereafter. Section 3 of the Andhra Pradesh Motor Vehicles Taxation Act of 1963 runs as follows:—

"The Government, by notification from time to time, direct that a tax shall be levied on every motor vehicle used or kept for use in a public place in the State."

The learned Magistrate held as follows:—

"In my opinion the said chassis were neither used or kept for use in a public

place in the State' nor the respondent is liable for prosecution for the alleged contravention of the above sections.... The chassis are neither used nor kept for use in this State except that they are admittedly passing through this State. Hence the respondent is discharged,...."

3. The learned Public Prosecutor treated the judgment of the learned Magistrate as judgment of acquittal though the learned Magistrate stated that he discharged the accused. The learned Public Prosecutor accordingly filed this appeal against the acquittal.

4. In the charge-sheet, the Motor Vehicles Inspector has stated that the accused is liable for punishment under Rule 17 of the Andhra Pradesh Motor Vehicles Taxation Rules. This rule runs as follows:—

"Whoever commits breach of any provision of these rules shall be punishable with fine which may be extended to Rs. 50."

5. In view of the maximum sentence which can be awarded under this rule, the case is a summons case as defined under sub-section (v) of Section 4 of the Code of Criminal Procedure. The learned Magistrate obviously followed the summons procedure. Consequently, there cannot be any discharge in the case and what the learned Magistrate mentioned as "Discharge" was obviously a mistake in expression, for "Acquittal" of the accused. Section 262, Criminal P. C., lays down the procedure for trial of summons cases even in summary trial. It provides that the procedure prescribed for summons procedure shall be followed in summons case. So I agree with the learned Public Prosecutor in treating the judgment of the lower Court as judgment of acquittal.

6. In an unreported judgment D/-6-10-1967 in W.P. Nos. 1456, etc., of 1965 and 66, etc., of 1966 (Andhra Pradesh) of this High Court, it has been held that the chassis which ply on the public roads of Andhra Pradesh State being taken on public road by a dealer for purpose of building bodies and ultimate sale to others means use on public roads in the State and that the vehicle is liable to tax. This is a direct decision on the question concerned in the present case. Therefore, the accused has committed an offence mentioned in the charge-sheet and is liable for punishment under Rule 17 of the Andhra Pradesh Motor Vehicles Taxation Rules.

7. I, therefore, set aside the acquittal of the accused and convict the accused and sentence him to pay a fine of Rs. 50. Time for payment, two weeks.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 178
(V 57 C 23)

BASI REDDI, ACTG. C. J. AND SAMBASIVA RAO, J.

In re P. Ramalakshamma, Appellant.

Writ Appeal No. 220 of 1968, D/-26-7-1968, against order of Chinnappa Reddy, J., in W. P. No. 1729 of 1967, D/-12-6-1968.

Motor Vehicles Act (1939), Ss. 59 and 61 — Applicability — Applicant for stage carriage permit dying pending his application — Substitution of his legal representative as applicant — Substitution not possible — W.P. No. 1729 of 1967, D/-12-6-1968 (Andhra Pradesh), Affirmed — (Civil P. C. (1908), O. 22 — Object).

Where an applicant for stage carriage permit dies pending his application, it is not possible to substitute his legal representative as the applicant. (Paras 2 and 9)

A permit is transferable from one person to another when its holder is alive under S. 59 of the Motor Vehicles Act and is transferable on his death to the person succeeding to the possession of the vehicles covered by the permit under S. 61, only on the permission of the Transport Authority. But these two provisions relate only to permits and do not refer or relate to applications for permits which are pending before the Transport Authority. It is not, therefore, possible to derive any assistance from these provisions in deciding whether in a pending application for a stage carriage permit the legal representative can be brought on record when the applicant dies, (Para 3)

The Motor Vehicles Act does not contain any specific provision to bring the legal representatives on record or for applying the provisions of the Civil P. C. in general and O. 22, Civil P. C., in particular, to the proceedings under the Act. The cardinal principle behind O. 22, Civil P. C., is that the right to sue should survive and then only the legal representatives of the deceased plaintiff or defendant are brought on record. If that right does not survive, the Civil P. C. does not provide for any legal representatives coming on record. There is no doubt that there are cases where such a right does not survive after death and are strictly limited to the person of the plaintiff or the defendant. Such a right dies with the person. If the claim to such a right matures into a decree, then it becomes the property of the successful plaintiff or defendant and devolves upon his legal representatives but not until then. (Para 5)

While the permit is a property transferable and heritable subject of course to the conditions and requirements of law in that behalf, a mere application for a stage carriage permit is not property. Every citizen may have a right to apply for a permit, but it cannot be said that such a right is trans-

ferable or heritable. It is nothing but a right personal to the applicant. The legal representative, in his turn, has a right to apply by himself as a citizen but not through the deceased applicant. It cannot be said that the deceased applicant leaves behind him a right which devolves upon his heirs and successors. (Para 4)

W.P. No. 763 of 1965 D/-14-2-1968 (Andhra Pradesh), Approved. W.P. No. 1729 of 1967 D/-12-6-1968 (Andhra Pradesh), Affirmed. AIR 1957 All 471, Foll. AIR 1963 Mys 278, Diss. from. Observation of Rajagopalan, J., in W.P. No. 459 of 1957 D/-5-8-1957 (Madras), Rel. on. (Paras 2 and 9)

Cases Referred:	Chronological	Paras
(1968) W.P. No. 763 of 1965 D/-14-2-1968 (Andh. Pra.), Sreenivasan v. Government of Andhra Pradesh (1963) AIR 1963 Mys 278 (V 50) = 1963 Mys LJ (Sup) 180, Meenakshi v. Mysore S. T. A. Tribunal		2, 9
(1957) AIR 1957 All 471 (V 44) = 1957 All LJ 478, Ratan Lal v. State Transport Authority		7
(1957) W.P. No. 459 of 1957 D/-5-8-1957 (Madras)		6
		8

O. Adinarayana Reddy, for Appellant.

JUDGMENT:—The husband of the appellant applied for the grant of a stage carriage permit on the route Proddatur to Kandimalayalapalli. Before the application came up for adjudication, the applicant died. On his death, the appellant applied to the Regional Transport Authority, Cuddapah, to substitute her as the applicant, in the place of her deceased husband. The Regional Transport Authority, however, was not prepared to treat her as an applicant in the place of her deceased husband. She, therefore, filed W.P. No. 1729 of 1967 in this Court, for the issuance of a writ of prohibition, directing the authorities not to proceed further in pursuance of the notice dated 5-8-1967 proposing to consider the route in question.

2. Our learned brother, Chinnappa Reddy J., held, following the view taken by Gopal Rao Ekbote J., in W.P. No. 763 of 1965 (Andh. Pra.) that the appellant, as the legal representative of her deceased husband (applicant), cannot bring herself on record to pursue the application for a stage carriage permit. This writ appeal is preferred against that decision.

3. To contend that a right accrues to the applicant on application for a stage carriage permit and such a right devolves on the legal heirs, on the death of the applicant, reliance is placed upon Ss. 59 and 61 of the Motor Vehicles Act, 1939 (hereinafter referred to as 'the Act'). Both of them, however, relate only to permits and not to applications. Section 59(1) provides that a permit is not transferable, except with the permission of the Transport Authority. Section 61(1) deals with transfer of a permit on the death of its holder and says that when a holder dies, the person succeeding

to the possession of the vehicles covered by the permit, may, for a period of three months, use the permit, as if it has been granted to himself. But, that is permissible only if such person informs the Transport Authority, within 30 days of the death of the holder and of his intention to use the permit. Sub-section (2) of Section 61 further provides that the Transport Authority, on the application made in this behalf, within 3 months of the death of the holder of a permit, may transfer it to the person succeeding to the possession of the vehicle covered by the permit. Thus, the permit is transferable from one person to another, when the holder of the permit is alive under Section 59 and is transferable, on his death, to the person succeeding to the possession of the vehicles covered by the permit under Section 61, only on the permission of the Transport Authority. But, these provisions relate only to permits and do not refer or relate to applications for such permits, which are pending before the Transport Authority. It is not, therefore, possible to derive any assistance from these provisions in deciding the question, whether in a pending application for a stage carriage permit, the legal representatives can be brought on record when the applicant dies.

4. While the permit is a property which can be transferred and inherited, subject of course to the conditions and requirements of law in that behalf, mere application for a stage carriage permit is not property. Every citizen may have a right to apply for a permit. But, it is difficult to hold that such a right is transferable or heritable. It is nothing but a right personal to the applicant. The legal representative, in his turn, has a right to apply, by himself, as a citizen. But he or she does not derive such right, through the deceased applicant, but as a citizen of the State. It cannot be said that the deceased applicant left behind him a right, which devolves upon his heirs and successors.

5. The Act does not contain any express or specific provision to bring the legal representatives on record or for applying the provisions of the Civil Procedure Code in general, and Order 22 therein in particular, to the proceedings under the Act. It should also be noted in this connection that the cardinal principle behind Order 22 of the Civil Procedure Code is that the right to sue should survive. It is only when the right to sue survives, the legal representatives of the deceased plaintiff or defendant are brought on record. If the right to sue does not survive, the Civil Procedure Code does not provide for any legal representatives coming on record. There is no doubt, that there are cases where such rights do not survive after death and are strictly limited only to the person of the plaintiff or the defendant. Such a right dies with the person. If that claim matures into a decree, then it becomes property of the successful plaintiff

or defendant and devolves upon his legal representatives but not until then.

6. This view was shared by the Allahabad High Court in *Ratan Lal v. State Transport Authority*, AIR 1957 All 471, wherein a Division Bench of that Court had to deal with a similar contention. In that case, one Munna Lal died after making an application for a stage carriage permit and his son sought to be substituted as the applicant as the legal representative of his deceased father. Repelling this contention, the learned Judges held:

"So far as the right of a person only to make an application for the grant of a permit is concerned, there is no doubt that such a right is neither transferable nor heritable and it does not survive on the death of the person who had originally made the application. In fact, there is no right in the strict sense of the word which a person acquires merely by making an application for the grant of a permit."

7. The Mysore High Court, however, took the contrary view in *Meenakshi v. Mysore S. T. A. Tribunal*, AIR 1963 Mys 278, by holding that the legal representative of the deceased applicant can be brought on record, even though the application has not ripened into a permit. While doing so, reliance was placed on Secs. 59 and 61 of the Act. With respect, we are not inclined to agree with the learned Judges. Apparently, a distinction was not made before them, between the right which a permit confers upon a holder of the permit, and absence of any such right in a person who has merely made an application and died when the application was pending. We do not, therefore, think it possible to follow that decision.

8. In *Meenakshi v. Mysore S. T. A. Tribunal*, AIR 1963 Mys 278, reference was made to a Madras decision in W.P. No. 459 of 1957, D/-5-8-1957 (Mad.). That was a case in which one Elumalai applied for a permit to the Regional Transport Authority and that permit was granted to him. On account of the non-production of the transport vehicle in respect of which permit was decided to be granted to him, the actual issue of the permit to him was deferred and, before the permit was so issued to Elumalai, he died. One of his sons sought the delivery of the permit to him and accordingly the permit was delivered to him. The unsuccessful applicants who were aggrieved by the grant of the permit to Elumalai appealed, and, during the pendency of the appeal, Elumalai's son, who had taken delivery of the permit, applied for permission to prosecute and defend the appeal, as the legal representative of his father. The appellate authority took the view that the son could not be permitted to defend the appeal as a legal representative of his father and also that the delivery of the permit to the son, after the death of Elumalai, was not within the competence of the Regional Transport

Authority. In that view, it allowed the appeal and set aside the permit granted to Elumalai. The writ petition was filed against this decision before the Madras High Court by Elumalai's son, Rajagopalan J., while dismissing the writ petition, expressed the view that since Elumalai was not the holder of a permit when he died, and none had been issued to him, the transfer of that permit to his son was not justified under Section 61 (2) of the Act. In this context Rajagopalan J., made the following observation, which is material for the present consideration:—

"The position was much the same as it would have been, had Elumalai died after making the application for a permit but before even the Regional Transport Authority considered the question of selection, except of course, that in this case, on the strength of the order dated 24-12-1956, Elumalai purchased the bus MDS 2249, the rights of ownership in which of course, as constituting property devolved upon Elumalai's legal representatives."

This observation lends support to the view we have taken.

9. For these reasons, we hold that the view taken by our learned brother Gopalrao Ekbote J., in W.P. No. 763 of 1965 (Andh. Pra.) is right and our learned brother Chinnappa Reddy J., is equally justified in following this decision. We do not, therefore, see any merits in the writ appeal which is accordingly dismissed.

Appeal dismissed.

AIR 1970 ANDHRA PRADESH 180
(V 57 C 26)

FULL BENCH

P. BASI REDDY, ACTC. C. J., SAMBASIVA RAO AND VENKATESWARA RAO, JJ.

M. Kishta Reddy and others, Petitioners v. Collector, Karimnagar Panchayat Wing, Karimnagar and others, Respondents.

Writ Petitions Nos. 161, 250, 628 and 1854 of 1965, 366, 1231, 1278 and 1385 of 1966; 1368 and 3268 of 1967 D/-8-8-1968.

(A) Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), Ss. 25 and 50—S. 50 has no application to cessation of office of sarpanch under S. 25 (2) — Sarpanch ceasing to hold office under S. 25 (2) filing petition under Art. 226 — Petition cannot be rejected on the ground that alternative remedy under S. 50 is available to him. W.P. No. 274 of 1966 (Andh. Pra.) and W.A. No. 36 of 1966 (Andh. Pra.) and 1969 Lab IG 343 (Andh Pra), Overruled.

Provisions of S. 25 (2) and S. 50 of the Act deal with different situations and S. 50 has no application in a case of cessation of office which occurs under S. 25 (2). If S. 50 has no application, the remedies provided

by that section are not available to the petitioners who ceased to hold the office of sarpanch by virtue of S. 25 (2). The remedy of appeal to the Government, afforded by S. 50 (4), is not also open to them. Therefore, rejection of their petitions under Art. 226 of the Constitution on the ground that they could not approach the High Court, without availing themselves of the remedies open to them including an appeal to the Government under S. 50, is wrong. W.P. No. 274 of 1966 (Andh. Pra.) and W.A. No. 36 of 1966 (Andh. Pra.) and 1969 Lab IG 343 (Andh Pra), Overruled. (Distinction between the provisions of Ss. 25 and 50 pointed out.) (Para 26)

(B) Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), Ss. 25 and 232 — Cessation of office of sarpanch under S. 25 (2) — Intimation by Collector — It is proceeding under Act — Revision lies.

Revision under S. 232 of the Act lies to the Government not only against the orders but also the proceedings recorded under the provisions of the Act by the Commissioner or the District Collector. The intimation issued by the Collector on the basis of Government notification under S. 2 (5) of the Act to the sarpanch of the cessation of his office under S. 25 (2) is a proceeding under the Act within the meaning of S. 232 and the aggrieved sarpanch has a remedy by way of revision under that section. (Para 21)

(C) Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), S. 25 (2)—Cessation under section applies to past acts.

Cessation under Section 25 (2) occurs automatically on the failure of the sarpanch to hold even a single meeting within a consecutive period of three months, with effect from the date of expiration of that three months' period. Whenever the failure to hold such a meeting takes place, cessation also automatically occurs. Whether it has happened in the past or whether it occurs in the present or whether it may occur in the future is immaterial, since cessation is an automatic occurrence with the failure to hold meetings. (Para 21)

(D) Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), S. 25 (2) — Constitution of India, Art. 21 — 'Word life' — It does not take in its scope matters like individual status enjoyed by person. AIR 1960 SC 932 and AIR 1963 SC 1295, Foll. (Para 39)

(E) Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), S. 25 (2) — Certiorari — Administrative order — Writ cannot be issued — (Constitution of India, Art. 226).

The cessation of office under Section 25 (2) is a purely administrative event and the intimation given by the Collector is an administrative proceeding wholly unconcerned with any judicial procedure. Therefore neither the cessation of office nor the intimation given by the Collector is amenable to

a writ of certiorari. AIR 1959 SC 107, Foll. (Para 42)

(F) Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), S. 25 (2) — Mandamus — Issuc of — Constitution of India, Art. 226.

Under S. 25 (2) a Sarpanch ceases to hold office on his failure to discharge the statutory duty of holding at least one meeting, in a consecutive period of three months. Cessation takes place automatically on the failure occurring and there is no right conferred on the delinquent Sarpanch and any corresponding duty cast on any authority in respect thereof. Therefore a mandamus cannot be issued. AIR 1959 SC 107, Foll. (Para 44)

(G) Panchayats — Andhra Pradesh Gram Panchayats Act (2 of 1964), S. 25 — Constitution of India, Art. 14 — Provisions of S. 25 are not violative of Art. 14.

There is no similarity between the members and the Sarpanch, in relation to the affairs of the Gram Panchayat; and the sarpanch plays a more vital role than the members in the administration of the Gram Panchayat, and therefore, the distinction therein between the members on the one hand, and the Sarpanch on the other, under Sections 16 to 25 of the Act, is based upon valid classification, which has a crucial bearing on the object of sound panchayat administration, which the Act seeks to achieve. Therefore, the provisions of S. 25 (2) are not violative of Art. 14 of the Constitution. AIR 1961 SC 1715, Applied. (Para 34)

Cases Referred: Chronological Paras

- (1969) 1969 Lab IC 343 = 1966-2 Andh WR 249, G. Venkatesam v. The Collector Medak 3, 26
- (1968) AIR 1968 SC 33 (V 55) = (1968) 1 SCJ 651, National Engineering Industries Ltd, v. Hanuman 17
- (1968) 1968-1 Andh WR 278, Thukivakam Gram Panchayat v. District Collector Chittoor 22
- (1966) W. A. No. 36 of 1966 (Andh Pra) 4, 26
- (1966) W. P. No. 274 of 1966 (Andh Pra) 3, 4, 26
- (1966) 1966-2 WLR 921 = 1967 AC 13, Board of Trustees of the Maradana Mosque v. Mahmud 28
- (1965) AIR 1965 SC 1518 (V 52) = (1965) 2 SCR 858, Ram Dial v. State of Punjab 35
- (1964) 1964-2 Andh WR 375, Ramachary v. State of Andhra Pradesh 16
- (1964) 1964-2 Mad LJ 380 = ILR (1964) 1 Mad 14, Kuppaswami v. Corporation of Madras 15
- (1963) AIR 1963 SC 1295 (V 50) = 1963 (2) Cri LJ 329, Kharak Singh v. State of Uttar Pradesh 37
- (1961) AIR 1961 SC 1602 (V 48) = (1962) 2 SCR 125, Jyoti Pershad v. Union Territory of Delhi 32

- (1961) AIR 1961 SC 1715 (V 48) = (1962) 1 SCR 733, State of Orissa v. Dhirendranath Das 33, 35
- (1960) AIR 1960 SC 932 (V 47) = (1960) 3 SCR 499, In re Sant Ram 36
- (1959) AIR 1959 SC 107 (V 46) = 1959 SCR 1440, Radheshyam v. State of Madhya Pradesh 30, 35, 42, 44
- (1958) AIR 1958 SC 538 (V 45) = 1959 SCR 279, Ram Krishna Dalmia v. Justice Tendolkar 31
- (1954) AIR 1954 SC 545 (V 41) = 1954 SCJ 611, Suraj Mall Mohta and Co. v. Visvanatha Sasthri 35
- (1954) 1954-2 Mad LJ 680 = 67 Mad LW 805, Thiruppusiswamy v. Manickam 14
- (1954) 98 Law Ed 884 = 347 US 497, Spottswood Thomas Bolling v. Melvin Sharpe 39
- (1952) AIR 1952 SC 75 (V 39) = 1952 SCJ 55, State of West Bengal v. Anwar Ali Sarkar 35
- (1950) AIR 1950 SC 222 (V 37) = 1950 SCR 621, Province of Bombay v. Khushaldas 43
- (1926) AIR 1926 Mad 877 (V 13) = ILR 49 Mad 563, Mariya Pillai v. Muthuvelu 13
- (1923) 67 Law Ed. 1042 = 262 US 390, Robert T. Meyer v. State of Nebraska 39
- (1921) 66 Law Ed 254 = 257 US 312, William Truax v. Michael Corrigan 35

P. A. Choudary, for Petitioner in W. P. No. 161 of 1965 and 1868 of 1967; T. S. Narsinga Rao and E. Subrahmanyam, for Petitioner in W. P. No. 250 of 1965; A. Raghuvir, for Petitioner in W. P. No. 628 of 1965; Y. Satyanarayana, for Petitioner in W. P. No. 1854 of 1965; D. V. Reddipantulu, for Petitioner in W. P. No. 366 of 1966; A. Venkatramana, for Petitioner in W. P. No. 1231 of 1966; B. P. Jeevan Reddy, for Petitioner in W. P. No. 1278 of 1966; V. Madhava Reddy, for Petitioner in W. P. No. 1385 of 1966; P. Shivshanker, for Petitioner in W. P. No. 3268 of 1967; 2nd Govt. Pleader (for No. 1); T. Laxmaiah, T. Dhanurbhanudu, S. Venkateswara Rao and A. Narasimha Rao (for Nos. 2 to 7), for Respondents in W. P. No. 161 of 1965; 2nd Govt. Pleader, for Respondents in W. P. Nos. 250, 628, 1854 of 1965; 366; 1231, 1278 and 1385 of 1966 and 3268 of 1967 and (for Nos. 1 and 2) in W.P. No. 1868 of 1967; G. Haridhatha Reddy and K. Narasimham, (for Nos. 3 to 9), for Respondents in W. P. No. 1868 of 1967.

SAMBASIVA RAO, J.: Common questions arise in all these writ petitions and, therefore, they may be conveniently disposed of together.

2. The petitioners were Sarpanchas of Gram Panchayats. They were intimidated by their respective District Collectors, that they had ceased to be Sarpanchas, as laid down under Section 25 (2) of the Andhra Pradesh

Gram Panchayats Act, (hereinafter called the Act), as they had failed to hold even a single meeting of the Gram Panchayat in a consecutive period of three months. The petitioners, thereupon, filed the writ petitions, seeking writs in the nature of certiorari, calling for the records relating to or connected with the proceedings of the Collectors, under which the intimation of cessation of office had been given to them and to quash the same.

3. Most of these petitions came up before Seshachalapathi J. The learned Judge referred them to a Division Bench by his order dated 29th September, 1967. There were, however, two earlier decisions of Gopal Rao Ekbote J., in W. P. No. 274 of 1966 and W. P. No. 331 of 1966. The latter case was reported in G. Venkatesam v. The Collector, Medak, (1966) 2 Andh WR 249 = (1969 Lab IC 343). In those two cases also, the Sarpanchas moved this Court for the issuance of a writ under Art. 226 of the Constitution, quashing the notice issued to them by the Collectors informing them that they had ceased to be Sarpanchas under Section 25 (2) of the Act. The learned Judge dismissed the petitions holding that—

"The petitioner cannot come to this Court without approaching the Commissioner under Section 50 and explaining to him as to how and why he has not ceased to be the Sarpanch and there is no reason to feel that the Commissioner will not give him hearing which he is obliged to give and pass a reasoned order, as required under sub-sec. (3) of Section 50 of the Act.

It is now firmly settled that whenever the Act provides special remedies, the High Court would be slow in encouraging the petitioners to directly approach this Court under Art. 226 of the Constitution without exhausting the remedies available under the special Act."

4. The order in W. P. No. 274 of 1966 (Andh Pra) was carried in appeal before a Division Bench of this Court in W. A. No. 36 of 1966 (Andh Pra) and the Division Bench consisting of Manohar Pershad, C. J., and Sharfuddin Ahmed J., dismissed the appeal and upheld the view of Gopalrao Ekbote J., holding that Section 50 of the Act would apply to the case and that it was always open to the appellant to approach the authorities concerned, who are bound to give him a reasonable opportunity for explanation and that he could also file an appeal under clause (4) of Section 50 of the Act.

5. Thus, both the decisions of the learned single Judge, as well as the decision of the Division Bench of this Court proceeded on the assumption that Section 50 of the Act would apply to the cessation of the office of the Sarpanch under Section 25 (2) and, therefore, the procedure laid down by Section 50 should be followed in such cases of cessation. When these petitions came up before Seshachalapathi J., the counsel for the petitioners argued that the above view re-

quired reconsideration. They argued that Section 25 and Section 50 of the Act deal with different situations and Section 50 has no application to cases arising under Sec. 25 (2). They, further, questioned the validity of Sec. 25 of the Act also. Finding considerable force in these contentions, Seshachalapathi J., referred the cases to a Division Bench.

6. All these petitions accordingly came up before a Division Bench. The Bench however, felt that, in view of the important questions that are raised in these petitions, they should be heard by a Full Bench. The petitions have thus come up before us.

7. The first contention that was put forward before us is, that Section 25 (2) and Section 50 of the Act deal with different situations and that Section 50 has no application in a case of cessation of office which occurs under Section 25 (2). If Section 50 has no application, the remedies provided by that Section are not available to the petitioners. The remedy of appeal to the Government, afforded by sub-section (4) of Section 50, is not also open to the petitioners. Section 25 (2) is a self-wielding provision and the provisions of Section 50 cannot be read into the provisions of Section 25 (2). Therefore, their petitions cannot be rejected, as they were by Gopalrao Ekbote, J., and the Division Bench of this Court, on the ground that they could not approach this Court with a petition under Article 226 of the Constitution, without availing themselves of the remedies open to them including an appeal to the Government under S. 50.

8. The learned Government Pleader, appearing for the respondents agreed with the contention of the petitioners to the extent that Section 50 has no application. In fact, it was stated in the counter affidavit filed in W. P. No. 366 of 1966 that—

"I submit that reference to Section 50 has no relevancy. Section 25 is quite different from Section 50 of the Andhra Pradesh Gram Panchayats Act, 1964. There is no interrelation between the above said two sections. Only in case of removal of sarpanchas under Section 50 of the said Act, opportunities like show cause notice, appeal etc., are available. But this is statutory disqualification under Section 25 (2) of the Act under which no procedure for enquiry is laid down."

9. Thus, the petitioners and the respondents are one, in contending that Section 50 is not attracted to a case under Section 25 (2) and that, therefore, the view taken by the learned single Judge and the Division Bench should be reconsidered.

10. It would be useful in this context, if the relevant provisions of Secs. 25 and 50 of the Act are noticed. Section 25 of the Act bears the caption "Powers and Functions of the Sarpanch". Sub-section (1) requires him to make arrangements for the election of the Upa-Sarpanch and to convene the meetings of the Gram Panchayat, and empowers him to have full access to the re-

cords of the Gram Panchayat, to exercise administrative control over the executive officer and to exercise all the powers and perform all the functions conferred on him by the Act and the Rules. Then sub-section (2) lays down that—

“It shall be the duty of the Sarpanch or the person for the time being exercising the powers and performing the functions of the Sarpanch to convene the meetings of the Gram Panchayat so that at least one meeting of the Gram Panchayat is held in every month. If the Sarpanch or such person fails to discharge that duty with the result that no meeting is held in a consecutive period of three months, he shall, with effect from the date of expiration of period of three months aforesaid, cease to be the Sarpanch, or as the case may be, cease to exercise the powers and perform the functions of a Sarpanch, unless such cessation has otherwise occurred before that date, and for a period of one year from such date, he shall not be eligible to be elected as Sarpanch or to exercise the powers and perform the functions of the Sarpanch.”

The context in which this section occurs, is also worthy of note. Upto Section 15, the Act deals with constitution of Panchayats for Villages, their total strength, division of the Panchayats into constituencies, reservation of seats for women and members of the scheduled castes, election of members, election of Sarpanchas and Upa Sarpanchas and preparation, publication and correction of electoral rolls. From Section 16 onwards, the Act lays down the qualifications and disqualifications of voters, candidates and members. Section 20 provides for restoration of members to office in certain cases and Sec. 22 prescribes the authority to decide questions of disqualifications of members. Section 23 deals with resignation of a member, Upa Sarpanch or Sarpanch. Then Section 24 provides for cessation of office of Sarpanch and Upa Sarpanch. It declares that the Sarpanch shall cease to hold office as Sarpanch or Upa Sarpanch on his ceasing to be a member of the Panchayat Samithi under Proviso A to Sec. 4 (1) (i) of the Andhra Pradesh Panchayat Samithis and Zilla Parishads Act, 1959, or on the expiry of his term of office as member of the Gram Panchayat, or on his otherwise ceasing to be such member; or on his election as President of the Panchayat Samithi.

Coming next, Section 25 not only prescribes the powers and functions of the Sarpanch, in sub-section (1), but also lays down in sub-section (2) that he would cease to be the Sarpanch, if he fails to hold a meeting of the Gram Panchayat in a consecutive period of three months. Under both Sections 24 and 25, the Sarpanch ceases to hold office. But, there is no penalty attached to cessation under Section 24. On the other hand, for the cessation which occurs under Section 25 (2) there is a penalty attached, viz., for a period of one year from such cessation, the person, who ceases to be the

Sarpanch is not eligible to be elected as Sarpanch or exercise the powers and functions of the Sarpanch. The reason for this distinction between the two cessations is obvious. While the cessation under Section 25 (2) is incurred on account of failure of the Sarpanch to discharge statutory duties, it is not so in the case of cessation under Section 24. That cessation does not occur on account of any failure to discharge a duty. The Constitution has proclaimed, under Art. 40, as one of its directive principles, that the State shall take steps to organise Village Panchayats to enable them to function as units of self-Government. It is to carry out this object the Gram Panchayat Act and similar Acts have been enacted. The concern and the anxiety of the legislature to maintain and sustain the principles of local self-Government is writ large throughout the scheme of the Act.

Therefore, the Sarpanch, as the head of the Gram Panchayat, is enjoined to hold at least one meeting of the Gram Panchayat in every month. Otherwise, the very purpose and object of Panchayat administration would be defeated. It is to preserve this spirit of Panchayat Administration, that the penalty is imposed on Sarpanchas, who fail to maintain its spirit and to hold at least one meeting in a consecutive period of three months. Thus, the penalty that is imposed on an erring Sarpanch under Section 25 (2), is not only understandable but appears to be fully warranted in the circumstances.

11. Section 50 in its turn provides for removal of Sarpanch, Upa Sarpanch or members and it reads as follows :

(1) “The Commissioner may, by notification and with effect from a date to be specified therein, remove any Sarpanch or Upa-Sarpanch who, in his opinion, wilfully omits or refuses to carry out or disobeys the provisions of this Act or any rules, bye-laws, regulations or lawful orders issued thereunder, or abuses the powers vested in him.

(2) The Commissioner may, by notification and with effect from a date to be specified therein, remove any member, who in his opinion, is guilty of any misconduct in exercising or purporting to exercise the rights conferred or performing or purporting to perform the functions imposed by or under this Act.

(3) The Commissioner shall, when he proposes to take action under sub-section (1) or sub-section (2), give the Sarpanch, Upa-Sarpanch or member concerned an opportunity for explanation and the notification issued shall contain a statement of the reasons for the action taken.

(4) Any person aggrieved by an order in a notification issued under sub-section (1) or sub-section (2) may, within thirty days from the date of publication of such notification prefer an appeal to the Government and the Government may, pending a decision on such appeal, postpone the date specified in such notification; and shall, in case the ap-

peal is allowed, by order, cancel such notification.

(5) If any notification issued under sub-section (1) or sub-section (2), is cancelled under sub-section (4), the person, if any, elected as Sarpanch, Upa Sarpanch or member between the date of such notification and the date of cancellation thereof, shall cease to hold the office to which he is so elected and the person in respect of whom such notification was first issued shall be restored to office from the date of cancellation of such notification.

(6) Any person in respect of whom a notification has been issued under sub-section (1) or sub-section (2) removing him from office of Sarpanch, Upa Sarpanch or member shall, unless the notification is cancelled under sub-section (4), be ineligible for election as Sarpanch or Upa-Sarpanch or for election as member or from holding any of those offices for a period of three years from the date from which his removal from office has taken effect."

It thus, provides for removal of Sarpanch or Upa Sarpanch, if they wilfully omit or refuse to carry out the provisions of the Act or the rules made thereunder, or abuse the powers vested in them, and for the removal of any member who is guilty of any misconduct. It is not mere omission or refusal to carry out the provisions of the Act that could be a ground for removal of a Sarpanch or Upa-Sarpanch. There should be a wilful omission or refusal on the part of the delinquent office-bearer. It is to be noted that, for cessation of office occurring under Section 25 (2), the failure to hold the meetings of the Gram Panchayat need not be wilful. There is no such requirement in that provision. For whatever reason it has happened, it is sufficient to attract the mischief of Section 25 (2), if, even a single meeting is not held in a consecutive period of three months. That is why the person, who ceases to be the Sarpanch, is visited with the prescribed penalty for one year. On the other hand, obviously because his acts of omission and commission are wilful, the Sarpanch removed under Section 50, is made, under sub-section (6), ineligible for election as Sarpanch or Upa-Sarpanch, or even for an election as member or holding any of those offices, for a period of three years from the date of his removal. Thus Section 50 imposes a heavier penalty than Sec. 25 (2), for the reason that the omission or refusal there is wilful.

12. There is another distinction between the two provisions. Section 25 lays down that the Sarpanch ceases to hold office, with effect from the date of expiration of the period of three months, during which no meeting is held. It does not provide for any order to be made to that effect. Without the need of any authority making any order or notification, a Sarpanch ceases to be so, automatically, with effect from the date of the expiration of the period of three months. What the Collector had informed to these

petitioners, under the impugned notices, is only that they had ceased to be Sarpanchas. It is only a mere and simple intimation of an event, which had occurred under the provisions of the Statute. The petitioners have not ceased to be Sarpanchas, on account of this notice issued by the Collector, but they automatically incurred the cessation, by failure to hold a meeting in a consecutive period of three months, on the expiration of that period of three months.

13. That cessation automatically occurs under such circumstances without the aid of any order of any other authority, is well established. In *Mariya Pillai v. Muthuvelu*, AIR 1928 Mad 877, a Division Bench of the Madras High Court, construing Sec. 50 (1) (b) and (4) of the Madras Local Boards Act, 1920 held that—

"The question whether the President of the Board has or has not reported the failure of the member to attend the meetings of the Board, cannot affect the question whether the member had or had not ceased to be a member of the Board."

Irrespective of the fact, whether the President reported the same or not, a member, who failed to attend the meetings of the Board, was held to have automatically ceased to be so.

14. In *Thirupulliswamy v. Manickam*, (1954) 2 Mad LJ 680, Rajamannar, C. J., considering the scope of Section 50 (1) and Section 51 of the Madras District Municipalities Act of 1920, expressed the view that—

"A Councillor ceases automatically to hold office if he becomes disqualified in one or other of the ways mentioned in clauses (a) to (i) of Section 50 (1) of the Madras District Municipalities Act. No doubt, in case of dispute, Section 51 provides for recourse to the District Judge. But it is not as a result of the order of the District Judge that a councillor ceases to hold his office. The councillor ceases to hold office because of the supervening disqualification even if no application is filed or an application is filed late."

15. A Division Bench of the same Court reiterated a similar view in *Kuppuswami v. Corporation of Madras*, (1964) 2 Mad LJ 380. It was a case where a Councillor of the Madras City Municipal Corporation sustained loss of his office by reason of his non-attendance at the meetings of the Council for three consecutive months. Following the two decisions referred to above, the learned Judges observed—

"It is also clear from the terms of the section extracted above that no formal act of any authority is necessary to put an end to the membership of a Councillor who had absented himself for three consecutive months from the date when he last attended a meeting of the Council. The cessation of membership is automatic on such absence."

16. This Court also took the same view as the Madras High Court in *Ramachary v.*

State of Andhra Pradesh, (1964) 2 Andh WR 375. There, the President of a Panchayat Samithi was informed that he had ceased to be the President in view of his failure to hold meetings, as required under Sec. 22 (7) of the Panchayat Samithis and Zilla Parishads Act. Gopalrao Ekbote J., held that, once the President failed to hold the meeting as required by law, he automatically incurs the disqualification and that it is not necessary for any officer to pass an order declaring that he is disqualified. If he has failed to hold the meeting as directed under Section 22 (7), that provision of law comes immediately into operation and the President gets disqualified automatically.

17. Finally, the Supreme Court itself, considered this point in *National Engineering Industries Ltd. v. Hanuman* (1968) 1 SCJ 651 = (AIR 1968 SC 33). The Supreme Court was considering, in an Industrial dispute, the scope of the Standing Order which provided that a workman would lose his lien on his appointment, if he does not join duty within 8 days of the expiry of his leave. Wanchoo C. J., speaking for the Court held, that the standing order obviously meant that the services of the workman were automatically terminated on the happening of the contingency contemplated by the Standing Order and that he could not be said to continue in service thereafter.

18. It is thus beyond doubt that the cessation of office under Section 25 (2) is automatic. But, such is not the case under Section 50. It provides for removal by the Commissioner. Before doing so, the Commissioner must give the concerned person an opportunity for explanation. After that explanation is considered, and if he is not satisfied with it, then only the order of removal will be passed. It is only after the order is passed, the removal from office takes effect. Against such an order, an aggrieved person can prefer an appeal to the Government under sub-section (4) of Sec. 50 and the Government is empowered to postpone the date of removal during the pendency of the appeal. This manner and procedure of removal is obviously far different, from the automatic cessation of office contemplated by Sec. 25 (2).

19. Under Section 25 (2) cessation takes place, ipso facto, on the failure of a Sarpanch to hold at least one meeting in a consecutive period of three months, on the date of expiry of the period of three months. No formal order and no enquiry preceding that cessation, is contemplated by Section 25 (2). That is obviously because, generally speaking, there is nothing to be enquired into, as to whether the meetings of the Gram Panchayat have been held or not. It is essentially a matter of record. Section 38 requires, that the minutes of the proceedings shall be forwarded by the Sarpanch within three days of the date of the meeting of the Gram Panchayat, to the District Panchayat Officer and to the Panchayat Samithi. If it

happens, that no meeting is held in three months, the Sarpanch ceases to hold the office, without anybody passing an order to that effect. On the other hand, the removal under Section 50 is to be made by an authority constituted under the Act, viz., the Commissioner. In the first instance, he must come to an opinion that a particular Sarpanch or Upa-Sarpanch has wilfully omitted or refused to carry out or disobeyed the provisions of the Act or he has abused the powers vested in him. Once he comes to such an opinion he has to give a notice and opportunity to the delinquent, for explanation. That explanation must be considered, and if it is not satisfactory and ultimately the Commissioner decides upon the removal of the delinquent, he should issue a notification directing removal, which shall contain a statement of the reasons for the action taken. And, there is a further remedy for the delinquent, by way of an appeal to the Government. All this procedure is provided by Sec. 50, obviously because an authority is constituted to remove delinquent office-bearers and members. That authority is constituted as a quasi-judicial one. Therefore, the order passed under Section 50 is a quasi-judicial order, as distinct from a purely administrative event, that takes place under Section 25 (2).

20. Even in cases of cessation of office under Section 25 (2), it is conceivable that there may be instances, where doubts might arise, whether meetings were really held or not, within a period of three months and whether cessation had actually taken effect. Even in such cases, even though cessation is an administrative event, it does not absolve the concerned authorities from observing ordinary rules of fair play. If an affected Sarpanch seeks an opportunity, to satisfy the Collector that he has in fact held a meeting within three months it is necessary, according to the ordinary rules of fair play, to give him that opportunity. But such a position is altogether different from the carefully formulated procedure prescribed by Sec. 50, which involves issuance of notice and affording an opportunity for explanation, to the delinquent, and then passing an order stating the reasons. A vital difference lies in the manner and the mode of the two procedures. Against an order of removal, an appeal lies to the Government under Section 50 (4) of the Act. Though there is no specific provision under Section 25 (2) enabling the aggrieved person to carry the matter in appeal, Section 232 of the Act provides for a revision to the Government. As we have already said, there is no formal order needed to effect the cessation of an erring Sarpanch. But, the Collector as the appointed authority issues an intimation, as it has been done in all the cases before us, informing the Sarpanch that he has ceased to hold that office. If the Sarpanch feels that there is no cessation, he can seek an opportunity before the Collector, to explain his position, as required by the Rules of fair play. If he

still feels aggrieved by the refusal of the Collector to give him an opportunity or by his subsequent decision, he can prefer a revision before the Government under Section 232.

21. It is obvious that such a revision lies to the Government, because Section 232 provides that—

“(1) The Government may, in their discretion at any time, either suo motu or on application, call for and examine the record of any order passed or proceedings recorded under the provisions of this Act by—

(a) the Commissioner or the District Collector or any officer or person authorised by the Commissioner or the District Collector under sub-section (2) of Section 231; or

(b) any authority, officer or person authorised by the Government under sub-sec. (1) of that section or any person empowered by them under sub-section (3) of that section; or

(c) any other authority officer or person, for the purpose of satisfying themselves as to the legality or propriety of such order, or as to the regularity of such proceedings and pass such order in reference thereto as they think fit:

Provided that the Government shall not pass any order prejudicial to any party unless such party has had an opportunity of making a representation.

(2) The powers of the nature referred to in sub-section (1) may also be exercised by such authority, officer or person as may be empowered in this behalf by the Government.

(3) Nothing in this section shall apply to judicial proceedings of a nyaya panchayat or of a conciliation board under Chapter VII.”

There is no doubt, that revision lies to the Government not only against the orders, but also the proceedings recorded under the provisions of the Act by the Commissioner or the District Collector. An intimation or notice of cessation issued by the Collector, is certainly a proceeding under the Act. It is contended by the learned counsel for the petitioners that since there is no provision in the Act for issuing a notice of cessation under Section 25 (2), such notice cannot be a proceeding recorded under the provisions of the Act. We cannot accede to this contention. Cessation takes place under Section 25 (2). By notification III issued in G. O. Ms. No. 64, Panchayati Raj (PTS. VIII) Department, dated 30th January, 1964, the Governor of Andhra Pradesh authorised the District Collectors, to exercise and discharge the powers and duties of the Commissioner under the provisions of the said Act specified in the Schedule in regard to all Gram Panchayats situated in their respective jurisdictions. This notification is issued under the provisions of Section 2 (5) of the Act, which defines ‘Commissioner’ as meaning “any officer who is authorised by the Government to exercise any of the powers or discharge any of the duties of the Commis-

sioner under this Act.” Though Section 25 (2) is not one of the provisions included in the Schedule to the aforesaid notification, the Government of Andhra Pradesh issued another order in Memorandum No. 3490/Panchayats-1/64-2 dated 16-1-1965 to the following effect:—

“As per sub-section (2) of Section 25 of the Andhra Pradesh Gram Panchayats Act, 1964, if a Sarpanch of a Gram Panchayat fails to conduct at least one meeting within a consecutive period of three months he ceases to be the Sarpanch from the date of expiration of three months. By virtue of the above provision, the Sarpanch automatically ceases to be such and he will, therefore, be precluded to conduct any further business of the Panchayat after that date. According to sub-section (1) of Section 28 of the said Act, when the office of the Sarpanch is vacant, the Upa Sarpanch shall exercise the powers and perform the functions of the Sarpanch until a new Sarpanch is elected and assumes office. Some difficulty may arise for the simultaneous operation of these two provisions inasmuch as the Sarpanchas, who may be desirous of continuing in the office even after incurring disqualification may not hand over charge to the Upa Sarpanch or they may even conceal the fact of their cessation.

The Government after examining the above difficulty direct that Inspecting Officers viz., Extension Officers (Pis) or Divisional Panchayat Officers should detect such cases and report to the Collector, who will intimate those Sarpanchas about their disqualification and cessation of office and take action to fill up the casual vacancy.”

We have already referred to Section 38, under which proceedings of the meetings of the Gram Panchayat shall be forwarded by the Sarpanch to the District Panchayat Officer and to the Panchayat Samithi within three days of the meeting. The Government in the aforesaid memorandum dated 16-1-1965, therefore, directed the Extension Officers and others to report to the Collector, about the disqualification and cessation of office incurred by the defaulting Sarpanch and that thereupon the Collector of the District who has been appointed by the Governor as a Commissioner under Section 2 (5), will intimate the Sarpanch, of the cessation of his office. It is by virtue of this notification, the Collectors have been sending intimations to the defaulting Sarpanchas, of the cessation of their office. The notification, as has already been stated, was issued by the Governor of Andhra Pradesh under Section 2 (5) of the Act. There is, therefore, no doubt, that this intimation issued by the Collector to the Sarpanch is a proceeding under the provisions of the Act, within the meaning of Section 232. There is, therefore, the remedy by way of a revision to a Sarpanch, who feels aggrieved in regard to the cessation of his office under Section 25 (2).

22. It was then contended by the learned counsel for the petitioners, that a revision under Section 232 of the Act is not available to the aggrieved person as a matter of right. Reliance was placed upon the decision of this Court in Thukivakam Gram Panchayat v. District Collector, Chittoor, (1968) 1 Andh WR 278. That decision says that Section 232 of the Gram Panchayat Act confers a discretion upon the State Government to interfere or not to do so, and the Government has discretionary power, either suo motu to call for records and examine the orders passed by the authorities specified in clauses (a), (b) and (c) of Section 232 (1) or can be moved to so call for and examine the records, on application by a person. The fact, that a person is given a right to move the Government under this section to call for records and examine them does not necessarily confer any right on him to have the orders reviewed. It is a method of drawing the attention of the revising authority to call for the records and examine them. The revising authority may or may not call for the record. The learned counsel relied upon these observations and contended that there is no right in the aggrieved person to file a revision and the revising authority may or may not interfere with the impugned notice. But that is the same case with all revisions, including revisions under Section 115, Civil P. C. Even in regard to regular appeals, Order 41, Rule 11, Civil P. C. provides that—

“The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.”

By virtue of this provision, the appellate Court is given the discretion for sending for the records of the case. It may or may not call for the record and may or may not entertain the appeal. That depends upon its satisfaction as to the merits of the case. From that, it cannot be said that there is no appeal provided to the appellate Court and revision to the revising Court under the Civil P. C. We do not understand the decision in 1968-1 Andh WR 278, as laying down any different propositions. In fact, it laid down that—

“The fact that a person is given a right to move the Government under this section to call for records and examine them does not necessarily confer any right on him to have the orders reviewed. It is a method of drawing the attention of the revising authority to call for the records and examine

them. The revising authority may or may not call for the records. If it does not call for them it need not give reasons for not calling for the same or even for saying that it is satisfied that the order under revision requires no interference. But where it finds that it is a fit case in which it should interfere with the order, it must give notice to the party concerned before passing any order.”

The principle behind the discretionary power conferred on the revising authority, is its satisfaction about the merits of the case. If it is of the opinion that the revision petition before it has no merits, it rejects it in limine. If, on the other hand, it feels that it is a fit case in which it should interfere, it gives a notice to the party concerned before passing any order. That is the position in all revisions and in a large variety of appeals also. What all the Division Bench sought to lay down in that decision is, that no aggrieved person can claim, as a matter of right, that the impugned order or proceeding should be reviewed. It is, therefore, clear that there is a remedy available to the aggrieved Sarpanch, to prefer a revision under Sec. 232 of the Act, if he feels aggrieved by the cessation of his office.

23. Even so, it was argued that the Government exercising its revisional powers under Section 232 cannot grant stay of the cessation of office pending the revision petition before it and, therefore, the remedy by way of revision is not adequate. This argument is unsustainable in view of the clear provision made in clause (c) of Sec. 232 (1) that the revising authority can “pass such order in reference thereto (the revision petition) as they think fit”. We have no doubt that this would include the power to pass interim orders pending revision petitions.

24. The above discussion shows that there is a clear distinction in the matter of procedure between Sec. 25 (2) and Sec. 50.

25. The two provisions are also distinct from one another in the matter of penalty provided. Section 25 (2) provides that the person who ceases to be the Sarpanch will be ineligible to be elected as Sarpanch or to exercise the powers and functions of the Sarpanch, for a period of one year from the date of cessation. Section 50 levies heavier penalty, by debarring the removed Sarpanch to hold the office for a period of three years. If both the sections are intended by the Legislature to deal with the same situation, the different penalties provided by the two provisions cannot be reconciled and explained. It is, therefore, obvious that the two provisions are intended to deal with two different situations.

26. We have already noticed the context in which Section 25 occurs. Section 50 is, on the other hand, included in the context of the powers of inspection and supervision conferred on the officers of the Government over the administration of the Gram Panchayats. This shows that Section 50 is enact-

ed to confer some special powers on the supervising authorities, so that they could effectively control and regulate the administration of the Gram Panchayat, in accordance with the provisions of the Act and the Rules made thereunder. That apart, there is another material circumstance which should be noted in this connection. The Andhra Pradesh Gram Panchayats Act was enacted in the year 1964 and it is a successor Act to the Madras Village Panchayats Act, 1950 (Act 10 of 1950), which was in force in the Andhra area of the State of Andhra Pradesh, till the 1964 Act came into force. The power to remove a President or Vice-President of a panchayat was conferred on the Inspector under Section 47 of the 1950 Act. Sec. 47 provided for a similar procedure in removing the President as in the present Act under Section 50. Thus, a similar provision existed in the previous Act also. But there was no provision in the Act of 1950 similar to Sec. 25 (2) of the present Act. If Section 25 (2) is intended to govern the same situation as Section 50, it is not necessary to introduce this new provision.

From this, it can be safely inferred that Section 25 is not supposed to meet the same situation as Section 50. Under the provisions of the Act or the rules and the by-laws made thereunder, a large variety of duties are cast on the Sarpanch and powers conferred on him. If he wilfully commits acts of commission and omission in respect thereof, he becomes liable to be proceeded against under Section 50. For instance, his wilful refusal to forward the proceedings of the Gram Panchayat meetings to the District Panchayat Officer and to the Panchayat Samiti, as required under Section 38, is one of such situations. His failure to make arrangements for the election of the Upa-Sarpanch is another instance. His failure to exercise administrative control over the officers of the Panchayat for the purpose of implementation of the resolutions of the Gram Panchayat or any committee thereof is yet another instance. Also it may be, that a cessation arising under Section 25 (2) itself may, in some cases, lead to passing of an order under Section 50. Supposing a person who has ceased to be a Sarpanch under Section 25 (2) does not vacate his office despite the cessation and the notice issued to him by the Collector in this behalf, and is obdurate and persists in clinging on to the office of Sarpanch, then the Commissioner may start proceedings under Sec. 50 against him for removal.

In the event a removal is ordered under Section 50, the removed person will incur the heavier penalty of being ineligible to the office for a period of three years. This will happen, not because he has ceased to be the Sarpanch under Section 25 (2), but because a separate order of removal is passed under Sec. 50. In this connection, it must also be noticed that while the Collector is authorised by Memorandum No. 3490 dated 16-1-1965 to give intimation of cessa-

tion to the Sarpanch occurring under Sec. 25 (2), it is the Secretary to the Government, Panchayat Raj Department, who can take proceedings under Section 50 as per notification (1) contained in G.O. Ms. No. 64 dated 30th January, 1964. For these reasons, we are unable to agree with the view expressed by Gopalrao Ekbote J., in W.P. No. 274 of 1966 (Andh. Pra.) and (1966) 2 Andh WR 249 = (1969 Lab IC 343) and by the Division Bench in W.A. No. 36 of 1966 (Andh. Pra.). We are firmly of the opinion that Section 25 (2) and Section 50 deal with different situations and Section 50 and the procedure laid down thereunder, have no application to a case of cessation that occurs under Section 25 (2).

27. It was then urged by the learned counsel for the petitioners, that cessation under Section 25 (2) could in any event occur only with continuing or future acts of failure to hold meetings. It has no application to past acts. This argument suffers from an obvious fallacy. It overlooks the obvious effect of Section 25 (2), that the cessation automatically occurs, on the failure of the Sarpanch to hold even a single meeting within a consecutive period of three months, with effect from the date of expiration of that three months' period. Whenever the failure to hold such a meeting takes place, cessation also automatically occurs. Whether it has happened in the past or whether it occurs in the present or whether it may occur in the future is immaterial, since cessation is an automatic occurrence with the failure to hold meetings.

28. The decision of the Privy Council in Board of Trustees of the Maradana Mosque v. Mahmud, (1966) 2 WLR 921, relied on by the learned counsel in this behalf, renders no assistance to their argument. There, the Privy Council was construing the words "is being so administered in contravention of any of the provisions of the Act". In view of the clear wording of the section, the Privy Council held that the present tense is clear from the section and, therefore, it does not take in past events. Even in that case, the Privy Council took care to add that—

"This does not mean, of course, that a school may habitually misconduct itself and yet repeatedly save itself from any Order of the Minister by correcting its faults as soon as they are called to its attention. Such behaviour might well bring it within the words 'is being administered'."

But, the language of Section 25 (2), as we have pointed out, is altogether different and lays down that cessation takes place, whenever the failure to hold meetings occurs. Therefore, this argument has no merits.

29. It was next argued that S. 25 (2) is unconstitutional, inasmuch as it is highly arbitrary and discriminatory and is, therefore, violative of Art. 14 of the Constitution. The learned counsel pointed out that, as there are no rules of guidance for enquiry, Section 25 (2) confers arbitrary and unbrid-

led powers on the authority, to terminate the office of a Sarpanch. This argument is once again vitiated by the fallacy, based on the assumption, that the Collector, by his notice, terminates the office of the Sarpanch under Section 25 (2). As we have pointed out more than once, no order of cessation is necessary under or contemplated to be passed by Section 25 (2). The cessation is automatic. The Collector only gives an intimation of such cessation. It is thus a statutory cessation. No powers in this behalf are conferred under this section on any authority. Therefore, there is no question of any authority exercising arbitrary and unbridled power in this respect.

30. Absence of any provision for enquiry before cessation was pointed out as an indication of arbitrary nature of Section 25 (2). We see no substance in this contention. Whether any meeting has been held or not is a matter of fact, borne out by the record. Section 38 of the Act requires the Sarpanch to forward the proceedings of all the meetings of the Gram Panchayat, to the District Panchayat Officer and to the Panchayat Samiti, within three days from the date of the meeting. These proceedings will show, whether any meeting has been held or not. Generally speaking, there cannot be any controversy about this matter. Therefore, there is no need for any enquiry. As we have stated earlier, if, in any individual case, a Sarpanch feels that the circumstances have been misunderstood and that, in fact, a meeting has been held under rules of fair play, he can seek an enquiry and bring it to the notice of the Collector. If he fails to satisfy the Collector, he can go, in revision, to the Government under Section 232. Thus, there is no need for any separate enquiry, in cases contemplated by Section 25 (2), unless one is sought by the concerned person.

If an enquiry is sought, the District Collector cannot refuse it. As the Supreme Court held in *Radheshyam v. State of Madhya Pradesh*, AIR 1959 SC 107, "even in an administrative action, the State Government is not absolved from observing the ordinary rules of fair play. Even where administrative action is taken, it may be necessary to give an opportunity to a party to have his say before an order is passed. But that is quite different from the well-ordered procedure involving notice and opportunity of hearing necessarily to be followed, before a quasi-judicial action open to a writ of certiorari can be taken. The difference lies in the manner and the mode of the two procedures". If in any individual case, such ordinary rules of fair play are not observed, the affected person may go to the Government in revision and if he fails there, he can come to this Court in an application under Art. 226 of the Constitution. But, this does not affect the validity of Section 25 (2), on the ground that it does not provide for an elaborate enquiry.

31. It was next urged that the provisions of Section 25 (2) are, in any event, highly discriminatory. The argument is, that, according to Section 25 (2), a Sarpanch not only ceases to be the Sarpanch but also becomes ineligible to be elected as Sarpanch, for a period of one year, while in similar cases, provided by Secs. 17 to 20, disqualified members merely cease to hold their offices. Thus, the argument runs that the Sarpanch is made to incur special disadvantages like the penalty under Section 25 (2), while members merely cease to hold their office, under the other provisions. Before we examine the actual merits of this contention, we will first state the law on the question of discrimination as being violative of Art. 14 of the Constitution. The Supreme Court has, time and again, considered this question, and the law on this aspect of the matter is firmly settled and established. In *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538, S. R. Das, C. J., speaking for the Court, held that—

"It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled. Namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration."

The learned Chief Justice proceeded further and observed that—

"that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds:

that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest."

32. In *Jyothi Pershad v. Union Territory of Delhi*, AIR 1961 SC 1602, the Supreme Court pointed out that—

"If the statute itself or the rule made under it applies unequally to persons or things similarly situated, it would be an instance of a direct violation of the constitutional guarantee and the provisions of the statute or the rule in question would have to be struck down.

The enactment or the rule might not in terms enact a discriminatory rule of law but might enable an unequal or discriminatory treatment to be accorded to the persons or

things similarly situated. This would happen when the Legislature vests a discretion in an authority, be it the Government or an administrative official acting either as an executive officer or even in a quasi-judicial capacity by a legislation which does not lay down any policy or disclose any tangible or intelligible purpose, thus clothing the authority with unguided and arbitrary powers enabling it to discriminate.

In such circumstances the very provision of the law which enables or permits the authority to discriminate, offends the guarantee of equal protection afforded by Article 14."

33. In *State of Orissa v. Dharendra Nath Das*, AIR 1961 SG 1715, the Supreme Court again pointed out that the question of discrimination would arise only in cases where people or classes affected, are similarly circumstanced.

34. We will now examine, in the light of these principles laid down by the Supreme Court, whether any discrimination has been made under Section 25 (2) as argued by the learned counsel. Section 17 lays down that no village officer or officer of State or local authority shall be qualified for being chosen as a member of the Gram Panchayat. Section 18 provides for a disqualification of persons convicted of election offences, to hold any office in a Gram Panchayat for a period of five years from the date of conviction. Section 19 (1) deals with disqualification of candidates, who have been sentenced by criminal Court to imprisonment for certain offences. Section 19 (2) refers to disqualifications of persons of unsound mind, deaf and mute persons, and lepers, insolvents, and those who are interested in a contract with the Gram Panchayat, for being chosen as members. Section 20 declares that a member shall cease to hold office, if he suffers from any of the disqualifications therein. Clause (k) of Section 20 refers to members, who absent themselves from a meeting of the Gram Panchayat, for a period of three consecutive months. It was pointed out that under these provisions, a person who incurs those disqualifications ceases to be a member or ceases to be qualified for being elected as a member, while the Sarpanch under Section 25 (2), in addition to his ceasing to be the Sarpanch, incurs the penalty for one year. But, from a reading of these provisions of the Act, it is obvious that the members are placed in one class and the Sarpanch in another. The object behind the classification is obvious. Members of Gram Panchayats play a less active role than the Sarpanch. They meet and transact business, only when a meeting is called by the Sarpanch. Without any meeting being convened, the members cannot meet.

That is why a positive duty is cast upon the Sarpanch, under Section 25 (1) (b), to convene the meetings of the Gram Panchayat and the Gram Sabha. He is also enjoined

to convene at least one meeting of the Gram Panchayat every month. If the Gram Panchayat does not meet, the administration of the village affairs by the Gram Panchayat, the betterment of which is the very object of the Act, will be defeated. The very principle behind Panchayat Raj is thrown overboard, if the meetings of the Gram Panchayat are not convened. The function and power of calling the Gram Panchayat is conferred on the Sarpanch and if he fails to discharge that function, it would result in serious dislocation of the administration of the Gram Panchayat. Thus, there is a high principle involved in the distinction made between the powers and functions of the Sarpanch and those of the members, especially in regard to the holding of the meetings of the Gram Panchayat. Moreover, most of the disqualifications referred to in Sections 18 to 20, are incurred by the members or candidates, on account of other reasons like becoming of unsound mind or being deaf, mute or a leper. On the other hand, the non-holding of a meeting of the Gram Panchayat is on account of dereliction of the statutory duty on the part of the Sarpanch.

It should be remembered that, under Sec. 20, clause (k), a member who absents from the meeting of the Gram Panchayat for three consecutive months, also ceases to be a member, just like a Sarpanch who fails to hold a meeting in a consecutive period of three months ceases to hold his office. If a member fails to attend a meeting, that does not obstruct, generally, the Gram Panchayat to meet and hold its deliberations. The meetings of the Gram Panchayat will go on, despite the absence of a member. Thus, the administration of the Gram Panchayat is not seriously affected by the absence of a member from the meeting. On the other hand, if the meetings of the Gram Panchayat themselves are not held, the very administration of the affairs of the Gram Panchayat will be brought to a standstill. That is why greater importance is naturally attached to the holding of the meetings of the Gram Panchayat. For that reason, a penalty also is imposed on the Sarpanch who fails to hold such meetings. Thus, we have no doubt whatever that there is no similarity between the members and the Sarpanch, in relation to the affairs of the Gram Panchayat; that the Sarpanch plays a more vital role than the members in the administration of the Gram Panchayat, and that, therefore, the distinction therein between the members on the one hand and the Sarpanch on the other, under Sections 16 to 25 of the Act, is based upon valid classification, which has a crucial bearing on the object of sound Panchayat administration, which the Act seeks to achieve.

35. It was next pointed out that under Section 22, an authority is constituted to adjudicate upon questions of disqualifications of members, while there is no such authority to adjudicate upon cessation and

penalty incurred under Section 25 (2). Apart from the availability of the remedy by way of revision under Section 232 to a person who has ceased to hold office under Section 25 (2), several of the matters which lead to disqualifications under Sections 16 to 20 require investigation and must be adjudicated upon, on the basis of evidence and material relating to it. That is why Section 22 provides that, where an allegation is made that a particular person has become disqualified under any one of the provisions, and the concerned member disputes that allegation, then the question is referred to the authority for decision. There is, thus, an allegation and denial, which must, necessarily, be investigated into and adjudicated upon, by a competent authority. It is for that reason sub-section (2) provides for the continuation of the member in office pending such decision. It is also important to note that the benefit of this enquiry under Section 22 is given to a Sarpanch or a Upa Sarpanch also and if he is restored by the final order as a member, he is deemed to have been restored also to the office of the Sarpanch or the Upa-Sarpanch, as the case may be. In this class of affected persons, there is no distinction made between members and Sarpanchas and Upa-Sarpanchas. It is only in regard to the failure to hold meetings, no enquiry is provided for, for the reason we have already stated, viz., that there is nothing to be enquired into, because the non-holding of the meeting is borne out by the proceedings of the Gram Panchayat.

Thus, we see no basis for the argument that the provisions of Section 25 (2) are discriminatory and, therefore, violative of Art. 14. There is nothing in the following decisions, relied on by the learned counsel for the petitioners, which would in any way detract from the view we have expressed. *State of West Bengal v. A. A. Sarkar*, 1952 SCJ 55 = (AIR 1952 SC 75); *AIR 1961 SC 1715*; *Suraj Mall Mohta and Co. v. Visvanatha Sastri*, 1954 SCJ 611 = (AIR 1954 SC 545); *William Truax v. Michael Corrigan*, (1921) 66 Law Ed 254 (U.S. Supreme Court Reports); *Ram Dial v. State of Punjab*, AIR 1965 SC 1518; and AIR 1959 SC 107. In all these decisions, what was emphasised is, that the problem of equal protection clause is one of classification and drawing the line and that such classification must be based on reasonable and substantial basis. In AIR 1965 SC 1518, one section of the Punjab Municipalities Act was struck down, as violative of Art. 14, because it discriminated between members similarly situated. These decisions, therefore, do not render any assistance to the contention of the petitioners that there is undue discrimination made by the Act between members and Sarpanch of the Gram Panchayat. We, therefore, reject this argument.

36. The next point that was argued was that Section 25 (2) is violative of the peti-

tioners' rights under Art. 21 of the Constitution. Article 21 is in the following terms: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

One would understand by the words "deprived of his life" occurring in this Article in conjunction with "Personal liberty", as referring to danger to life, like sentence of death, etc. But, Shri P. A. Choudary contended that 'life' does not mean merely 'animal life' but includes status in life. The office of Sarpanch, according to them, comes within the scope of the word 'life', as occurring in Art. 21. In support of this contention reliance was placed upon the decision in *In re Sant Ram*, AIR 1960 SC 932, wherein the Supreme Court held that the word 'life' does not include 'livelihood'. This decision, instead of helping the learned advocate's construction of the word 'life', is opposed to it. It certainly excludes a very important aspect of human existence, viz., 'livelihood' from the meaning of the word 'life' in Art. 21.

37. Reliance was next placed upon another decision of the Supreme Court in *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295, wherein the following observation of Field J., explaining the scope of the words 'life' and 'liberty', which occur in the fifth and fourteenth amendments to the U. S. Constitution was extracted. By the term 'life' it is meant:

"Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, of the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world....."

38. The Supreme Court itself, in that decision, had no occasion to deal with the scope of the word "life" and it was only construing the scope of the words "personal liberty". Therefore, that decision does not render any assistance to the learned counsel's argument. The observations of Field J., extracted therein, clearly refer to a life in a human body and only says that the life can be affected by mutilation of the body, by the amputation of an arm, or leg, or the destruction of any other organ of the body, because it is through these limbs that a human being maintains contacts with his surroundings and the outer world.

39. The decisions relied on by the learned counsel in *Robert T. Meyer v. State of Nebraska*, (1923) 67 Law Ed 1042 (U.S. Supreme Court Reports) and *Spottswood Thomas Bolling v. Melvin Sharpe*, (1954) 98 Law Ed 884 (U. S. Supreme Court Reports) deal only with the word "liberty" and do not throw any light on the meaning of the word "life". There is thus no support to the extraordinary construction that the learned counsel for the petitioner seeks to place

on the word "life" occurring in Art. 21. We cannot accept that the word "life" in Art. 21 takes in its scope, matters, like individual status enjoyed by a person. This argument must be rejected.

40. It was also urged that the Collectors, who gave notices to the petitioners, are not duly authorised to issue them. This stand is wholly incorrect. We have already referred to Notification III in G.O. Ms. No. 64 dated 30th January, 1964 and Memo. No. 3490 dated 16-1-1965. By the said notification III, the Governor of Andhra Pradesh, exercising his powers under clause 5 of Section 2 of the Act, authorised the District Collectors to exercise and discharge the powers and duties of the Commissioner, in regard to all Gram Panchayats, situated in their respective jurisdictions, under the provisions of the Act specified in Schedule thereto. Then, under the Memorandum dated 16-1-1965, the Collectors were authorised to intimate those Sarpanchas about their disqualification and cessation of office, who failed to hold a meeting in a consecutive period of three months and to take action to fill up the casual vacancy. There is, therefore, no doubt that the Collectors are duly authorised in this behalf.

41. Thus, we find no force in any of the contentions of the learned counsel for the petitioners, questioning the validity of Section 25 (2) of the Act, the cessation of office that is incurred under Section 25 (2), and the intimation given by the Collectors to the petitioners, of such cessation.

42. This apart, the learned Government Pleader also contended that the cessation of office under Section 25 (2) is a purely administrative event and the intimation given by the Collector is an administrative proceeding wholly unconcerned with any judicial procedure. It was, therefore, his contention that neither the cessation of office nor the intimation given by the Collector is amenable to a writ of certiorari. This contention appears to be well founded. The Supreme Court laid down in AIR 1959 SG 107 that—

"Even where administrative action is taken it may be necessary to give an opportunity to a party to have his say before an order is passed. But that is quite different from the well-ordered procedure involving notice and opportunity of hearing necessarily to be followed before a quasi-judicial action open to a writ of certiorari can be taken. The difference lies in the manner and the mode of the two procedures. For the breach of the rules of fair play in taking administrative action a writ of certiorari will not lie."

43. In *Province of Bombay v. Keshaldas*, AIR 1950 SG 222, the Supreme Court laid down that—

"When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determi-

nation of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari."

In the present cases, as we have already stated, there is not even a need of a formal order of any authority, before cessation of office happens under Section 25 (2). Even supposing that the Collector has to form an opinion, as to whether at least one meeting has been held in a consecutive period of three months, it is only a matter of administrative character and is not amenable to a writ of certiorari.

44. The learned Government Pleader next urged that even a writ of mandamus cannot be issued as there is no legal right in the petitioners and any corresponding duty cast on the appropriate authority which have been violated in this case. What all Section 25 (2) provides for is, that a Sarpanch ceases to hold office on his failure to discharge the statutory duty of holding at least one meeting, in a consecutive period of three months. Cessation takes place automatically on the failure occurring and there is no right conferred on the delinquent Sarpanch and any corresponding duty cast on any authority in respect thereof. We, therefore, see considerable force in this contention of the learned counsel for the respondents. Nevertheless, it would be a different matter if the ordinary rules of fair play have not been observed. As the Supreme Court observed in AIR 1959 SG 107, even in taking an administrative action, the State Government is not absolved from observing the ordinary rules of fair play. If a Sarpanch feels aggrieved, that he has had no opportunity of explaining that default has not occurred in holding meetings, he can seek an opportunity to explain the matter before the District Collector. If that opportunity is denied to him, it is open to him to carry the matter in revision to the Government under Section 232. In individual cases, this Court can review, under Art. 228 of the Constitution, whether ordinary rules of fair play have been observed or not in the first instance or in the revision before the Government. We are of the opinion that a Sarpanch who feels aggrieved of the cessation, cannot otherwise invoke the jurisdiction of this Court under Art. 226.

45. We will now proceed to consider, in the light of the above observations, the different writ petitions that are now before us.

W.P. No. 161 of 1965.

46. In this writ petition, the petitioner failed to hold meetings of the Gram Panchayat from 1-7-1964 to 17-11-1964. As the counter-affidavit discloses, the petitioner requested the District Panchayat Officer to hold an enquiry. That officer, after issuing a notice to the petitioner on 6-12-1964, held an enquiry on 16-12-1964, in the Gram Panchayat office itself. The enquiry was conducted in the presence of the petitioner

and the statements of the members who were present were also recorded. The signature of the petitioner on these statements was also taken. On this enquiry, it was found that no meeting was held for a considerable period of three months. It does not appear from the petitioner's affidavit that he has sought any further enquiry from the Collector nor has he preferred any revision to the Government. It is clear that the rules of fair play have been observed in this case and that there is no ground made out for our interference under this writ petition. The writ petition is accordingly dismissed.

W.P. No. 250 of 1965.

47. The petitioner in this case did not convene any meeting in the three succeeding months after 13-8-1964. The District Panchayat Officer, during his inspection of the Gram Panchayat on 18-1-1965, detected this non-compliance with the mandatory duty cast on the Sarpanch. The officer also noted that fact in the minutes book. Further, it was stated in the counter-affidavit that—

"It would have been open to the petitioner to approach the first respondent and put forth his case soon after the District Panchayat Officer has noted down in the minutes book."

However, the petitioner did not seek any such opportunity. Nor has he carried the matter in revision to the Government. If he thinks that he has got any representation to make in this behalf, he could have approached the Collector. But, he did not do so. It is open to him to prefer a revision if he is so advised to the Government. We do not see any scope in this case to find that rules of fair play have not been observed. There is, therefore, no ground made out for our interference. The writ petition is accordingly dismissed.

W. P. No. 628 of 1965.

48. In W. P. No. 628 of 1965, as the counter-affidavit discloses, the petitioner himself had admitted in his statement during the enquiry made by the Divisional Panchayat Officer on 29-3-1965, that he had not conducted any meeting during the period from 12-10-1964 to 25-2-1965. In that statement he had not mentioned anything about his absence from the village and about handing over of records to the Upa-Sarpanch and reporting the same to the Panchayat Samiti, Jangaon.

It is obvious that there was an enquiry held, whereat the petitioner was personally present and made a statement, admitting the fact of non-convening a meeting for three months. He also produced the Minutes Book before the Divisional Panchayat Officer. The petitioner has not preferred any revision to the Government. There is thus absolutely no ground for our interference in this case. The writ petition is, therefore, dismissed.

W. P. No. 1854 of 1965.

49. In this writ petition, the petitioner himself admitted before the Additional Extension Officer for Panchayats, Cheepurupalli, on 20th September, 1965, that he had not convened any meeting of the Gram Panchayat during the months from June to the end of September, 1965. He also admitted that he had handed over the Minutes Book and the agenda book of the Gram Panchayat to the officer on that day. In the light of this admission, it is clear that the petitioner had ample opportunity to present his case before the Inspecting Officer. It now transpires that he has subsequently brought into existence some new minutes books, apart from those which he had handed over to the Inspecting Officer on 20th September, 1965. The latter books cannot be obviously accepted in view of the statement made by the petitioner. He did not seek any further opportunity to represent his case before the Collector nor has he preferred any revision. We do not, therefore, think it a proper case where we can interfere. The writ petition is accordingly dismissed.

W. P. No. 368 of 1966.

50. The petitioner had failed to conduct the meetings of the Gram Panchayat from 14-8-1964 to 24-12-1964. The Divisional Panchayat Officer, Narayanpet, examined the minutes book and reported the failure to the Collector. In fact, the petitioner did not any time dispute this fact. He also availed himself of the opportunity of filing a petition before the Government, obviously under Section 232 of the Act. Even in that petition he did not dispute the fact that he had not held the meetings. Therefore, there are absolutely no merits in this writ petition and we dismiss it.

W. P. No. 1231 of 1966.

51. The petitioner in this case did not convene any meetings of the Gram Panchayat from February, 1966 to July, 1966. The Extension Officer of Panchayats inspected the Panchayat, its office, and the minutes book. The counter-affidavit discloses that the petitioner manipulated, in order to cover up his failure to hold the meetings, a fresh minutes book after the receipt of the proceedings of the Collector. It is manifest from the minutes book maintained by him, that no business was transacted by the Panchayat and that the petitioner had obtained signatures of the members leaving space without transacting any business of the Panchayat to cover up default. His case that the Extension Officer had taken away the earlier minutes book is patently false. If he had really convened any meeting, as shown in the new minutes book, he could have forwarded its proceedings to the District Panchayat Officer and to the Panchayat Samithi, as required by Section 38 of the Act. But he did not do so. This fact clearly establishes that no meeting was actually convened. This writ

petition has been filed on the issuance of the proceedings of the District Collector. No revision has been filed before the Government. Under the circumstances, we hold that there are no merits in this writ petition and dismiss it.

W. P. No. 1278 of 1966:

52. The petitioner failed to convene the meetings of the Panchayat from 20th of March, 1966 to 5th July, 1966. The second respondent, viz., the Divisional Panchayat Officer, Warangal inspected the Panchayat and made enquiry. The petitioner made a statement before him admitting his failure to hold the meetings. The Minutes Book also was produced before the second respondent and it clearly shows that no meeting was held. The petitioner did not seek any further opportunity either before the Collector or by preferring a revision to the Government. He has filed this writ petition on receiving the proceedings of the Collector without availing himself of the remedies open to him. It was open to him to file a revision petition before the Government, of which opportunity he did not avail himself. The writ petition has, therefore, no merits and is dismissed.

W. P. No. 1355 of 1966:

53. In this case the District Panchayat Officer inspected the office and the records of the Gram Panchayat on 8-7-1965 and found out that no meetings of the Gram Panchayat had been held from 29-3-1965 till the date of inspection. The present contention of the petitioner that he had held some meetings during that period, cannot be accepted, because he did not forward the proceedings of any such meeting, as he was required to do under Section 38 of the Act. He availed himself of the remedy by way of revision to the Government. The Government dismissed the revision petition. Obviously the entire records including the Minutes book were thoroughly examined by the District Panchayat Officer. It is alleged by the respondents that the petitioner has concocted a new Minutes book. That allegation seems to be correct, in view of the absence of any intimation of these proceedings to the District Panchayat Officer and to the Panchayat Samithi. We, therefore, dismiss this Writ Petition.

W. P. No. 1868 of 1967:

54. The petitioner seeks to explain the failure to hold meetings of the Gram Panchayat in a consecutive period of three months, by stating that he had been absent from his village from 15-6-67 to 14-7-1967, for taking medical aid and that, therefore, he had delegated his powers and functions to the Upa-Sarpanch on 15-6-1967. There was no meeting of the Gram Panchayat on 14-6-1967 and there was no such resolution passed to that effect. The District Panchayat Officer visited the village on 6th August, 1967 and inspected the office. He recorded the statements of the Petitioner and the Panchayat Clerk. The petitioner made a statement

before the District Panchayat Officer, admitting that he did not conduct the meetings after the Budget meeting held in March, 1967, owing to his pre-occupations and personal affairs. It was on the basis of this enquiry and admitted failure on the part of the petitioner, the District Panchayat Officer reported the matter to the Collector. Thereupon, the Collector issued the impugned intimation to the petitioner, that he had ceased to be the Sarpanch. His ill-health could not be true because, it appears, from the counter affidavit, that he had attended the General Body meeting of the Panchayat Samithi, of which he was a member, on 22nd June, 1967. In view of the facts stated above, the contention of the petitioner, that he had no proper opportunity cannot be accepted. Besides, he has not chosen to prefer any revision to the Government. The writ petition has, therefore, no merits and it is, therefore, dismissed.

W. P. No. 3268 of 1967:

55. The allegation against the petitioner is that he did not hold any meeting of the Gram Panchayat after 26-3-1967. But in his statement before the inspecting Officer made on 25-8-1967, he stated that he had called for a meeting on 24-8-1967, which was neither attended nor presided over by him and that the proceedings were not recorded in the minutes book. It is contended for the respondent, that such a proceeding did not tantamount to holding a meeting as required by Section 25 (2). The matter was sent to the Government for clarification. The Government expressed the view, by its memorandum dated 30th October, 1967, that it was not holding a meeting within the meaning of Section 25 (2). It was only after receiving the Government's memorandum, the Collector issued the intimation which is now impugned in this writ petition. In these circumstances, the petitioner cannot complain of lack of opportunity to explain his case. He had his full say in the matter. We do not, therefore, see any merits in this writ petition, which we dismiss.

56. The respondents will have their costs in all these writ petitions, Advocates fee Rs. 50 in each case.

Order accordingly.

AIR 1970 ANDHRA PRADESH 194
(V 57 C 27)

CHINNAPPA REDDY, J.

Thirumala Reddy Mahalakshamma, Petitioner v. Mulkuri Murlidhar Rao and others, Respondents.

Transfer Civil Misc. Petn. No. 713 of 1968, D/- 2-9-1968.

Civil P. C. (1908), S. 24—Dispute regarding jurisdiction—Existence of—No bar to High Court ordering transfer.

KL/FM/F630/68/TVN/B

The suit was for a permanent injunction restraining the several defendants from interfering with the plaintiff's enjoyment of properties mentioned in Schedules 'A', 'B' and 'C' in the plaint. 'A' schedule properties were in Nizamabad District while 'B' and 'C' schedule properties were in Guntur District. Plaintiff claimed the properties as the heir of his adoptive father Kutumba Rao, as also under a Will by the said Kutumba Rao. Defendants 1 to 4 were residents of Sri Nagar in Nizamabad District and Defendants 5 and 6 were residents of Mulekalur, Guntur District. A single suit was laid for all the above properties and against all the defendants vaguely alleging that all the defendants conspired together and with a common unlawful intention were trying to cause obstruction to the enjoyment of the plaintiff's properties. Defendant 4 filed this application under S. 24 of Civil P. C. for transfer of the suit from Guntur Court to Nizamabad Court alleging that the suit was laid at Guntur with the only object of harassing that defendant. She claimed 'A' schedule properties to be her own and that they were in her possession and enjoyment. She also alleged that Defendants 5 and 6 had no interest whatever in the properties at Guntur and that they were plaintiff's friends impleaded with the only object of investing the Guntur Court with jurisdiction, which it did not have. The application was opposed by the plaintiff and Defendants 5 and 6.

Held that in the circumstances of the case the suit ought to be transferred from Narasaraopet Court to the Court of District Munsif at Bodhan in Nizamabad District. (Para 9)

A plea that since the defendant-applicant had alleged that the Court at Narasaraopet had no jurisdiction to try the suit, the suit could not be transferred from that Court, was overruled. The language of Section 24 of Civil P. C. is very wide and there are no restrictions or impediments in the way of the High Court exercising the power of transfer merely because there is a dispute regarding jurisdiction. (1885) 13 Ind App 134 (PC) and (1881) ILR 6 Cal 30, Dist.; AIR 1932 Sind 215 and AIR 1955 Mys 115, Diss.; AIR 1934 All 569 and AIR 1955 Nag 44, Rel. on, (Paras 7 and 8)

Cases Referred: Chronological Paras
 (1955) AIR 1955 Mys 115 (V 42) =
 ILR (1955) Mys 330, Krishnaji Rao 5, 6
 v. Gokuldas
 (1955) AIR 1955 Nag 44 (V 42) =
 ILR (1955) Nag 36, K. L. Daftary 7
 v. K. L. Dube
 (1940) AIR 1940 Oudh 164 (V 27) =
 ILR 15 Luck 619, Kanhaiya Lal 5, 6
 v. Hamid Ali
 (1934) AIR 1934 All 569 (V 21) =
 1934 All LJ 345, Narain Das v. 7
 Khunni Lal
 (1932) AIR 1932 Sind 215 (V 19) =
 26 Sind LR 277, Gangumal v. 5, 6
 Nanikaram

(1885) 13 Ind App 134 = ILR 9 All 191 (PC), Ledger v. Bull 5
 (1881) ILR 6 Cal 30, Peary Lal
 Mozoomdar v, Komal Kishore
 Dassia 5, 6
 Venkatesh Wadki, for Petitioner; A. V. Krishna Rao (for No. 1), J. V Suryanarayana (for Nos. 7 and 8), R. Narasimha Reddy (for No. 6), for Respondents.

ORDER: The 4th defendant in O. S. No. 305/1967 on the file of the Court of District Munsif of Narasaraopet in Guntur District seeks a transfer of the suit to the Court of District Munsif of Bodhan in Nizamabad District. The suit is laid by the plaintiff for a permanent injunction restraining the several defendants from interfering with the plaintiff's enjoyment of the properties mentioned in the A, B and C schedules annexed to the plaint. A schedule properties are lands situated in Jakora village in Nizamabad District while B and C schedule properties are a house and house site situated in Mulakalur and Chimalamani in Guntur District. The plaintiff claims that he is entitled to all the properties as the heir of his adoptive father Kutumba Rao, as also under a will executed by the said Kutumba Rao. Defendants 1 to 4 are stated to be residents of Sri Nagar in Nizamabad District while defendants 5 and 6 are residents of Mulakalur in Guntur District. A single suit is laid in respect of all the properties and against all the defendants by making the vague allegation "All the defendants conspired together and with a common unlawful intention are trying to cause obstruction to the enjoyment of the plaintiff of his properties."

2. The fourth defendant has filed a written statement claiming that 'A' schedule properties belong to her and are in her possession and enjoyment. She alleges that the 5th and 6th defendants have no interest in any of the suit properties, that they are friends of the plaintiff and that they are impleaded in the suit merely to invest the Narasaraopet Court with jurisdiction. It is stated in Para. 4 of the written statement:

"4. He filed this suit with false and frivolous allegations by adding B and C schedule undisputed properties and adding defendants 5 and 6, his own friends with a view to create jurisdiction to this Court, and with ulterior object of putting defendants 1 to 4 to great inconvenience. The real dispute relates to A schedule properties which are situated in Banswada taluk of Nizamabad district. So this Court cannot have territorial jurisdiction to try this suit."

In Para. 8 it is stated:

"This Court will not have pecuniary and territorial jurisdiction also."

3. The fourth defendant has filed the present application for transfer contending that since the A schedule properties are situated in Nizamabad District and the suit is one for a permanent injunction, convenience of parties and witnesses requires

that it should be tried in the Court of District Munsif, Bodhan. It is averred that the suit is laid in the Court at Narasaraopet only for the purpose of barassing the petitioner. It is also stated that defendants 5 and 6 are not really interested in the plaint 'B' and 'C' schedule properties and that they have been impleaded in the suit and 'B' and 'C' schedule properties have been included not because of any dispute but merely to invest the Narasaraopet Court with jurisdiction.

4. The application is opposed by the plaintiff and defendants 5 and 6. Curiously enough, the plaintiff in his affidavit states that defendants 5 and 6 are interested in 'B' and 'C' schedule properties. Plaintiff also claims that since he is relying on a will executed in his favour at Mulakalur it is necessary to examine several witnesses from Mulakalur and therefore convenience requires that the suit should be tried in Cuntur District. He also claims that as arbiter litis the choice of forum is his.

5. Sri A. V. Krishna Rao, learned Counsel for the plaintiff also raises a preliminary objection that the application under Sec. 24 is not maintainable at the instance of the petitioner who has raised an objection regarding the jurisdiction of the District Munsif's Court, Narasaraopet. He contends that Section 24 empowers the High Court or the District Court to transfer a case from one competent Court to another competent Court, but does not empower the High Court or the District Court to transfer a suit instituted in a Court which has no jurisdiction to entertain it. He submits that the defendant having raised an objection to the competency of the District Munsif's Court, Narasaraopet to entertain the suit, he cannot now seek a transfer of the suit from that Court to a competent Court. He relies upon the well known case of *Ledgard v. Bull*, (1885) 13 Ind App 134 (PC), *Peary Lal Mazoomdar v. Komal Kishore Dassia*, (1881) ILR 6 Cal 30, *Cangumal v. Nanikaram*, AIR 1932 Sind 215; *Kanhaiya Lal v. Hamid Ali*, AIR 1940 Oudh 164 and *Krishnaji Rao v. Cokuldas*, AIR 1955 Mys 115.

The facts in (1885) 13 Ind App 134 (PC), were that the plaintiff instituted a suit in the Court of a Subordinate Judge for damages for an alleged infringement of certain exclusive rights secured to him by three Indian patents. S. 22 of the Patents Act expressly provided that such a suit could be laid only in the Court of the District Judge. The defendant filed a written statement objecting to the jurisdiction of the Subordinate Judge to entertain the suit. Realising that the Court of Subordinate Judge had no jurisdiction to entertain or try the suit the plaintiff made an application to the District Court, in which the defendant also joined to transfer the suit to the file of the District Court. The District Court accordingly transferred the suit to its own

file and tried it. Their Lordships of the Privy Council held that the first essential step for the maintenance of a suit was its due institution and as the suit could not be duly instituted in the Court of Subordinate Judge, the transference of the suit to the District Court was equally incompetent. Their Lordships also pointed out that the parties could not by their mutual consent convert an incompetent suit into a proper judicial process. This case is really of no assistance because it was a case where the lack of jurisdiction of the Subordinate Judge to entertain the suit was patent and admitted and the order of transfer was itself made to get over the plea of jurisdiction.

6. In (1881) ILR 8 Cal 30, an appeal was filed inadvertently in the Court which had no jurisdiction to entertain it, but where it could more conveniently be heard. When it was realised that the Court had no jurisdiction to bear the appeal the appellant filed an application in the High Court to issue a rule authorising the Court to hear the appeal. The learned Judges of the Calcutta High Court held that they had no power to authorise any Court to assume jurisdiction to receive and hear an appeal contrary to the usual course prescribed by the Code. They observed that they had power under Section 25 of the Code of Civil Procedure to direct the transfer of an appeal only from a Court having jurisdiction to receive and try it. The learned Judges did not lay down the proposition that as soon as an objection is raised regarding the jurisdiction of a Court to try a suit no application for transfer of the suit from that Court is competent. This case also is of no assistance to the plaintiff.

In AIR 1940 Oudh 164, there is nothing in the judgment to support the contention of the plaintiff in the present case. In fact the present question never arose there as the suit had gone to trial without objection. The observations "we are therefore of opinion that so far as Section 24 Civil P. C. is concerned there is no reason to make a distinction between lack of inherent jurisdiction and lack of any other kind of jurisdiction in a Court trying the suit" do not assist the plaintiff in any manner. However, the cases of AIR 1932 Sind 215 and AIR 1955 Mys 115, are directly in point and they do lay down that it is not open to a defendant to contend that a particular Court has no jurisdiction to entertain a suit and at the same time ask for a transfer of the case to some other Court. The learned Judges lay down such a rule, but the principle on which they base such a rule is not clear from the reports of the cases. It could not be on the principle that there can be no transfer of a suit from a Court which is incompetent to entertain the suit because there was neither decision that the suit was incompetent nor was it common ground that the suit was incompetent. It could not also be on any principle of estoppel because it could not possibly be said that the plaintiff has been

misled into doing something which he would not have otherwise done. I am therefore reluctant to follow these two authorities.

7. The language of Section 24 Civil P. C. is very wide and there are no restrictions or impediments in the way of the High Court exercising the power of transfer merely because there is a dispute regarding jurisdiction. In *Narain Das v. Khunni Lal*, (AIR 1934 All 569), *Iqbal Ahmad, J.*, held that where the objection to the jurisdiction of a Court to entertain a suit is not patent or is not admitted, the power of the High Court to transfer a suit is untrammelled by any conditions and it is not necessary for the Court before making an order of transfer, to enter into the vexed and troublesome question of jurisdiction of the Court in which the suit was instituted. In *K. L. Daftary v. K. L. Dube*, (AIR 1955 Nag 44), *Sen, J.*, held that the power of transfer vested in the High Court is not fettered by any conditions and that there is no bar to the exercise of power under Section 24 of the Code merely because there is a dispute on the question of jurisdiction. *Sen, J.* also referred to the observations of *Bose, J.* in an unreported case where transferring a suit pending in the Akola Court to a Court at Wardha even though there was a dispute regarding the jurisdiction of the Akola Court, the learned Judge had observed:

"Taking this into consideration plus the fact that the Wardha Court undoubtedly has jurisdiction while that of the Akola Court is problematical, I direct of my own motion that the case be transferred to the Wardha Court under Sec. 24, Civil P. C."

8. I prefer to follow the view taken by *Iqbal Ahmad, J.*, *Sen, J.* and *Bose, J.*, to the view taken by the Sind and the Mysore Courts. Accordingly I overrule the preliminary objection raised by *Sri A. V. Krishna Rao*.

9. On the merits I have no doubt that the suit has been instituted in the Court at Narasaraopet merely with a view to harass the 4th defendant and to gain an unfair advantage. The A schedule properties are situated in Nizamabad District, the suit is one for a permanent injunction and the main question will necessarily be regarding possession of the properties. There appears to be considerable substance in the allegation of the 4th defendant that the 'B' and 'C' schedule properties have been included in the suit and the 5th and 6th defendants have been impleaded as parties to the suit merely with a view to give jurisdiction to the Court at Narasaraopet.

There is also no substance in the contention that the plaintiff has to prove the will which is stated to have been executed at Mulakalur within the jurisdiction of the Court at Narasaraopet because, will or no will, the plaintiff is still the heir of late Kutumba Rao, his adoptive father. O.S. No. 305/1967 on the file of the District

Munsif's Court. Narasaraopet is, therefore, directed to be transferred to the Court of the District Munsif, Bodhan for trial and disposal according to law. The petitioner is entitled to his costs. Advocate's fee Rs. 100.
Petition allowed.

AIR 1970 ANDHRA PRADESH 197 (V 57 C 28)

P. JAGANMOHAN REDDY, C.J. AND
RAMACHANDRA RAO, J.

Commissioner of Expenditure Tax, Andhra Pradesh, Hyderabad, Applicant v. Sri S. R. Y. Sivarama Prasad Bahadur, Respondent.

Case Referred No. 15 of 1965, D/- 19-11-1968, referred by Income-Tax Appellate Tribunal, Hyderabad, D/- 30-1-1965.

(A) Hindu Law — Impartible estate — Incidents of — Right of junior members for maintenance is governed by Custom—Income of estate is not joint family income — (Tenancy Laws — Madras Impartible Estates Act (2 of 1904), S. 4).

The following principles concerning the impartible estates may be taken to be settled by decisions. Impartibility is essentially a creature of custom. The junior members of a joint family in the case of ancient impartible joint family estate take no right in the property by birth and therefore have no right of partition having regard to the very nature of the estate that it is impartible. Secondly, they have no right to interdict alienations by the head of the family either for necessity or otherwise. This is subject to Section 4 of the Madras Impartible Estates Act in the case of impartible estates governed by the said Act. The right of junior members of the family for maintenance is governed by custom and is not based upon any joint right or interest in the property as co-owners. The income of the impartible estate is the individual income of the holder of the estate and is not the income of the joint family. To this extent, the general law of Mitakshara applicable to joint family property has been modified by custom and an impartible estate, though it may be an ancestral joint family estate is clothed with the incidents of self-acquired and separate property to that extent. The only vestige of the incidents of joint family property which still sticks on to the joint family impartible estate is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. For the purpose of devolution of the property, the property is assumed to be joint family property and the only right which a member of the joint family acquires by birth is to take the property by survivorship, but he does not acquire any interest in the property itself. (1888) ILR 10 All 272 (PC) and (1899) ILR 22 Mad 383 (PC) and AIR 1918 PC 81 and AIR 1921 PC 62 and AIR

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1932 PC 216 and AIR 1954 Mad 5 and AIR 1941 PC 1 and AIR 1942 PC 3, Foll.

(B) Expenditure Tax Act (1957), Ss. 4 (i), 4 (ii), 19 and 2 (g) (ii) (b) — Assessee's impartible estate vested in Government under Estates Abolition Act — Compensation payable to coparceners as sharers — Coparcener takes his share of compensation absolutely — Expenditure by assessee's son for his foreign education, not includible in expenditure of the family — Son sharing in the compensation money is not a dependent under Section 2 (g) (ii) (b) — Neither provision under Sec. 4 (ii) nor that under S. 4 (i) applicable — (Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Ss. 45 (2) (a), 45 (6), 44 and 49 — Compensation payable on vesting — Share of compensation money is individual and absolute property of the sharer).

The Expenditure Tax Officer assessed the Rajah of Challapalli to expenditure tax treating the expenses incurred by one of his sons Mallikarjuna, for his education abroad, as expenditure of the assessee's family for the relevant years. The assessee was the holder of an impartible estate within the meaning of Madras Impartible Estates Act which vested in the Government of Madras under the Estates (Abolition and Conversion into Ryotwari) Act. As a result of such vesting, the Government of Madras was under a liability to deposit certain amounts of compensation with the Estates Abolition Tribunal and these amounts were payable to such persons and in such manner as was prescribed under the Abolition Act and its Rules. The assessee contended that by virtue of sub-section (6) of Sec. 45 of the Abolition Act, the compensation amount was payable not to the family as such, but to certain persons described as sharers, maintenance holders and creditors under the said Act. He therefore argued that his son Mallikarjuna, as such sharer was entitled to a part of the compensation amount which was his individual property. The son was therefore said to have his own sources of income and that though the money was defrayed in the first instance by the assessee, it was subsequently debited to the son's account, as such the inclusion was unjustified. The Department, on the other hand, contended that the impartible estate was the property of the joint family and that the compensation amount also constituted joint family property and that the fiction contained in Section 44 did not have the effect of converting the joint family property into individual property of the various coparceners. The Expenditure Tax Officer rejected the claim of the assessee to exclude the foreign education expenses incurred by the son and pointed out that under Section 4 (ii) read with Section 19 of the Expenditure Tax Act, the expenditure would be taxable in the hands of the family, even if met by the individual member out of the assets allotted to him at a partial partition. The case was also said

to attract provision under S. 4 (i) of the Act:

Held, (1) that whatever might have been the position earlier to the Estates Abolition Act, the sharers specified in Section 45 (2) (a) of that Act were given a right in the compensation as if that compensation was joint family property and that partition had taken place in respect of that property and each of the sharers was entitled to a specific share therein to which they were entitled individually and absolutely. Provision under sub-section (6) of Sec. 45 and that under Sec. 49 of the Abolition Act reinforced the above view. (Para 6)

(2) that the estate having been notified and vested in the Government, the holder had no longer the obligation to maintain his sons, which right had been provided for to the sons under Sec. 45 (6) of the Abolition Act by giving them a share in the compensation as if the property was joint family property and the same was divided. Accordingly, the son was not a dependent within the meaning of Section 2 (g) (ii) (b) of the Expenditure Tax Act. But since the assessee was being assessed on the assumption that he was the karta of the joint family property, in respect of the other properties held jointly, to which the ordinary Hindu Law applied the son was a coparcener and would be a dependent within the meaning of Sec. 2 (g) (ii) (b). (Para 10)

(3) that under Section 4 (ii) of the Expenditure Tax Act, the expenditure incurred by a dependent could only be included in computing the expenditure of the Hindu undivided family if that expenditure was incurred out of income or property transferred directly or indirectly, to the dependent by the assessee. Since Sec. 45 (6) of the Estates Abolition Act vested an absolute interest in the son in lieu of his right to maintenance and treated it as if it was allotted to him in a partition of the family property, whether the partition be partial or otherwise, the property could not be said to have been transferred directly or indirectly. The expenditure of the son could not therefore be included in the expenditure of the family deeming the provision under Section 45 (6) of the Estates Abolition Act to be a statutory transfer. (Para 11)

and (4) that for an item to be included under S. 4 (i) of the Expenditure Tax Act within the taxable expenditure of a Hindu undivided family, it must be incurred for the collective obligation of the family or for the separate personal requirements of the coparceners or other members of the family in their capacity as members of the family. The karta of a joint family assessed to tax could not be a dependent by the express terms of Section 2 (g) (ii) (b); and the expenditure incurred by a karta out of his separate estate for his own purposes, even though the family would have been liable to meet that expenditure if the expenditure

were not incurred, the expenditure would, prima facie, not be liable to be included in the taxable expenditure of the family. In so far as the coparcener was concerned, it must be shown that it was an obligation that had to be incurred by the joint family which the dependant coparcener had incurred from out of his separate property, before such expenditure could be included in the expenditure of the joint family. In the absence of a finding by the Expenditure Tax Officer that the expenditure was incurred by Mallikarjuna in respect of an obligation which the joint family had to incur, the second requirement of Sec. 4 (i) of the Act could not be said to have been satisfied. (1960) 2 Mad LJ 102 and AIR 1953 Mad 185 and AIR 1941 PC 120 and AIR 1965 SC 866 and AIR 1968 SC 1125, Foll. (Para 13)

Cases Referred: Chronological Paras
 (1968) AIR 1968 SC 1125 (V 55) =
 69 ITR 683, Commr. of Expenditure-
 tax v. Darshan Surendra Parekh 3, 13
 (1965) AIR 1965 SC 866 (V 52) =
 (1965) 2 SCR 100, Commr. of Income
 Tax v. Keshavlal 11
 (1960) 1960-2 Mad LJ 102 = ILR
 (1960) Mad 773, Subramania Iyer
 v. Kutti Raja 6, 11
 (1954) AIR 1954 Mad 5 (V 41) =
 ILR (1954) Mad 500, Senthathikalai
 v. Varaguna Rama 4
 (1953) AIR 1953 Mad 185 (V 40) =
 1952-2 Mad LJ 243, Ranga Rao v.
 State of Madras 6
 (1942) AIR 1942 PC 3 (V 29) = ILR
 (1942) Mad 419, Krishna Yachendra
 v. Rajeswara Rao 4
 (1941) AIR 1941 PC 120 (V 28) =
 ILR (1942) 23 Lah 1 = (1941) 2
 Mad LJ 972, Commr. of Income
 Tax, Punjab v. Krishna Kishore 4, 9
 (1932) AIR 1932 PC 216 (V 19) =
 ILR 59 Cal 1399, Shiba Prasad
 Singh v. Prayag Kumari Debi 4
 (1921) AIR 1921 PC 62 (V 8) = ILR
 43 All 228, Baijnath Prasad Singh
 v. Tej Bali Singh 4
 (1918) AIR 1918 PC 51 (V 5) =
 ILR 41 Mad 773, Rama Rao v.
 Rajah of Pittapur 4
 (1899) ILR 22 Mad 383 = 26 Ind
 App 83 (PC), Venkata Surya v.
 Court of Wards 4
 (1888) ILR 10 All 272 = 15 Ind App
 51 (PC), Sartaj Kuari v. Deoraj
 Kuari 4
 T. Ananta Babu, for Applicant; J. V.
 Sreenivasa Rao, for Respondent.

JAGANMOHAN REDDY, C. J.: The Income-tax Appellate Tribunal has referred the following question of law for our opinion under Sec. 64 (1) of the Expenditure Tax Act, 1957 (hereinafter called "the Act"), viz.

"Whether on the facts and in the circumstances of the case and on a proper construction of Section 4 (ii) and Sec. 19 of the

Expenditure Tax Act 1957 (as applicable for the respective assessment years) the amount spent on the foreign education of Sri Mallikarjuna Prasad was rightly excluded from the taxable expenditure of the family for the respective assessment years."

2. The assessee, Rajah of Challapalli, was assessed to expenditure tax for the year 1958-59 to 1961-62, for which the relevant accounting years were the financial years immediately preceding those years. While so assessing him, the Expenditure Tax Officer included sums of Rupees 15439, 18080, 14930 and 14750 respectively in the four accounting years in question, being expenses incurred by one of his sons, Sri Mallikarjuna Prasad, as expenditure of the assessee's family for the said years. The assessee contended that his son had his own sources of income and that though the money was defrayed in the first instance by the assessee, it was subsequently debited to the son's account, as such, the inclusion was not justified. It was found that the karta of the family, Sri Sivarama Prasad, the assessee, was the holder of the estate of Challapalli, an impartible estate within the meaning of the Madras Impartible Estates Act, 1904, that the said estate vested in the Government of Madras under the Estates (Abolition and Conversion into Ryotwari) Act, 1948 as from 7-9-1949, and as a result of such vesting, the Government of Madras was under a liability to deposit certain amounts of compensation with the Estates Abolition Tribunal, and these amounts were payable to such persons and in such manner as was prescribed under the Abolition Act and the rules made thereunder. It was averred by the assessee that by virtue of sub-section (6) of Section 45 of the Abolition Act, the amount was payable not to the family as such, but to certain persons described as sharers, maintenance holders and creditors under the said Act; and inasmuch as the karta and his three sons were sharers who were entitled only to an aliquot share in the compensation amount deposited with the Tribunal after meeting the claims of the creditors and maintenance holders, the share of the compensation was the individual property of the son.

The Department, on the other hand, contended that the impartible estate was a property of the joint family and that the compensation amount constituted joint family property also; as such, the fiction contained in Section 44 did not have the effect of converting this joint family property into the individual property of the various coparceners. The Tribunal found that the several adjustments were carried out in the books of the joint family styled "tenants-in-common account," and to this account was credited the amounts received by sale of agricultural lands, implements, amounts derived by way of lease etc. To the same account were debited the several expenses commonly incurred, such as expenses on agricultural and the like as also expenses incurred for foreign

education of Mallikarjuna Prasad. At the end of the year, the net credit, excluding foreign education expenses of Mallikarjuna Prasad, was divided into 4 equal shares and transferred to the individual accounts of the Karta and his three sons. The foreign education expenses were debited to the account of Mallikarjuna Prasad. It was also pointed out that in the year ending 31-3-1959, when loans were advanced to Challapalli Sugars, in the individual names of the three sons, they were debited only to the share of the three sons and not to the father. So also in the year ended 31-3-1960, personal chitta balances were debited to the accounts of the individual members respectively and not all the members equally. The Expenditure Tax Officer rejected the claim of the assessee to exclude the foreign education expenses incurred by Mallikarjuna Prasad, who, in respect of the years 1960-61 and 1961-62, pointed out that under Section 4 (ii) read with Sec. 19 of the Act, the expenditure would be taxable in the hands of the family, even if met by the individual member out of the assets allotted to him at a partial partition.

The Appellate Assistant Commissioner, in appeal, however, set aside the order of the Expenditure Tax Officer including these amounts, on the ground that Section 4 (ii) is inapplicable, and in that view, deleted the expenditure incurred on foreign education. The Appellate Tribunal confirmed the order of the Appellate Assistant Commissioner.

3. Before us, the arguments which have been advanced by the learned advocate for the Department, Sri Anantha Babu, proceeded on similar lines as those addressed before the Appellate Assistant Commissioner and the Appellate Tribunal. Reliance, however, was placed on the provisions of Section 4 (i) of the Act apart from Section 4 (ii) which alone was considered by the I. T. Authorities. He also cited a decision of their Lordships of the Supreme Court in Commissioner of Expenditure Tax v. Darshan Surendra Parekh, 69 ITR 683 = (AIR 1968 SC 1125).

4. But before we refer to the relevant provisions of the Act, it is necessary to state the true nature of an impartible zamindari and the rights of the holder of the estate as also of the other members of the joint family in the estate. It is unnecessary for our purpose to trace the historical development of this law as laid down in Sartaj Kuari v. Deoraj Kuari, (1888) ILR 10 All 272 (PC), Venkata Surya v. Court of Wards, (1899) ILR 22 Mad 383 (PC) (the first Pittapur case), Rama Rao v. Rajah of Pittapur, ILR 41 Mad 778 = (AIR 1918 PC 81) (the second Pittapur case) Baijnath Prasad Singh v. Tej Bali Singh, ILR 43 All 223 = (AIR 1921 PC 62) or the classical judgment of Sir Dinshaw Mulla in Shibaprasad Singh v. Prayag Kumari Debi, ILR 59 Cal 1399 = (AIR

1932 PC 216), because that law has been set out succinctly by Satyanaraya Rao, J., delivering the judgment of a Bench of the Madras High Court consisting of himself and Subba Rao, J. (as he then was) in Senthathikalai v. Varaguna Rama, ILR (1954) Mad 500 = (AIR 1954 Mad 5). The learned Judge observed at p. 508 (of ILR Mad) = (at pp. 7-8 of AIR Mad), thus: "The law relating to impartible estates had to undergo several vicissitudes and some of the observations of the Judicial Committee in the leading decisions on the point may seem to be irreconcilable. But it may now be taken that the following principles were settled by decisions. Impartibility is essentially a creature of custom. The junior members of a joint family in the case of ancient impartible joint family estate take no right in the property by birth and therefore have no right of partition having regard to the very nature of the estate that it is impartible. Secondly, they have no right to interdict alienations by the head of the family either for necessity or otherwise. This, of course, is subject to Section 4 of the Madras Impartible Estates Act in the case of impartible estates governed by the said Act. The right of junior members of the family for maintenance is governed by custom and is not based upon any joint right or interest in the property as co-owners.

This is now made clear by the Privy Council in Commr. of Income-tax, Punjab v. Krishna Kisbore, ILR (1942) 23 Lah 1 = (AIR 1941 PC 120) and Krishna Yachendra v. Rajeswara Rao, ILR (1942) Mad 419 = (AIR 1942 PC 3). The income of the impartible estate is the individual income of the holder of the estate and is not the income of the joint family. To this extent the general law of Mitakshara applicable to joint family property has been modified by custom and an impartible estate, though it may be an ancestral joint family estate is clothed with the incidents of self-acquired and separate property to that extent. The only vestige of the incidents of joint family property which still sticks on to the joint family impartible estate is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. For the purpose of devolution of the property, the property is assumed to be joint family property and the only right which a member of the joint family acquires by birth is to take the property by survivorship, but he does not acquire any interest in the property itself."

5. From this statement of law, it is apparent that no member of the joint family has any right in praesenti in an impartible estate, except the bolder thereof; that the estate is considered to be joint family property only for the purpose of devolution, but no member of the joint family acquires any right by birth. Almost every incident of a joint Hindu family is non-existent either in respect of commensality, acquisition of

right by birth, right to partition or joint possession and enjoyment, except, as we have said, the right of survivorship in respect of devolution of property. This concept as established by the case-law recognised by the Estates Abolition Act in Section 45 (1) while making certain provisions relating to the compensation payable to the holders of an impartible zamindari and also those who have an interest in that property. That section provides that in the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the provisions which followed that sub-section should apply. In this sub-section, the Legislature by the use of the words "had to be regarded" implied that the recognition was by reason of the successive decisions to which we had referred to earlier which is only to the extent of treating the property as joint family property for the purpose of ascertaining the succession thereto immediately before the notified date. In sub-section (2) of Section 45, it is further provided that the Tribunal shall determine the aggregate compensation payable to all the persons mentioned in sub-clauses (a) and (b) thereof considered as a single group, of which sub-clause (a) consists of the principal landholder and his legitimate sons, grandsons and great-grandsons in the male line living or in the womb on the notified date, including sons, grandsons and great-grandsons adopted before such date (who are called "sharers"). It is unnecessary to refer to the further provisions in relation to maintenance holders or creditors or the determination of the amount of compensation payable to the maintenance holders provided for in sub-sections (2) (b), (3), (4) or (5) of Section 45, except to set out sub-section (6) which deals with the manner in which the balance of the aggregate compensation is to be divided. It provides—

"(6) The balance of the aggregate compensation shall be divided among the sharers, as if they owned such balance as a joint Hindu family and a partition thereof had been effected among them on the notified date."

6. It is clear from a reading of sub-sections (1), (2) (a) and (6) that while the Legislature recognised the nature and the rights of the members of the joint family in an impartible estate which vested in the Government under the Abolition Act, it intended to deal with the compensation in a manner different to that which would have been dealt with under the law prior to the notification under the Abolition Act. A similar argument as that advanced by the learned advocate for the Department was sought to be urged before a Bench of the Madras High Court in *Subramania Iyer v. Kutti Raja*, (1960) 2 Mad LJ 102 at p. 107, namely, that the share that was given to

the sons under S. 45 (6) was compensation of their chance of succession to the estate and not as a share in any joint family asset, and that, therefore, it could not be held that by reason of S. 45 (6) there had been a partition between the holder of the impartible estate and his sons, and that even if by reason of that provision there is partition, it is only a statutory partition without in any way affecting joint family or the rights in joint family property. This argument was repelled by Ramachandra Iyer, J., who after pointing out that the impartible estate is recognised as joint family property only for ascertaining who should succeed on the death of the holder, observed at p. 107: "Section 45 regulates the rights of various members of the family on the taking over of an impartible estate. Section 45 (6) creates a right to the compensation amount in the sharers, namely, the principal landholder, his legitimate sons, grandsons, etc. No other person barring the maintenance holders has any right to the compensation amount."

In *Ranga Rao v. State of Madras*, (1952) 2 Mad LJ 243 = (AIR 1953 Mad 185), a brother of the holder of an impartible estate taken over under the Act by the Government claimed the compensation amount as partible property. The learned Judges negatived the claim. Section 45 (6) states that the compensation amount would be divisible between the sharers as if there is a partition on the notified date. Therefore, whatever might be the rights of the principal landholder or his sons in the impartible estate before the date of the notification, the compensation amount is treated as (1) property owned by the sharers as if they constituted members of the joint Hindu family and (2) the share of each of the sharers determined as if there had been partition between them on the notified date. In other words, two results follow from the statutory provision: (1) that the compensation amount is joint family property of the sharers and (2) that there had been a partition of that asset on the date of notification between them. Section 45 which enacts a fiction cannot, however, be extended so as to effect a division between the members of the family in regard to other properties, for neither the status of the family nor its other properties are within its operation.

These observations are, with respect, in accord with the view we have taken, namely, that whatever might have been the position earlier, the sharers specified in Section 45 (2) (a) of the Abolition Act have been given a right in the compensation as if that compensation is joint family property and that partition has taken place in respect of that property and each of the sharers is entitled to a specific share therein, to which they are entitled individually and absolutely. Apart from providing in sub-section (6) of Section 45 that the amount

is to be divided among the sharers, Sec. 49 further reinforces that the share to which the sharer is entitled is an absolute interest, by providing where it is alleged that the interest of any person entitled to receive payment of any portion of the compensation has devolved on any other person or persons, whether by act of parties or by operation of law, the Tribunal shall determine whether there has been any devolution of the interest, and, if so, on whom it has devolved. If, as contended by the learned advocate for the Department, the compensation divided between the sharers under the provisions of Section 45 (6), still partakes of joint family character, the provision envisaging transfer of that compensation by the sharer who is entitled to it or the devolution of that share on his legal heirs would be inconsistent with that contention. On the other hand, that provision would only be consistent with an absolute interest in respect of his share of the compensation which he could, before receiving it, bequeath, make a gift or dispose of it in any way he liked, and where he did not do so, deal with it that share would devolve under law to his legal heirs and not vest in the other coparceners by survivorship. In the view we have taken on this aspect of the matter, the share of the compensation is the separate property of the son Mallikarjuna Prasad, and he is entitled to spend from that amount the expenses towards his education, which cannot be said to have been incurred by the joint family.

7. The question which now remains to be considered is whether it is expenditure which the assessee joint family had to incur in discharge of any obligation which the family has towards the coparceners; if so, whether it is an expenditure incurred by the joint family from out of what is transferred directly or indirectly to the dependant by the assessee, so as to bring that expenditure to tax liability under Sec. 4 (ii), or as expenditure incurred by any person other than the assessee in respect of any obligation or personal requirement of the assessee, exceeding Rs. 5,000, so as to bring it under Section 4 (i). Section 4 (i) and (ii) read as follows:—

“S. 4 (i).—Unless otherwise provided in Section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act, namely,—

(i) any expenditure incurred, whether directly or indirectly by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependants to the extent to which the amount of all such expenditure in the aggregate exceeds Rs. 5,000 in any year;

(ii) Where the assessee is an individual, any expenditure incurred by any dependant of the assessee, and where the assessee is a Hindu undivided family, any expendi-

ture incurred by any dependant from or out of an income or property transferred directly or indirectly to the dependant by the assessee.

Explanation.—For the removal of doubts it is hereby declared that nothing contained in this section shall be deemed to require the inclusion in the expenditure of the assessee of any expenditure incurred by any other person for or on behalf of the assessee by way of customary hospitality or which is of a trivial or inconsequential nature.”

8. It is also pertinent to notice the definitions of certain terms used in the Act, namely “assessee” and “dependant”. Section 2 (c) defines “assessee” as “an individual or a Hindu undivided family by whom expenditure-tax or any other sum of money is payable under this Act, and includes every individual or Hindu undivided family against whom any proceeding under this Act has been taken for the assessment of his expenditures;” “Dependant”, under Section 2 (g) means “(i) where the assessee is an individual, his or her spouse or minor child, and includes any person wholly or mainly dependant on the assessee for support and maintenance; (ii) where the assessee is a Hindu undivided family, (a) every coparcener other than the Karta; and (b) any other member of the family who, under any law or order or decree of a Court, is entitled to maintenance from joint family property.”

9. Applying the above definitions to the facts of this case, Mallikarjuna Prasad being the son of the holder of the impartible zamindari, is entitled to maintenance by custom, though the said son has no right in the property as such. In (1941) 2 Mad LJ 972 = (AIR 1941 PC 120), the Privy Council had elaborately considered the several questions relating to the nature and incidents of an impartible zamindari, and while holding that the income of an impartible estate is not income of the undivided family but is the income of the holder, notwithstanding that he may have sons from whom he is not divided and the income which consists of interest can hence be assessed to income-tax as that of an “individual” under Ss. 8 and 12 of the Income-tax Act, 1922, observed at page 985 (of the M. L. J.): “Their Lordships will in the present case assume that the sons of the assessee have a right to be maintained by him, that this right arises from the fact that he is the present holder of the impartible estate, and that the right is a right to be maintained out of the current income thereof in such sense that it could be enforced against the assessee in default by the Courts in India giving them a charge upon the property or a sufficient part of it. Even so, it is not true in fact or in law to say that the income from the estate is received by the assessee as the income of a joint Hindu family receivable by the Karta, nor is it received by him on behalf of himself and his sons; but on

his own account as the holder by single heir succession of the impartible estate. The 'presently existing right' of the sons is to be paid a suitable maintenance or to have it provided for them in the ordinary course of Hindu family life. The Hindu law is familiar not only with persons such as wives, unmarried daughters and minor children for whose maintenance a Hindu has a personal liability whether he may have any property or none, but also with cases in which the liability arises by reason of inheritance of property and is a liability and to provide maintenance out of such property. It applies to persons whom the late owner was bound to maintain. The facts that the sons' right to maintenance arises out of the father's possession of impartible estate and is a right to be maintained out of the estate do not make it a right of a unique or even exceptional character or involve the consequence at Hindu law that the income of the estate is not the father's income."

10. Inasmuch as the statement of the case assumes that the assessee Rajah of Challapalli was assessed as the karta of a Hindu undivided family consisting of himself and his three sons, we are precluded from holding that in so far as the income of the impartible zamindari is concerned, it is not the income of the joint family and that the assessee should be assessed as an "individual." It may be that he has other properties apart from the income of the impartible zamindari which are governed by the ordinary Hindu law of joint family; and since the impartible zamindari had been notified and taken over by the Government, there can be no question of any income from that estate which can be assessed in the hands of the Rajah as individual income. It may also be noticed that once the estate is notified and is vested in the Government, the holder of the zamindari has no longer any obligation to maintain his sons, which right has been provided for to the sons under Section 45 (6) of the Abolition Act by giving them a share in the compensation as if the property was joint family property and the same was divided. Accordingly, the son cannot be considered to be a dependant within the meaning of Section 2 (g) (ii) (b) of the Act. But since in respect of the other properties held jointly with the father, to which the ordinary Hindu law applies, he is a coparcener and would be a dependant within the meaning of Sec. 2 (g) (i) (b).

11. The question now would be whether the provisions of Section 4 (i) or 4 (ii) of the Act applies to the case. In so far as Sec. 4 (ii) is concerned, the expenditure that is incurred by a dependant can only be included in computing the expenditure of the Hindu undivided family if that expenditure has been incurred out of income or property transferred directly or indirectly to the dependant by the assessee. The contention of Sri Anantha Babu that the provision of

Section 45 (6) of the Abolition Act should be deemed to be a statutory transfer is, in our view, untenable, for the simple reason, as we have said earlier, that Section 45 (6) vests an absolute interest in the son in lieu of his right to maintenance and treats it as if it was allotted to him in a partition of the family property. Now it is a well established proposition that property allotted on partition, whether partially or otherwise, is not property which can be said to have been transferred directly or indirectly vide the observations of Silri, J., in *Commr. of Income Tax v. Keshavlal*, AIR 1965 SC 866. The fact that partition contemplated under S. 45 (6) of the Abolition Act does not effect a division of status and, therefore, there is no such division at all, ignores the nature of the impartible zamindari, namely that coparceners in an impartible zamindari have no interest in praesenti and they cannot ask for partition, and as such, no question of division of status vis-a-vis that property is concerned, can arise. We have already referred in this connection to the judgment of the Madras High Court in 1960-2 Mad LJ 102 supra. In our view, the provisions of Section 4 (ii) of the Act are not applicable to this case, and therefore, the liability does not arise under the provision.

12. The learned Advocate for the Department has however laid great stress on the applicability of Section 4 (i), the requirements of which, according to him, are fully satisfied. It is his contention that for the applicability of that provision, the expenditure must be incurred (i) by any person other than the assessee; (ii) that it must be incurred in respect of an obligation or personal requirement of the assessee or any of his dependants, and (iii) that such expenditure in the aggregate should exceed Rs. 5000. According to him, Mallikarjuna Prasad has incurred the expenditure for his foreign education on behalf of the assessee in respect of an obligation which the assessee has towards him as a dependant. It is no doubt true that in each of the three assessment years in question the aggregate amount exceeded Rs. 5000, as such the third requirement of S. 4 (i) is satisfied.

13. Now we have to consider whether the other two requirements of Section 4 (i) are fulfilled. In so far as the first requirement is concerned, even though a coparcener or other member of a Hindu undivided family is, for the purposes of assessment, of the family to expenditure-tax a person other than the assessee, nonetheless, the expenditure incurred out of the family estate by a person or other coparcener out of his separate property is liable to be included in the taxable expenditure of the family if, and only if, it is incurred in respect of an obligation of the family or for the personal requirement of the coparcener or other members of the family which, if not incurred, would have been incurred by the family. But, as

observed by Shah J., in 69 ITR 683 = (AIR 1968 SC 1125) supra, "every item of expenditure incurred by a coparcener or other member of the Hindu undivided" family for his own purposes out of his separate property "is not expenditure in respect of an obligation of the" Hindu undivided family; nor is it expenditure to meet the "personal requirements of the coparceners or other members" of the family. For an item to be included under Sec. 4 (i) "within the taxable expenditure of a Hindu undivided family," it must be incurred for the collective obligation of the "family, or for the separate personal requirements of the coparceners or other members of the family in their capacity" as members of the family. The karta of a Hindu undivided family assessed to tax under the Expenditure-tax Act is by the express words of Section 2 (g) (ii) (b) not a dependant; and when expenditure is incurred by a karta out of his separate estate for his own purposes, even though the family would have been liable to meet that expenditure if the expenditure were not incurred, the expenditure will, *prima facie* not" be liable to be included in the taxable expenditure of "the family". In so far as the coparcener is concerned, it must be shown that it is an obligation that has to be incurred by the joint family which the dependant coparcener has incurred from out of his separate property, before such expenditure could be included in the expenditure of the joint family. There being no such finding that the expenditure was incurred by Mallikarjuna Prasad in respect of an obligation which the joint family has to incur, we cannot hold that the second requirement of Section 4 (i) is satisfied.

It may be observed that the Expenditure Tax Officer, the Appellate Assistant Commissioner as well as the Appellate Tribunal have all considered the question of inclusion of the expenditure on foreign education only under Section 4 (ii) and not under Sec. 4 (i). Even the question referred for our opinion is under Sec. 4 (ii) and not under Section 4 (i). As such, they have not ascertained, nor placed on record the necessary facts nor have they given a finding as to whether the foreign education of Mallikarjuna Prasad was an obligation on the assessee, whether there is an obligation on the joint family to give foreign education to Mallikarjuna Prasad, would involve the consideration, of several questions viz. Has the assessee any obligation to educate his son Mallikarjuna Prasad in a foreign country and incur such heavy expenditure? What is the practice in the joint family in respect of the sons, i.e., whether each of the sons have been afforded this opportunity of giving higher education abroad? What is the education Mallikarjuna Prasad has already had, whether he was a minor or major at the time of sending him abroad for foreign education, and whether education in India would not have been sufficient to discharge that obligation? Is it for technical

course that Mallikarjuna Prasad was sent abroad, which course could not properly be given in this country, or is it only for the purpose of affording him an opportunity to go abroad and incidentally to educate himself? As we have already pointed out, these questions have not been considered or dealt with either by the Expenditure Tax Officer, or the Appellate Assistant Commissioner or the Appellate Tribunal, and in such circumstances, we cannot say that it is pursuant to an obligation attached to the karta of the family that the expenditure on the foreign education of Mallikarjuna Prasad had to be incurred. We cannot, therefore, hold that the second requirement of Section 4 (i) also is satisfied.

14. In the light of what we have observed, our answer to the question is in the affirmative and in favour of the assessee. Let the reference be answered accordingly with costs. Advocate's fee Rs. 250.

Reference answered in the affirmative.

AIR 1070 ANDHRA PRADESH 204 (V 57 C 29)

GOPAL RAO EKBOTE AND KUPPUSWAMI, JJ.

Namarugunulla Gopala Rao, Petitioner v. Maruthi Rao Gongothi, Respondent.

Civil Revn. Petn. No. 477, of 1966, D/- 4-4-1969.

Debt Laws — Hyderabad Agricultural Debtors' Relief Act (16 of 1956), Section 4 — Applicability of Act — Debts incurred between date when Act came in force and notified date — Act is not applicable to such debts.

From the object and the scheme of the Act as well as from the various provisions of Ss. 2 (5), 4, 6, 11, 16, 19, 22, 63 of the Act itself it can safely be held the Act does not apply to debts created after the Act and that the debts created after coming into force of the Act and during the period prescribed for making an application under Section 4 are not covered by the provisions of the Act. The Act is not applicable to such debts. AIR 1964 Andh Pra 236 (FB), Explained and Rel. on.; AIR 1954 Bom 282, Rel. on. (Para 38)

Cases Referred: Chronological Paras
(1965) 1965-2 Andh WR 215 = ILR
(1967) Andh Pra 338, Gouramma
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I. V. Rangachari, for Petitioner; K.
Raghava Rao and K. R. Swamy, for Respon-
dent.

GOPAL RAO EKBOTE J.: This is a revision petition filed by the defendant against an order made by the First Additional Judge, City Civil Court, Hyderabad on 27-1-1966 whereby the learned Judge declined to transfer the case to the Special Court.

2. The necessary facts are that the respondent instituted O. S. No. 83 of 1965 in October 1965 before the lower Court on the foot of a mortgage for recovery of a sum of Rs. 15,383. The mortgage deed was executed on 16th October, 1959. It relates to a house bearing No. 1-7-176 situated at Bakara, Mushirabad in Hyderabad City.

3. The defendant-petitioner filed I. A. No. 883 of 1965 requesting the Court to transfer the case under Section 19 (1) of the Hyderabad Agricultural Debtors' Relief Act (XVI of 1956) hereinafter called "the Act", to the special Court constituted under the Act, as he is a debtor within the meaning of the Act.

4. This application was resisted by the plaintiff mainly on the ground that the petitioner is not a debtor and as the suit has been filed after the notified date, it cannot be transferred to the special Court. It was further contended that the petitioner is not an agriculturist and since the amount was not borrowed for agricultural purposes but was borrowed for the purpose of business and as the property is a house situate within the city of Hyderabad, the provisions of the Act do not apply.

5. Relying upon the decision of a single Judge in Gouramma v. Yadgir Reddy, 1965-2 Andh WR 215, the learned Judge held that the suit cannot be transferred to the special Court and consequently dismissed the application.

6. When this revision came before our learned brother, M. Krishna Rao, J., the correctness of the above said decision was challenged. The case therefore was directed to be posted before a Division Bench. That is how the matter has come before us.

7. It is common ground that the debt was incurred under the mortgage deed only on 16-10-1959 and the suit thereupon was laid in October 1965. In these circumstances, the real question which arises for consideration is whether the provisions of the Act apply to such a debt.

8. The Act came into force from the date of its publication in the Hyderabad Gazette dated 5-7-56. The date of filing the application for adjustment of debts under Section 4 was prescribed by the State Government to be 4-2-1960. The important

question therefore which has to be answered in this enquiry is whether the Act applies to a debt incurred after the commencement of the Act on 5-7-1956.

9. In order to answer that question effectively the scheme of the Act has to be correctly appreciated. According to the preamble, it is an Act to consolidate and amend the law for the relief of agricultural debtors in the former State of Hyderabad. This Act repealed the Debt Conciliation Act, 1349 Fasli and abolished all Boards established under the repealed Act.

10. Section 2 (5) defines the term 'debt' which reads as follows:

"debt" means any liability in cash or kind whether secured or unsecured due from a debtor whether payable under a decree or order of any civil Court or otherwise and includes mortgage money the payment of which is secured by the usufructuary mortgage of immovable property but does not include arrears of wages payable in respect of agricultural or manual labour, or any liability for the recovery of which remedy is barred by limitation."

11. Section 3 makes the act inapplicable to certain transactions.

12. It is Section 4 which is more relevant. It can be considered as the pivot round which the other provisions of the Act move. Any action or inaction under Section 4 produces results in regard to the debts of the debtor which term is also defined in Section 2 (6). Section 4 as it originally stood enjoined that the applications for adjustment of debts may be filed "within three months from the commencement of this Act." These words were substituted by Hyderabad Ordinance No. VI of 1956 promulgated on 31st October, 1956 by the following words:

"within such time as Government may by notification fix in this behalf."

Section 4 (1) was further amended by the Amendment Act XI of 1958. Ordinance VI of 1956 was repealed and the present subsection was substituted in the place of the previous one. By a notification subsequently issued the date for the purpose of Section 4 (1) was prescribed by the Government as 4-2-1960. The Rules were framed under the Act and were published in the Gazette. Section 4 directs that any debtor may within the prescribed date make an application to the Court for the adjustment of his debts. Section 5 directs every creditor and debtor to file a true and correct statement before the Court notwithstanding the fact that no application has been filed under Section 4.

13. Section 8 enjoins that if any debtor arrives at a settlement in respect of any debt due to the creditor an application may be filed within 30 days from the date of such settlement to the Court.

14. Section 11 provides that no application under Section 4 or Section 8 shall be entertained unless the total amount of debt

due on the date of the application is not more than Rs. 15,000.

15. Section 13 provides for the consolidation of applications filed under Section 4.

16. Section 16 provides that if no application is made within the time prescribed under Section 4 or if no application for recording settlement is made under Section 8 or if made is withdrawn and no fresh application is made under Section 4, and if no statement is submitted by the creditor in compliance with Section 5, the debt shall stand extinguished.

17. Section 18 directs the Court to decide certain points as preliminary issues.

18. Section 19 relates to transfer of pending suit, appeals, applications and proceedings to the Court established under the Act.

19. Section 22 is more important. It relates to the mode of taking accounts. It provides that separate accounts for principal and interest shall be taken. It further directs the manner in which such accounts shall be taken. Sub-section (2) relates to the transactions which commenced before 1-1-1931 and provides the mode for taking the accounts of such debts. Sub-section (3) relates to the transactions which commenced after 1-1-1931 but were held before 1-1-1943, and provides the mode of taking accounts of such debts. Sub-section (4) concerns itself with transactions which commenced after 1-1-1943 and prescribes the mode of taking accounts for the same. Sub-section (6) expressly states that "the accounts of principal and interest shall be made up to the date of the institution of the application" and further provides that "the aggregate of the balance if any appearing due on both such accounts against the debtor on that date shall be deemed to be the amount due at that date...."

20. Section 30 declares that the paying capacity of the debtor shall be deemed to be 60% of the value of all the property of the debtor.

21. Keeping in view the said paying capacity of the debtor, Section 31 directs the scaling down of the debts whether secured, unsecured or composite.

22. After the debts are thus scaled down, the Court is directed to make an award under Section 32 and to prepare a scheme for adjustment of debts through land mortgage banks.

23. Section 34 states that no amount in excess of the debts scaled down be recoverable as the excess amount would be deemed to have been extinguished by virtue of that section.

24. The award thus made then would be registered under Section 51.

25. The Act further provides that in case it is found that the income of the debtor and his moveable property are not sufficient to liquidate the debt within twelve years the Court shall adjudicate the debtor insolvent.

26. Section 63 empowers the Government to authorise any person to advance loans to debtors.

27. The above said scheme of the Act would make it abundantly plain that the real object of the Act is to relieve the agricultural debtor of all his debts outstanding on the date of the Act, to take accounts of the debts and then scale down and determine the amount payable keeping in view his paying capacity and to substitute the land mortgage bank as the creditor of the debtor in the place of the original creditors after they are paid in accordance with the Act, to declare the debtor insolvent in case it is found that he has not enough movable property to clear off the debts within 12 years and thus give him relief by providing protection of insolvency. The whole purpose and object of the Act therefore is to relieve an agricultural debtor of the heavy burden of debts in which he was found to have been placed and to provide him an opportunity to start his life anew and join the forces released for improving the agricultural production.

28. That this is so would be clear if it is remembered that the Act was brought into force soon after the Rural Credit Survey Report was presented to the Central Government. According to the All India Rural Credit Survey 1951-52 conducted by the Reserve Bank of India, the non-institutional agencies comprising the agriculturist money lenders, professional money lenders, relatives, landlords, traders and commission agents together accounted for 93% of the total borrowings of cultivators. The institutional agencies consisting of the Government, the co-operatives and the commercial banks accounted for the balance of 7%. It is in the light of this report that steps were taken by various States to relieve the agricultural debtors of their existing liability of debts so that they can start a new life. The Hyderabad Act was substantially based upon the Bombay Agricultural Debtors Relief Act, 1947. That Act does not provide for the scaling down of the debts created after the coming into force of the Act. Both the Bombay and the Hyderabad Acts do not make any provision for the scaling down of debts which are incurred after the Act. Section 13 of the Madras Agriculturists Relief Act (IV of 1938) provides for the rate of interest payable by agriculturists on new loans incurred after the commencement of that Act. No such provision appears in the Hyderabad Act.

29. The absence of such a provision in the Hyderabad Act is quite understandable if we bear in mind that Money-lenders Act which was in force had already regulated and controlled not only the money-lending business but also had prescribed the rate of interest beyond which no money-lender can charge interest.

30. Although the private money-lenders and other agencies continue to provide bulk of agricultural credit, their business was con-

trolled on the one hand and on the other the credit policy has been oriented since the publication of the Rural Credit Survey Report to provide an effective alternative agency both from the point of the individual and from the broader point of nation. Since then the objective of the agricultural credit policy has been to create conditions favourable for the development of co-operative credit societies so that they may discharge their responsibilities in the agricultural development programmes satisfactorily. It is thus evident that on the one hand the existing debts were taken over by the land mortgage banks which for more than three decades were almost wholly developed as institutional agencies for the transfer of past agricultural debts from the money-lenders to themselves and on the other expanded institutional credit policy and the various schemes of assistance to the agriculturists coupled with the regulation and control of the money-lending business and placed the agriculturists on the new road of agricultural progress. The cultivators were thus relieved from the onerous liability to pay heavy rate of interest which quite often range between 25 to 70 per cent and were also relieved from the yoke of the money-lenders who were advancing money on personal security of the agriculturist and on the implied understanding to sell the produce to the lender who was often a middle man. If these steps taken are borne in mind, it would be clear, that there is nothing surprising if the Act makes provisions for the satisfactory adjustment of the agriculturists' debts which were existing on the date of the Act without making any provision for the adjustment of debts which he might incur after the Act, because other enactments had provided satisfactorily for the protection in that behalf of the agriculturists.

31. Not only from the object and scheme of the Act it becomes clear that the Act does not apply to the future debts, but there is enough internal evidence to warrant and substantiate such a conclusion.

32. The definition of the 'debt' speaks of liability secured or unsecured due from a debtor. Now, the word 'due' according to the Law Lexicon by Sri P. Ramanatha Ayyar as a noun means :

"An existing obligation; an indebtedness; a simple indebtedness without reference to the time of payment; a debt ascertained and fixed though payable in future." And as an adjective it means :

"Capable of being justly demanded; claimed as of right; owing and unpaid, remaining unpaid; payable...."

Whether the word 'due' is used as a noun or as an adjective in the definition of 'debt', in either case it would mean an existing obligation or owing and unpaid liability which would point only in the direction of existing debt at the commencement of the Act. We do not however desire to rest our conclusion only on the meaning of the word

'due' but would like to rest it on other provisions also.

33. Section 4 had originally provided only three months for the filing of applications for adjustment of debts which clearly means that the debts existing at the commencement of the Act alone were thought of being adjusted. It would be meaningless to say that the debts incurred subsequent to the Act could also be adjusted under Section 4, particularly when only three months' time was fixed for filing applications for adjustment. If even debts incurred after the Act but before the notified date ought to come within the purview of the Act it would enable the debtor to incur a debt after the Act and apply for the relief under the Act the very next day. This could not have been intended. It is relevant to refer to Section 63 of the Act in this behalf which authorises the Government to authorise a person to give loans to debtors after the Act comes into force. The subsequent amendments only strengthen this understanding of the section. Even from Section 6 the same conclusion can be drawn. Section 11 which makes the Act applicable only to a debtor whose total amount of debts does not exceed Rs. 15,000/- also states that this liability of debts must be determined as "on the date of the application (under Section 4 of the Act)". Section 16 forces us to the same conclusion. If no application is filed under Section 4 for which time is prescribed, the debt would be deemed to have been extinguished.

34. Section 19 then lends further support. It speaks of transfer of pending suits etc., on the date of the application under S. 4.

35. Any doubt, if still lingers, is completely removed by Section 22 which provides the mode of taking accounts. It speaks of three periods. The first relates to transactions commenced before 1st January 1931, the second to the period between 1-1-1931, and 1-1-1943, and the third pertains to the transactions commenced on or after 1-1-1943. It is plain that the third period stops at the commencement of the Act and does not relate to any transactions commenced subsequent thereto. That is made plain in sub-s. (6) of S. 22. That provision directs to make up the accounts to the date of the institution of the application under Section 4 and declares the amount due at that date. Furthermore, not only the paying capacity of the debtor is determined as on date of the application under Section 4 but the debts payable under Section 22 are scaled down according to Sec-31 and the excess of the said amount is considered as extinguished under Sec. 34.

36. Thus from the object and the scheme of the Act as well as from the various provisions of the Act itself it can safely be held that the debts created after coming into force of the Act and during the period prescribed for making an application under Section 4 are not covered by the provisions

of the Act. The Act is not applicable to such debts.

37. We were referred to a decision of Chandrasekhara Sastry, J. in 1965-2 Andh WR 215. The facts as they appear from the judgment are that the suit promissory note was executed on 30th September, 1959. The suit was filed on 30th August, 1962, that is after the date notified under Sec. 4 of the Act, that is to say, 4-2-1960. It was contended before the learned Judge that only suits filed before the notified date could be transferred to the special Court. As the suit was filed subsequent to the notified date before which date alone any application for adjustment of the debts could be filed under Section 4, the suit could not be transferred under Section 19 (1) of the Act. Following State Bank of Hyderabad v. Mukundas, 1963-2 Andh WR 147 = (AIR 1964 Andh Pra 236) (FB), the learned Judge held that—

“the lower Court had no jurisdiction to transfer the suit to the file of the Munsif's Court at Shadnagar, as in the present case the suit was admittedly filed long after the notified date.”

38. The question which we have considered was not raised before the learned Judge. If the debt was incurred for first time on 30-9-1959, then according to our view the provisions of the Act would not apply. That means even Section 19 (1) of the Act also would not apply. The conclusion of the learned Judge therefore nevertheless remains valid. That decision, however, does not consider or decide the question which we have considered and decided. It was assumed in that case that the provisions of the Act applied to the suit debt. That assumption in our view cannot form a precedent for the proposition with which we are concerned. In that view of the matter, it is needless to consider whether the learned Judge was right in holding that the civil Court had no jurisdiction to transfer the case to the special Court as the suit was filed subsequent to the notified date. If the attention of the learned Judge was drawn to this aspect of the case, the question decided could not have arisen for consideration at all.

39. The same comment has to be made in reference to Pulliah Shetti v. Moinuddin Ahmed, 1963-1 Andh WR 170, which was decided by one of us (Gopal Rao Ekbote, J.) In that case, the date of the promissory note was 21-8-1956 and the suit was laid on 27-1-1959. Both the said dates it is plain, are subsequent to the Act. The suit, however was laid before the notified date. If the debt was incurred for the first time on 21-8-1956 when the promissory note was executed, according to our view, the Act would not apply to such a case. That question, however was not argued and therefore was not considered and decided in that case.

40. We were also referred to Moinuddin Ahmed v. Aita Pedda Pulliah Setty, 1960-1 Andh WR 181, M. A. Ansari, J. held:

“In view of Section 19 (3) of the Hyderabad Agricultural Debtors Relief Act, it is not necessary that an application should be pending in the other Court in order to transfer a pending case from a civil Court. The Court where the suit is pending being satisfied about some issues which the other Court has to determine, first, has to transfer the case to the other Court.” From the judgment it is not clear as to when the debt was incurred on the foot of the promissory note. That decision, however, does not consider the question as to whether the Act applies to a debt incurred subsequent to the Act.

41. Mr. Justice Ansari in the above said decision thought that the provisions of the Hyderabad Jagirdar Debt Settlement Act are similar to the provisions of the Act. He therefore placed reliance on Triamhak Lal v. Veeranna, 1958-1 Andh WR 387 = (AIR 1958 Andh Pra 361) (FB), to support the conclusion at which he had reached. Chandrasekhara Sastry, J. in his judgment also thought that the Hyderabad Jagirdar Debt Settlement Act (XII of 1952) correspond to the provisions of the Act substantially. The learned Judge therefore relied upon the Full Bench decision of this Court in (1963) 2 Andh WR 147 = (AIR 1964 Andh Pra 236) (FB) in support of the conclusion to which he had reached.

42. The Full Bench decision referred to above therefore becomes relevant and should be considered in detail. The facts of that case that the suit was laid by the State Bank of Hyderabad on 31st July 1958 for recovery of Rs. 40,869-1-10 as due on a cash credit account from defendants 1 to 5 as principal debtors and the 6th defendant as a guarantor as per the ledger account. The said cash credit account was opened with the Bank in February 1951. The balance was struck on 29th June, 1956. Suit notice was issued on 5-7-1958. The defendants denied the claim. After trial, the suit was decreed on 25-7-1959. Thereafter E. P. No. 17 of 1960 was filed on 22nd December 1959. The judgment-debtors applied for a transfer of the execution proceeding to the Jagirdars Debt Settlement Board under Section 25 (1) of the Hyderabad Jagirdars Debt Settlement Act which provision is in pari materia with Section 19 (1) of the Act.

43. The main point urged before Narasimham, J. was that Section 25 (1) of the said Act did not apply to the debt dated 25-7-1959 (the date on which the decree was passed by the trial Court). The learned Judge referred three questions for consideration of a Division Bench or a Full Bench as may be appropriate. The first of the three questions is relevant for our purpose. It runs as follows:

“Whether on a true construction of Section 25 (1) of the Act, it has application to suits, appeals and applications for execution

declared a tenure-holder and purchaser of field No. 11, area 18 acres 27 gunthas of mouza Nund-dhan, in Amravati district. He impleaded the respondent No. 2 Sukhdeo as a non-applicant to this application. Dayaram claimed that he had been holding the land as a tenant from before 1958-59, that he had acquired the rights of a tenant and was entitled to purchase the land and that he had made an offer of purchase by a notice on 5-12-1962. Along with the application, Dayaram filed a certified copy of the latest entry of the record-of-rights showing Sukhdeo as an occupant in column 9 and Dayaram as a protected lessee from 1952-53 to 1956-57 in column 11 of that document. It appears Sukhdeo preferred to remain absent but the present petitioner Gitabai filed an application for being impleaded as an additional party. The petitioner claimed that the field in dispute belonged to her, that it came to her from her mother as a legal heir and that the field had come to her mother by partition on 24-5-1954 of the family property. She also stated that the field was gifted to her by her brother Sukhdeo under a registered gift deed dated 19-7-1954. Thus, as she was the owner of the field, she was a necessary party to this case. Dayaram agreed to implead the petitioner without prejudice to his rights, so that the petitioner may take part in the proceedings. On being impleaded, the petitioner filed a detailed written statement. In this written statement she disclosed that her mother Janibai became a widow on the death of Balkisan in 1930, that Sukhdeo, respondent No. 2, was adopted as a son after the death of Balkisan, that the field was let out by Janibai to Dayaram in 1951-52 for one year and that he cultivated the field for the years 1951-52 and 1952-53. According to the petitioner, thereafter Dayaram relinquished possession of the field and that Janibai let out the field to Dayaram's brother Uttam for the year 1953-54 for cultivation. She also alleged that on 1-4-1953 he executed a 'batai patra' in the name of Janibai and Janibai handed over possession of the field to him. She claimed that Dayaram did not acquire the rights of a protected lessee because the land was let out to him by Janibai who was a widow and a person under disability. It was further disclosed that Janibai died on 30-6-1954 leaving the petitioner as the only daughter. She also claimed that the estate of Janibai was stridhan property and the petitioner succeeded to it as her daughter. She also alleged that Janibai had made a will. She claimed that she had never let out the field to Dayaram and Dayaram's possession over the field was unauthorised.

2. All these adverse allegations were repudiated in the further statement filed by Dayaram. He specifically repudiated the alleged oral partition of February 1951 between Sukhdeo and Janibai. He also denied the partition of 1954. He claimed that he had acquired the status of a protected lessee

because he had obtained the field from Sukhdeo.

3. Dayaram filed a copy of an order in a revenue case before the Sub-Divisional Officer determining the rent of the field at Rs. 160 on 5-2-1955. Sukhdeo was the non-applicant in these proceedings. He also filed copies of crop statements for the years 1952-53 and 1953-54 in both of which Dayaram alone was shown as cultivating the land on batai. Dayaram also filed crop statements showing his cultivation in the years 1961-62, 1962-63 and 1963-64 in which crop statements Sukhdeo continued to be shown as the occupant. Dayaram produced money order coupons showing acknowledgment of receipt of lease money by Sukhdeo on 7-6-1958, 19-3-1959, 5-3-1960, 6-3-1961 and 14-3-1962. He filed two more money order receipts showing refusal of money order by Sukhdeo in 1954. In addition, Dayaram filed receipts for payment of land revenue from 1959-60 to 1963-64.

4. As far as is evident from the record of the trial Court, the only document filed by the petitioner was the batai patra alleged to be executed by Uttam on 1-4-1953 scribed by one Madanlal and attested by two persons, Doma Maroti and Shrinivas the latter being the husband of the petitioner. At the trial Dayaram examined himself and the petitioner examined one Asaram and her husband Shrinivas.

5. The Additional Tahsildar before whom the proceedings were pending has recorded a finding that Dayaram was not the lawful tenant of the field, that Gitabai was the owner of the field and that the application was not therefore maintainable. It is strange that Gitabai who filed original documents like the partition deed of 1954 and the gift deed executed by Sukhdeo was allowed to take away those documents without leaving certified copies thereof on record. Courts are not empowered to allow parties to take away documents filed by them before the Court and in this regard the Courts below have acted in a grossly negligent and careless manner. Courts need not be reminded that they are exercising judicial power and the material on the documents on which their decisions are based must be available throughout the lis till the matter is finally decided. As tribunals of limited jurisdiction exercising exclusive powers under special Acts, there is a special responsibility cast on the presiding officers of the tribunals faithfully to observe these rules of procedure which are also rules of caution. If a party is allowed to file documents which influence the tribunal in arriving at its conclusion, it is not only fair but it is necessary that that document must continue to form part of the record throughout the proceedings. No party which has produced a document before the Court is ordinarily entitled to take away that document. Even assuming that there is an urgent need of taking away the original document, the least that can be insisted

upon is that the party files a certified copy of that document. In fact, the original documents should not be returned until the lis is decided. The High Court exercises superintendence over the tribunals under Articles 226 and 227 of the Constitution and it is unfortunate that the revenue officers exercising jurisdiction in tenancy cases and cases under other Acts omit to take the elementary precaution of preserving faithfully and intact on their record all the documents which are filed by parties or are allowed to be filed by the Court. We are constrained to observe that this elementary precaution is not taken even in proceedings before the Maharashtra Revenue Tribunal. The Courts are enjoined that no presiding officer is empowered to allow a party to take back the documents filed by him normally without notice to the other side and without placing on record a certified copy of that document. If documents are of the nature of certified copies, there is no case for taking away the documents at all. Allowing documents to be taken away introduces a grave lacuna in the procedure and creates unnecessary handicaps in the appreciation of the material and the conclusions drawn therefrom, by the superior Courts.

6. The Additional Tahsildar had observed that Dayaram failed to prove that he had taken lease in 1952-53 from Sukhdeo and in making this observation, he apparently failed to consider the pere patrak for that year which is on record clearly showing by this independent evidence that the revenue papers showed Dayaram as in cultivating possession of the field under a lease from Sukhdeo whose name appears as the occupant in that document. The Tahsildar has also committed a gross error in interpreting the evidence of Dayaram so far as the batai patra is concerned. Dayaram, it appears having been shown the batai patra, has admitted that the signature appeared to be of Uttam. But this admission is not tantamount to saying that Dayaram admitted that Uttam had executed the batai patra. It is one thing to admit the signature of a person on a document and quite another thing which has different legal implications to admit that that person whose signature is identified by the deponent has executed the document. Execution of a document is an act importing legal implications. That was not the question put to Dayaram and that was not the answer given by Dayaram. The inference drawn by the learned Additional Tahsildar therefore is wholly unwarranted.

7. The Tahsildar however observed, "it appears that this Uttam has put the applicant in possession of the land and relinquished his possession." This is an observation for which there is absolutely no warrant. But if that is the finding reached by the Tahsildar, it would at least show that Dayaram was in possession in 1954. It is on these observations that the Tahsildar recorded a finding that Dayaram failed to prove that he took

the field on lease from Sukhdeo in 1953-54 and onwards. The Tahsildar has recorded another finding that the contention of Gitabai that the field came to the share of Janibai as a result of the oral partition in 1951 was corroborated by Asaram who said that oral partition was confirmed in 1954 by documents. It is an admitted position that there is a recital in the registered partition deed of 1954 which was executed on 24-5-1954. It is stated in no uncertain terms that till that date the parties to the document of the partition, namely, Janibai on the one hand and Sukhdeo on the other, were joint. With this admission of Janibai through whom the petitioner claims, it is difficult to see any basis for the conclusion which apparently seems to have been reached on a very superficial scrutiny of the material on record by the Tahsildar that there was no oral partition between Janibai and Sukhdeo in 1951. The theory of oral partition, it is contended by Dayaram, is put forward to negative his rights which he would otherwise acquire under the Berar Regulation of Agricultural Leases Act as a protected lessee if the lease is established to be given not by Janibai but by Sukhdeo. The fact to be proved was whether there was an oral partition in 1951. That fact is assumed in coming to the conclusion that Dayaram could not get the rights of a protected lessee in the face of the contrary admission in the partition deed of 1954. Asaram's oral testimony could not be accepted which ran in flat contradiction of the averment as to jointness of parties till the date of partition on 24-5-1954. The Tahsildar has also drawn an inference of Uttam being in possession merely from the batai patra dated 1-4-1953. The Tahsildar failed to see that even assuming that Uttam had executed a batai patra, evidence had still to be led to prove affirmatively that there was delivery of possession of the property to Uttam and that Uttam was cultivating the land. The crop statement for 1953-54 runs counter to this claim of the petitioner and there is no oral evidence on record to show that the land was actually given in possession of Uttam or that he cultivated it. To draw an inference of actual possession and cultivation merely from the fact of the batai patra bearing the signature of Uttam leaves much to be desired in coming to that conclusion. There is no evidence in fact that Dayaram had given up possession when the alleged batai patra was executed by Uttam. The argument suggesting such an event is again without any basis. The Tahsildar has found fault with Dayaram when he stated that he considered Sukhdeo as the owner of the property. The Tahsildar failed to see that so far as Dayaram was concerned, no notice was given to him either after partition or after the gift, that Sukhdeo had made a gift of the property in favour of the petitioner. Normally, the tenant in possession is entitled to this notice. A transaction in the privacy of home between brother and sister, though under a registered docu-

ment, could not possibly be construed as notice to the world when no overt steps were taken by the persons concerned that the person creating a right or the person acquiring the right gave a notice that there was a change of ownership. It was the duty of both Sukhdeo and the petitioner to give such a notice to Dayaram as Dayaram was in possession of the property. Apart from this glaring omission, the Tahsildar altogether failed to notice the implication of the fact that throughout the revenue records of which he is the custodian continued to show Sukhdeo as the occupant and owner of the field. In the face of the name of Sukhdeo being shown in the record of rights as well as the crop statement as the occupant of the field, it is difficult to see that any blame could be fastened on Dayaram for treating Sukhdeo as the owner of the property. It will be seen that Sukhdeo did not try to correct the impression of Dayaram even in the proceedings commenced in 1955 for determination of fair lease money. It is said that Sukhdeo preferred to remain absent and the order was passed *ex parte*. The service, it is alleged, was also by substituted service. All this conduct on the part of Sukhdeo however cannot make Dayaram responsible if he continued to hold that Sukhdeo was the owner of the property in the absence of any direct knowledge attributed to Dayaram about the change of ownership. If Sukhdeo was really having nothing to do with the land either on his own behalf or on behalf of the true owner, namely, his sister Gitabai, it is difficult to see how Sukhdeo would continue to receive the rent sent by money order from Dayaram. There are money order receipts from 1959-60 showing payment of rent to Sukhdeo. As an honest person, Sukhdeo should have either refused the money orders or put Dayaram wise as to the proper person who was entitled to receive rent. For this conduct of Sukhdeo which it now suggested was in a sense collusive, Dayaram cannot be held responsible. There was no such suggestion in the pleadings in the lower Courts and it is difficult to hold that Sukhdeo could be colluding with Dayaram to the detriment of the interests of his sister. Again the inference drawn by the learned Tahsildar from the entry in the copy of the record-of-rights showing Sukhdeo as the occupant on account of the death of Janibai that he was not the owner till that date is a gross misreading of the record. The Tahsildar had before him at least till he passed the order the partition deed of 24-5-1954. Janibai had become the owner of the property as a result of this partition and it was only because of this document that Janibai's name must have come to be recorded as the owner, and after her death, naturally the field was again mutated in the name of Sukhdeo. To draw any other inference would be a gross perversion in the face of the documents on record. The learned Tahsildar seems to have failed to keep in mind the elementary rule that when the competition was between an asser-

tion of oral admission and the written document containing admission of both the parties that they were joint till 1954 he should not have persuaded himself to hold that there was an oral partition between Janibai and Sukhdeo in the face of the admissions in the written partition deed of 1954. The observation of the Tahsildar that the applicant had not filed the crop statements of 1951-52 onwards to show that he was in possession in 1951-52 or till 1952-53 is to say the least understandable in the face of these documents on record being very much in the record. Either the Tahsildar has chosen simply to ignore the existence of these documents or has come to make these observations in spite of them. The Tahsildar seemed to think that it is only the crop statements for the years 1961-62 to 1963-64 which were on record showing the possession of Dayaram, forgetting that there were documents of the previous periods 1951-52 to 1953-54 also. The Tahsildar also observed that it was the duty of Dayaram to examine Sukhdeo who received rent sent by money orders because it was Sukhdeo who could have explained it, and in the absence of Sukhdeo, he observed that not much weight can be attached to the money order receipts. Between the petitioner and Dayaram, Sukhdeo was much nearer to the petitioner, being her brother. It was he who had gifted the property and dealt with the property in spite of the gift. If an adverse inference were to be drawn on account of absence of Sukhdeo from the witness-box, it is difficult to hold that it could be against Dayaram. The further observation that Dayaram did not give lease money of 1958-59 to anybody is again not correct as the Tahsildar has not taken into account the money order receipt dated 19-3-1959 under the hand of Sukhdeo. The learned Tahsildar has referred to the evidence of Shrinivas, the husband of the petitioner. Even a cursory perusal of that evidence would have shown to the Tahsildar that in para. 16 he unequivocally admitted that in 1954 when Sukhdeo executed the gift deed the field was not in his possession but was in possession of Dayaram and the further admission of the witness that till 1954 i.e., till the death of Janibai, Gitabai had no concern and that he did not whether Dayaram's possession till 1954 was legal or illegal. If nothing else, this statement at least amounts to an unequivocal admission that in 1954 Dayaram was in cultivating possession of the property though the petitioner's witness stated it was unauthorised.

8. On the observations noticed above, the Tahsildar recorded a finding that the application was not maintainable by Dayaram and he was not entitled to purchase the property.

9. Dayaram challenged this order by an appeal before the Sub-Divisional Officer. That officer has dismissed the appeal. It may be mentioned that after securing the order

from the Tahsildar, the petitioner filed an application under Section 120 (c) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, claiming possession of the field from Dayaram on the ground that he was in unauthorised possession. The sheet-anchor of this application naturally was the order made by the Tahsildar referred to above. This application and the appeal were apparently considered together and were disposed of on the same day. After referring to the rival contentions of the parties, the appellate authority posed certain questions which according to it arose for decision in the appeal, namely—

(i) Whether the lower Court was acting without jurisdiction;

(ii) Whether the oral partition of the year 1951 was proved and

(iii) Whether Dayaram proved his tenancy of the field which entitled him to purchase the field in question?

We are not concerned in this case with the question of jurisdiction as that is no longer in dispute. It is the finding on the other two issues which are however a matter of debate.

10. On the question whether there was an oral partition in 1951, the appellate authority referred to the evidence of Asaram to that effect which it seems to have preferred and explained away the admission to the contrary in the partition deed which mentioned that the property was jointly held by them till that date by saying that that admission did not mean that separate shares were not apportioned earlier. The appellate authority has further sought support to this conclusion from the fact that in 1953 a *batai patra* alleged to be executed by Uttam in favour of Janibai came to be made. The reasoning which has found favour with the appellate authority was that because there was a *batai patra*. It must lead to the conclusion that there was a previous partition. The appellate Court has fallen into the same error as the Tahsildar in interpreting the entry in the record-of-rights showing the name of Sukhdeo as the occupant and having acquired this right as a heir after the death of Janibai from 30-8-1954. The appellate Court also failed to remember that Janibai had become the owner of this field as a result of partition between Sukhdeo and Janibai on 24-5-1954, and after her death son Sukhdeo was rightly recorded as the occupant. But this fact does not and could not lead to an inference that Janibai was all along the owner of the property in the face of the record-of-rights showing the name of Sukhdeo as the owner prior to 1954. It appears that there was a sale of field survey No. 18/1 of Wagholi on 9-4-1953 on which document of sale both Janibai and Sukhdeo appended their signatures. If Sukhdeo's name appeared as the executant of the sale deed, it would be wholly inconsistent with Janibai alone being the owner of the property or owner of the property at all, on this date.

The reasoning which found favour with the learned appellate authority in paragraph 13 with regard to this circumstance is, to say the least, difficult of proper apprehension. Similarly, the statement in paragraph 15 about the admission of signature of Uttam on the *batai patra* is tantamount to admission of execution of the *batai patra* is the repetition of the same mistake committed by the Tahsildar in interpreting this document. In paragraph 18 the appellate authority has observed that the oral partition of 1951 was reiterated by the written partition deed executed in the year 1954 a statement which is wholly in contradiction of the recitals of the partition deed of 24-5-1954. How any authority acting judicially could come to such a conclusion is difficult to understand in the face of the recitals in the partition deed. On such observations, the appeal came to be dismissed.

11. The matter was therefore taken up at the instance of Dayaram before the Revenue Tribunal. The Tribunal being fully cognizant of the limitations of its powers as a revisional authority, to which a reference is made in the order itself, has reversed the finding of the lower authorities and held that Dayaram had established his status as a tenant. The Tribunal rightly observed that the main issue involved was whether Dayaram was a protected lessee and a tenant of the field in dispute. It was only if he was a tenant that he would be entitled to purchase the field. It may be mentioned that two revisions had been filed before the Tribunal, one against the appellate order and the other against the order of summary eviction of Dayaram in proceedings under Section 120 (c) of the new Tenancy Act filed before the Sub-Divisional Officer.

12. The Tribunal pointed out that the Courts below had totally ignored the material evidence, namely, the inference to be drawn from the crop statements for the years 1952-53 and 1953-54 which were on record and which showed not only cultivating possession of Dayaram as a tenant but also the status of Sukhdeo as occupant of the fields. The Tribunal also correctly pointed out that the mutation in the name of Janibai as a result of the partition dated 24-5-1954 which was effected on 4-8-1954 had necessarily to be followed by further mutation in the name of Sukhdeo after her death on 30-8-1954. If Sukhdeo was the owner of the property in 1952-53 and 1953-54, then Dayaram must necessarily have acquired the rights of a protected lessee under the Leases Act on account of his cultivating possession in those two years. The specious argument that there was an oral partition in 1951 and therefore Janibai had become the owner of the property in 1951 could not be countenanced in face of the registered partition deed of 1954 which contained an unequivocal admission that till the date of that partition the parties were joint. In paragraph 12, the Tribunal pointed out that there was no evidence to

show that Uttam had ever cultivated the field in 1953-54 or at any time. Thus, this is a case where the finding about Uttam being the tenant is reached without evidence as to actual cultivation. I have already observed that mere production of a document of batai patra alleged to contain the signature of Uttam cannot lead to an inference of Uttam's cultivation. For that affirmative evidence had to be led before the Court from which an inference of actual cultivation had to be drawn. No such inference is drawn. If Sukhdeo alone was the owner of the property in 1953, it is another fact entirely omitted from consideration by the lower authorities. Even the execution of the batai patra could not clothe him with any rights in the property because the batai patra was in favour of Janibai who had no interest in the property as owner. This finding that Sukhdeo was the owner of the property cannot be displaced and cannot be shown to be wrong. The batai patra which appears to be the sheet anchor of the case of the petitioner is of no assistance in establishing her case. The Tribunal also pointed out that throughout the conduct of Janibai and Sukhdeo vis-a-vis Dayaram was of acquiescence in the cultivation and possession of Dayaram. If Dayaram was at any time in unauthorised occupation of the land as squatter or trespasser, it is difficult to believe that neither of them could have taken steps to oust him. On the contrary the conduct of Sukhdeo in receiving rent and acknowledging his right on land goes to show that the owner of the property was aware of the rights of Dayaram and had not raised his little finger against him. It is complained that no rent receipts are filed for the years 1952-53 and 1953-54. It must be remembered that the dispute was raised in 1963 and ordinarily agriculturists are not expected to retain receipts of payment long after they are made. Even persons given to keep regular accounts and papers find it difficult to maintain records after decades. In paragraph 16, the Tribunal has pointed out that the circumstances, documents and the inferences to be drawn from documents which are inference of law have been completely ignored by the lower Courts who had, as it were, gone off at a tangent in upholding the claim of the petitioner that there was an oral partition in 1951 and therefore Dayaram could not acquire any rights. If there is no basis for that finding, and I have not been shown any material or document from which such an inference could be drawn, the orders of the revenue authorities could not possibly be sustained. In my opinion, they have rightly been reversed and the only inference that can be drawn has been recorded by the Tribunal.

13. It is, however, seriously contended that the Tribunal has acted in excess of its jurisdiction in reversing the finding of the two Courts and especially the appellate authority as to the status claimed by Dayaram. It is urged that whether Dayaram had proved that he was a tenant is essentially a

question of fact and however erroneous assuming that there is error the finding may be, the Tribunal had no jurisdiction to interfere with such a finding. In my opinion, this contention is not well founded. It is true that in reaching a conclusion about the jural relationship like that of landlord and tenant in this case, certain facts are required to be established, and so far as the facts to be established lead to an inference of fact, that may be a finding which is binding on the superior authorities. But if the inference reached itself is without evidence, then it is open to the revisional authority to find what the evidence is in order to come to a proper conclusion as to the jural relationship. Moreover the question of status of Dayaram who claimed to be a tenant on land and a protected lessee is not a pure question of fact, nor is it dependent on an inference from fact. It is a question of law and or at any rate, a mixed question of law and fact. If any authority is needed for this proposition, it is only necessary to refer to a few precedents. In Narsayya v. Veerayya, AIR 1935 Mad 268, it has been held that the question as to whether a certain legal position is created as between the parties as the result of a certain transaction is a matter of law, and hence the question whether the relationship of landlord and tenant existed between the defendants and the plaintiff is one of law and not of fact. Reference is made to the decision of the Privy Council in Satgar Prasad v. Raj Kishore Lal, AIR 1919 PC 60. A similar view was taken in the Allahabad High Court recently in Ram Prakash v. Shambhu Dayal, AIR 1960 All 395, wherein the Court observed:

"Whether the facts found by the lower Court constitute a relationship of sub-tenancy or of landlord and tenant between the parties is a question of law, and if the lower Courts have come to an erroneous conclusion on this point, the High Court can interfere in Second Appeal."

There is another decision of the Privy Council in Dhanna Mal v. Moti Sagar, AIR 1927 PC 102, laying down that the proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is one of a legal inference from facts and not itself a question of fact. This decision was followed by the Supreme Court in Bejoy Gopal v. Pratul Chandra, AIR 1953 SC 153. In that case the question arose under Sections 109 and 112 of the Code of Civil Procedure, there being concurrent findings that the tenancy is permanent. The appellant urged that the appeal was not concluded by the concurrent finding of the Courts below that the tenancy was permanent because that question was one of the proper inference in law to be deduced from the facts as found by the Courts below. This contention was accepted.

14. In this Court, a similar view has been taken when the matter was referred to Division Bench, in Dhondi v. Dadoo, AIR 1954

Bom 100. In his order of reference Mr. Justice Shah (as he then was) has observed:

"It is true that an inference as to permanent tenancy is a mixed question of law and fact and could be raised in second appeal. But the facts found from which the inference in favour of a party claiming to be a permanent tenant is sought to be raised must be regarded as binding in second appeal, though the question as to what inference should be raised from those facts must be regarded as a question of law." A similar view has been taken in other High Courts also.

15. Where therefore on facts which could be said to be established, an inference as to the jural relationship between the parties viz., that of landlord and tenant, is required to be drawn, the jurisdiction of the revisional authority cannot be denied on the ground that it is interfering with the finding of fact. The inference being a legal inference to be drawn from proved circumstances, it was open to the Tribunal to record a finding. There was a further infirmity in reaching the finding, namely, the total absence of evidence regarding the oral partition or the letting of land or cultivation of land by Uttam which was the sheet-anchor of the petitioner's case, the total exclusion from consideration of other documents on record such as the crop statements of 1952-53 and 1953-54 which proved the cultivating possession of Dayaram from Sukhdeo who was shown as occupant, and a wholly erroneous inference is drawn from the mutation entry in the record-of-rights in coming to the conclusion that Janibai was the owner of the property from whom Sukhdeo obtained the property after her death, ignoring altogether the intervening fact of the partition of the property under which alone Janibai had been granted this field.

16. On a consideration of all the circumstances of the case, therefore, I have come to the conclusion that the Tribunal has properly exercised its jurisdiction and has arrived at the conclusions which cannot be successfully challenged. The result is that the petition fails and is dismissed with costs.

17. A grievance is made that Dayaram was dispossessed on the very next day of the order of the Sub-Divisional Officer holding that he was in unauthorised possession without giving any opportunity or time to Dayaram to secure stay of that order. Such indecent haste unnecessarily gives cause for complaints against the proper administration of justice. The authorities would have been better advised to avoid occasion for such complaints. As Dayaram succeeded, Dayaram may be restored to possession as early as possible.

Petition dismissed.

AIR 1970 BOMBAY 166 (V 57 C 29)

(NAGPUR BENCH)

J. R. VIMADALAL J.

Jagdishprasad Kashiprasad and others, Applicants v. The State of Maharashtra and another, Opponents.

Criminal Revn. Appln. No. 180 of 1968, D/-26-2-1969.

(A) Evidence Act (1872), Ss. 114 Illus. (g) and 3 — Non-examination of some of the prosecution witnesses — Adverse inference, when can be drawn — Appreciation of evidence.

A party asking the Court to draw against the other party an adverse inference of the nature indicated in Illustration (g) to Section 114 of the Evidence Act by reason of the non-examination of a witness by that party must, whether the proceeding be a civil or a criminal one, lay the foundation for it by eliciting evidence which would show that the witness in question was available to the other party for the purpose of giving evidence at the time of the hearing. That evidence may be elicited, either in the course of the cross-examination of the witnesses examined by the other side (e.g. the investigating officer in a criminal case), or by leading evidence to that effect. Unless that foundation is laid, no question of drawing an adverse inference as indicated in Illustration (g) to Section 114 arises at all. (Para 3)

Even if an adverse inference were to be drawn, it would be for the Court to weigh the evidence of such of the witnesses as have been examined before it as against that adverse inference and, if those witnesses are found to be reliable, the Court would be perfectly justified in convicting the accused persons. (Para 3)

(B) Criminal P. C. (1893), S. 367 — Evidence Act (1872), S. 3 — Seven accused persons — Three accused given benefit of doubt by reason of their names being not mentioned in F. I. R. — That cannot lead to conclusion that other accused persons named in F. I. R. which furnished valuable corroboration to evidence of complainant and the witness should also be acquitted. (Para 4)

A. K. Khanna, for Applicants; P. G. Palshikar, Addl. Govt. Pleader, for Opponent No. 1.

JUDGMENT: This is an appeal filed by four of the original seven accused persons against their conviction by the Judicial Magistrate, First Class, Khamgaon, which was confirmed by the Additional Sessions Judge, Khamgaon, on appeal.

2. The short facts of the case are that on the 18th of January 1967 the complainant Mahadeo found that one of his bullocks was missing from the Kotha and be ultimately traced the bullock to the cattle pound from

where it was got released. The prosecution story is that he was then proceeding by bus to Shergaon to report the matter to the police when he was waylaid by the four applicants before me, along with original accused Nos. 1, 2 and 3, who fell upon him and started beating him with sticks, with the result that he received a number of injuries and fell down unconscious on the road. According to the prosecution, when he regained consciousness, Mahadeo found Semadhan, Vishanu, Shriram and Deorao near him, and he was carried to the police station where he lodged his report and then sent for medical treatment. In view of the report made by Mahadeo, the accused persons were arrested and were put up for trial before the Judicial Magistrate First Class, Khamgaon. The said Magistrate, however, gave accused Nos. 1, 2 and 3 the benefit of doubt by reason of the fact that their names were not mentioned by Mahadeo in the report which he had lodged at the police station, but he convicted accused Nos. 4 to 7 who are the applicants before me of the offence under Section 323 of the Indian Penal Code and sentenced them to rigorous imprisonment for 15 days and to pay a fine of Rs. 25 each. He, however, acquitted all the accused persons of the offence under Section 147, as well as the offence under Section 149 read with Section 325 of the Indian Penal Code. On appeal to the District Court by accused Nos. 4 to 7, their conviction as well as the sentences imposed upon them by the trial Magistrate were confirmed. Accused Nos. 4 to 7 have thereafter filed the present revision application.

3. There is no substance whatsoever in this application in so far as the conviction of these accused rests upon the evidence given by Mahadeo, which is amply corroborated by the evidence of witness Samadhan, both of whom have rightly been believed by the lower Courts. The only ground urged before me has been that though four persons were mentioned by Mahadeo in the list as eye witnesses only two of them were examined. One of whom has stated that he came up subsequent to the actual incident. Mr. Khanna has therefore contended that an adverse inference should be drawn against the prosecution, but I am afraid that cannot help the accused. Even if an adverse inference were to be drawn, it would be for the Court to weigh the evidence of such of the witnesses as have been examined before it as against that adverse inference and, if those witnesses are found to be reliable, the Court would be perfectly justified in convicting the accused persons. Moreover, in the present case, no basis has been laid in the course of the evidence for drawing an adverse inference by reason of the non-examination of the two eye witnesses. A party asking the Court to draw against the other party an adverse inference of the nature indicated in Illustration (g) to Section 114 of the Evidence Act by reason of the non-examination of a witness by that party must, whether

the proceeding be a civil or a criminal one, lay the foundation for it by eliciting evidence which would show that the witness in question was available to the other party for the purpose of giving evidence at the time of the hearing. That evidence may be elicited, either in the course of the cross-examination of the witnesses examined by the other side (e.g. the investigating officer in a criminal case), or by leading evidence to that effect. Unless that foundation is laid, no question of drawing an adverse inference as indicated in Illustration (g) to Section 114 arises at all.

4. The only other point which was urged was that since the other three accused persons, one of whom was supposed to be main accused, have been acquitted, there is no reason why accused Nos. 4 to 7 should have been convicted on the same evidence. I am afraid, there is no substance in that contention of Mr. Khanna either, for the simple reasons that accused Nos. 1 to 3 have merely been given benefit of doubt by reason of their names not being mentioned by Mahadeo in the report which he has lodged in the police station which has been recorded as a first information report. That cannot therefore necessarily lead to the conclusion that the other accused whose names have actually been mentioned in the first information report which furnishes valuable corroboration to the evidence of Mahadeo and Samadhan should also be acquitted. The conviction of accused Nos. 4 to 7 imposed by the lower Courts, is therefore clearly correct and this revision application must fail. I am somewhat surprised at the very lenient sentence that has been imposed upon these accused persons by the Courts below, but having regard to the fact that no notice of enhancement has yet been issued, I have not thought it fit to interfere in the matter at this stage. The accused persons should surrender to their bail.

Application dismissed.

AIR 1970 BOMBAY 167 (V 57 C 30)
(NAGPUR BENCH)
ABHYANKAR, J.

Waman Suryabhan and others, Petitioners
v. Maharashtra Revenue Tribunal, Nagpur
and others, Respondents.

Special Civil Appln. No. 1143 of 1966,
D/-9-9-1968.

(A) Tenancy Laws — Bombay Vidarbha Region Agricultural Tenants (Protection from Eviction and Amendment of Tenancy Laws) Act (9 of 1958), S. 5 (1) — Object of — Right to obtain possession accrued before the Act — Application after Act ceasing to be in force — Held not barred by limitation.

HM/HM/D619/69/DRR/P

The plain meaning of the provision in Section 5 (1) is that the rights which accrued immediately before the Act were, as it were, kept in a state of suspended animation. They were not to be enforced during the period this Act was in force and became enforceable as soon as the Act ceased to be in force. Where, therefore, the landlord who had acquired the right to obtain possession of the property before the Act and nothing else had to be done except to make an application for possession, the right could be enforced in terms of the provisions of Section 5 (1) of the Act itself as soon as the Act ceases to be in force. The Act ceased to be in force on 31st December 1958, and an application made within two years of that date could not be held to be barred by limitation.

(Para 9)

(B) Tenancy Laws—Berar Regulation of Agricultural Leases Act (24 of 1951), S. 8 (1) (g) — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 36 — Order terminating lease under S. 8 (1) (g) of the Act of 1951, on 20-8-1958 — Appeals — Final order of Revenue Tribunal on 31-3-1960 — Application for possession on 5-5-1960 — Not barred by limitation.

Under the normal rule of construction, whenever an order of a subordinate authority is challenged in superior Courts by an appeal or a further appeal, such order of the original authority gets merged in the final order. The right to enforce the benefit of the order, therefore, would accrue only after the order has reached finality.

Thus, where the order terminating lease under S. 8 (1) (g) of the Act of 1951 was passed on 20-8-1958 but the second appeal filed by the tenant challenging the order was disposed of by the Revenue Tribunal on 31-3-1960, the application for possession made on 5-5-1960 by the landlord could hardly be resisted as barred by limitation.

(Para 10)

(C) Transfer of Property Act (1882), Ss. 112, 113 — Statutory leases — Acceptance of rent after termination of lease — No waiver — T. P. Act not applicable.

In the case of a statutory lessee, his right being created by statute, the corresponding obligation to pay the statutory rent until possession is delivered is implicit in such a situation. In fact, the rent is not the lease money in the true sense of the term at all but is a statutory solatium which a lessee protected by the statute is required to pay to the landlord. It has hardly any element of a contractual liability. It will therefore not be proper to apply the provisions of the Transfer of Property Act in case of statutory tenant's rights and obligations which must be worked under the statute which creates the lessee's rights and not under ordinary law. Where, therefore, a landlord recovers the rent from his sta-

tutory lessee after obtaining an order of termination of lease under S. 8 (1) (g) of the Act of 1951, there is no waiver of his right to obtain possession of the land.

(Para 12)

V. R. Manohar, for Petitioners; M. W. Samudra, for Respondents Nos. 3 and 4.

JUDGMENT: This is a tenants' petition under Article 227 of the Constitution challenging an order of the Maharashtra Revenue Tribunal holding that the respondents Nos. 3 and 4 were entitled to restoration of possession of two fields, Survey Nos. 58 and 72/2 of mouza Kasarkhed, tahsil Bala-pur, District Akola. The litigation has had a chequered career and it will be necessary to trace a few facts.

2. These two fields were cultivated by Suryabhan who had acquired the rights of a protected lessee under the Berar Regulation of Agricultural Leases Act, 1951. Digambar, the predecessor-in-title of the respondents Nos. 3 and 4 gave a notice under Section 9 (1) of the Leases Act terminating the tenancy of Suryabhan. On the basis of this notice, two proceedings came to be started, one by Suryabhan and another by Digambar. Digambar started proceedings under Section 8 (1) (g) of the Leases Act challenging the order terminating the lease and Suryabhan's application registered as Revenue Case No. 94/59/58-57 in which he challenged the bona fides of the notice under Section 9 (3) of the Leases Act. Both the applications were considered and tried together and disposed of by a common order dated 20-8-1957. A copy of this order was filed in the subsequent proceedings before the Naib-Tahsildar. The Sub-Divisional Officer held that the notice was valid and bona fide. He allowed the application of Digambar and terminated the lease of Survey Nos. 58 and 72/2 under Section 8 (1) (g) of the Leases Act and rejected the application of Suryabhan in Revenue Case No. 94/59/58-57.

3. Suryabhan apparently did not file a separate appeal challenging that part of the order under Section 8 (1) (g) of the Leases Act, terminating the lease, but he challenged by an appeal before the appellate authority the decision of the Sub-Divisional Officer holding that the notice was bona fide. This appeal was dismissed in default by the appellate authority. Against this order, Suryabhan preferred a second appeal which was disposed of by the Bombay Revenue Tribunal by its order dated 31-3-1960. The Tribunal held that Suryabhan was not entitled to any reliefs. Thus, Suryabhan's application under Section 9 (3) was finally disposed of by the order of the Tribunal dated 31-3-1960.

4. Thereafter on 5-5-1960 Digambar commenced by an application of that date proceedings for possession of the property on the basis of the order in his favour in the proceedings under Section 8 (1) (g) of

the Leases Act. During the pendency of those proceedings, the original tenant Suryabhan died and the petitioners who are the legal representatives of Suryabhan were brought on record. Suryabhan and after him, the petitioners contested the application for possession on several grounds, but only two grounds survive for consideration in this petition, namely, that the application of Digambar was barred by limitation under Sec. 36 (2) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, and that Digambar by his conduct had accepted the petitioners as tenants inasmuch as he had filed a suit in the Civil Court claiming lease money for the years 1957-58 and 1959-60 and obtained a decree therefor.

5. The application was allowed by the Naib-Tahsildar rejecting both the contentions of the petitioners. Against this order the petitioners preferred an appeal. The appellate authority accepted the contention of the petitioner on both points, and allowing the appeal ordered dismissal of the application of Digambar.

6. Against this reversing order in appeal, the present respondents 2 and 3 preferred a revision before the Mah. Rev. Tribunal. The Tribunal has allowed the revision application, repelling the contentions of the petitioners on both the points in these proceedings, namely, on the ground of limitation and waiver. It is this order of the Tribunal which is under challenge.

7. In support of their objection that the application filed on 5-5-1960 was barred by limitation, the petitioners' contention is that the right to possession accrued in favour of Digambar on 20-8-1957. This application under Section 36 (2) has been filed by Digambar more than two years after the right to possession accrued i.e., more than two years from 20-8-1957, and, therefore, should be treated as barred by limitation. It will be useful to deal with this contention first.

8. On behalf of the contesting respondents, reliance has been placed before the Tribunal as well as in this Court on the provisions, firstly, of Sections 3 and 4 of the Bombay Vidarbha Region Agricultural Tenants (Protection from Eviction and Amendment of Tenancy Laws) Ordinance, 1957 (No. IV of 1957), and also on the provisions of Sections 3, 4 and 5 of the Bombay Vidarbha Region Agricultural Tenants (Protection from Eviction and Amendment of Tenancy Laws) Act, 1957 (No. IX of 1958). The provisions of the Act and the Ordinance being identical, reference will be made to the provisions of the Bombay Act No. IX of 1958. The contention of the learned counsel for the petitioners is that in order to claim the benefit of this Act or the Ordinance, it was necessary for his client either to have tendered the lease money due to the landlord in respect of the land for the agricultural

year ending 31-3-1958 and to show a willingness to hold land thereafter on the same terms and conditions, or for the landlord to make an application for possession and in such proceedings it was for the tenants, i.e., the petitioners to deposit within such time as may have been prescribed by the Court, the rent or lease money due to the landlord for the agricultural year ending 31-3-1958. Thus, according to the petitioners, unless the conditions in Section 3 by voluntary tender of lease money for the years 1957-58 or by depositing the same amount if the landlord were to make an application for possession, were satisfied, the landlord could not get the benefit of either of these two provisions of law.

9. I do not think this contention is well founded. Besides Sections 3 and 4 of the Bombay Act 9 of 1958, there is another blanket provision in Section 5 (1) of the same Act to the following effect:—

"Any right, privilege, obligation or liability acquired, accrued or incurred under any enactment, judgment, decree or order of any Court or Tribunal or authority or by any contract between the parties immediately before the commencement of this Act, or which may be acquired, may accrue or be incurred during the period for which this Act remains in force, but the enforcement of which has been stayed by the provisions of this Act, shall immediately on such provisions ceasing to have force, revive and be enforceable as if such provisions had not come into force."

The intention of the Legislature in making provision like Section 5 (1) of the Act is obvious. Section 3 gives a right to a careful tenant to protect himself by making a tender of the amount of lease money due, so that for a period of two years from the date of the commencement of this Act, such tenant is saved from any botheration of eviction or termination of tenancy. Section 4 prima facie applies to pending proceedings or proceedings which may be instituted, and if any such proceedings by way of execution or for eviction or for termination of tenancy are pending or instituted after the coming into force of the Act, provision is made for stay of such proceedings on terms. But apart from such cases, the Legislature enjoined that any right, privilege, or liability acquired, accrued or incurred under any order or decree of the Court revives and becomes enforceable after the provisions cease to have effect. To give full effect to this provision, it must be held that even in those cases where neither the landlord nor the tenant or ex-tenant has taken any steps, the Legislature intended that no such proceedings should be taken by the landlord for eviction of a tenant or for termination of tenancy of a tenant, and in case of such a landlord, he was assured that the right will become enforceable as soon as the provision ceases to have force. The plain meaning of this provision is that the rights which had accrued were, as it

were, kept in a state of suspended animation. They were not to be enforced during the period this Act was in force and became enforceable as soon as the Act ceased to be in force. Therefore, in case of rights of the landlord who had acquired such rights like the respondent to obtain possession of the property—and in this case nothing else had to be done except to make an application for possession—the right could be enforced in terms of the provisions of Section 5 (1) of the Act itself as soon as the Act ceases to be in force. The Act ceased to be in force on 31st December 1953, and if an application is made within two years of that date, I do not see how the application could still be resisted on the ground of limitation.

10. There is yet another aspect of this matter which cannot be lost sight of. The petitioners themselves had challenged the order holding that the notice was bona fide by an appeal and later by a second appeal before the Tribunal. That appeal was dismissed. But under the normal rule of construction, whenever an order of a subordinate authority is challenged in superior Courts by an appeal or a further appeal, such order of the original authority gets merged in the final order. The right to enforce the benefit of the order, therefore, would accrue only after the order has reached finality, namely, as a result of the decision of the second appeal in this case. The second appeal filed by the petitioners was disposed of by the Tribunal on 31-3-1960. The application for possession made on 5-5-1960 by the respondents could hardly be resisted as barred by limitation even on this aspect of the matter. There is no substance in the plea of limitation raised and it has been rightly rejected.

11. The second ground on which the application was resisted was the alleged waiver on the part of the landlord because he filed a suit for lease money for the years 1958-59 and 1959-60 during which time the petitioners were in possession and enjoyment of the property. The learned counsel for the petitioners wanted to support this plea calling in aid the provisions of Section 113 of the Transfer of Property Act. In the first instance, that section in terms is restricted to a notice given under Section 111 (h) of the Transfer of Property Act, namely, the consequences of waiving a notice to determine the lease or to quit the property. No such waiver is implied by conduct or by some other acts showing an intention to treat the lease as subsisting. This provision cannot be applied to the facts of this case. Then reference was made to Section 112 under which a forfeiture under Section 111 (g) may be waived if the landlord accepts rent. The conditions of this section are also not satisfied and the plea has rightly not been pressed too far. In the case of a statutory lessee, he is bound to pay the amount of lease money not only till the statutory lease

comes to an end by order of the Court but until possession is given. The right being created by statute, the corresponding obligation to pay the statutory rent until possession is delivered is implicit in such a situation. The petitioners, therefore, were bound to pay the lease money as provided in the statute. In fact, it is not the lease money in the true sense of the term at all but it is a statutory solatium which a lessee protected by the statute is required to pay to the landlord. It has hardly any element of a contractual liability. It will, therefore, not be proper to apply the provisions of the Transfer of Property Act in case of statutory tenant's rights and obligations which must be worked under the statute which creates the lessee's rights and not under ordinary law. This plea also, therefore, is equally not available to the petitioners and has been rightly rejected.

12. No other point was urged. The order of the Tribunal is correct. The petition fails and is dismissed with costs.

Petition dismissed.

AIR 1970 BOMBAY 170 (V 57 G 31)

ABHIYANKAR AND CHANDURKAR JJ.

Smt. Gangabai, Petitioner v. President Municipal Council, Tumsar and others, Respondents.

Special Civil Appln. No. 1059 of 1967,
D/- 15/10-4-1969.

Municipalities — Maharashtra Municipalities Act (40 of 1905) Sections 41, 48, 44, — Maharashtra Municipalities Election Rules (1966) Rule 63 — Occurrence of vacancy due to resignation by Councillor — Holding of by-election — Satisfaction by Collector that resignation is tendered validly is condition precedent— Must hold inquiry for that purpose.

The provisions of Section 48 read with Section 41 of the Act and Rule 63 of the Election Rules show that in case a vacancy alleged to have occurred in the office of a Councillor on account of resignation is challenged either by the Councillor concerned or at the instance of any one competent to make such a challenge, and when the matter is before the Collector on a report being received under Section 48 (2) to make arrangements for holding a by-election, the Collector ought to satisfy himself that the vacancy has in fact occurred.

(Para 24)

Where the Councillor of Municipality has apprised the Collector that the so-called resignation alleged to be given by him is not a conscious act of resignation and that his signature is taken on resignation by misrepresentation and fraud, it is obligatory for

HM/JM/D823/69/DVT/D

the Collector to hold inquiry and decide whether the councillor in fact tendered resignation validly. (Para 26)

From the fact that the power of the Collector to hold a by-election to the office of a councillor is made to depend on there having occurred a vacancy in the office of such a Councillor it is implicit that the collector should be satisfied that in fact and in law a vacancy has occurred in the office of the Councillor, and then only he can exercise his power of holding by-election under Rule 63. The mere submission of the report by the Chief Officer of the Municipality that a vacancy has occurred does not furnish a cause of action or ground for the exercise of power under Rule 63, and the contingencies contemplated under Section 44 are not the only contingencies under which inquiry can be held. Resignation becomes effective on its mere receipt by the President and he has no right to decide whether resignation is tendered validly. The duty to hold a by-election having been cast on the Collector, the Collector in his turn must be satisfied on proper inquiry that in fact the office of the Councillor has become vacant by a valid resignation. AIR 1967 Bom 334 Foll,

(Paras 19, 23)

Cases Referred Chronological Paras
(1967) AIR 1967 Bom 334 (V 54)=

1966 Mah LJ 334, Ramkrishna v.
Secy. Village Panchayat, Borjai 21

S. W. Dhabe and S. G. Kukdey, for Petitioner, A. S. Bobde (for No. 1) B. A. Masodkar (for Nos. 1 and 2) and C. S. Dharma-dhikari Asst. Govt. Pleader (for No. 3) R. B. Pendharkar (for No. 4) S. V. Natu (for No. 5), for Respondents.

ABHYANKAR J.— The petitioner Gangabai has filed this petition under Articles 226 and 227 of the Constitution claiming the following reliefs:—

(1) That the notice dated 23-9-1967 (annexure A) and the proceedings of the meeting dated 28-9-1967 (annexure N) stating therein that the petitioner is not a member be quashed;

(2) That the Annexures D and E said to be the copies of the resignation of petitioner dated 23-9-1967 be also quashed and it be further declared that the petitioner continues to be the member of Municipal Council, Tumsar;

(3) That a writ of mandamus be issued against the respondents nos. 1 to 3 directing them to treat the petitioner as a Municipal Councillor and give her all privileges and rights of a Councillor under the provisions of the Maharashtra Municipalities Act, 1965; and

(4) That an interim order be passed staying the effect of Annexures D and E and ordering further that the petitioner be continued as a member of the Municipal Council till the decision of the petition.

2. The petitioner has impleaded to this petition as respondents the President of the Municipal Council at Tumsar, the Chief Officer of the Municipal Council, the Collector, Bhandara, one Dulichand Bhogsu Giripunje, who is a Councillor from ward No. 4; and one Motiram son of Laxman Mankar, alleged to be an employee of the Municipal Council at Tumsar.

3. Elections were held for electing Councillors of the Municipal Council at Tumsar in Bhandara district after the coming into force of the Maharashtra Municipalities Act, 1965, and poll was taken on 9th July 1967. The petitioner was one of the contestants to the office of Councillor to a seat reserved for women from ward No. 21 called Shivajinagar. The petitioner polled the maximum number of votes and was declared elected from that ward. By a notification dated 20th July 1967, the names of all the Councillors elected to the Municipal Council were published as required by Section 19 (1) of the Maharashtra Municipalities Act, 1965 (hereinafter referred to as the Act.)

4. A meeting of the elected Councillors to elect the President and the Vice-President was held on 1st August 1967. It appears that although the Municipal Council comprises 21 members, one elected member was enjoined not to participate in the meeting on account of the pendency of an election petition. The remaining 20 Councillors were evenly divided between the two groups, one alleged to be led by Saraf and the other alleged to be led by Narayanrao Karemore. The polling for each of the two offices showed that the votes were evenly divided for each candidate and Shri Saraf was declared elected as President by toss and Shri Kisanrao Karemore was declared elected as Vice-President also by toss.

5. The petitioner has alleged that she belonged to a group in opposition to the elected President, respondent No. 1. According to the petitioner, she was called in the first week of September 1967 by the respondent No. 4 who came to her house and told her that as the President wanted to visit her ward, she should accompany him and accordingly she came to the office of the Municipal Council. It was at about 10 a.m. in the morning. When she went to the office believing in good faith that she was called by the President, she found that the President was sitting with his party members along with the respondent No. 4. There were some other persons present and she was entertained to tea. The President was apprised by the petitioner of the unsatisfactory conditions of Shivajinagar from which she was elected. After taking tea, the respondent No. 4 produced a written paper before her and she was called upon to sign it. The petitioner alleges that she does not know reading or writing except making her signature as Gangabai. She has further alleged that believing in good faith on the representation and assurance of the respondent 1

that she was signing an invitation for a party at the residence of one Mahadeo Kahalkar, the petitioner signed that paper and signed it in the usual way of her signature, namely, by putting the name Gangabai only.

6. The petitioner further alleged that on 23-9-1967 a notice of a special meeting was issued to all the Councillors of the Municipal Council and an item on the agenda was consideration of the resolution to pass a motion of no-confidence against the Vice President. A copy of that notice has been annexed to the petition. The petitioner however did not receive any such notice. The meeting was convened for 23-9-1967 to consider this resolution. As the petitioner did not receive a notice, the petitioner became suspicious about the conduct of the respondents Nos. 1 and 4 and other persons and according to her, she sent a telegram on that date on 23-9-1967 demanding why she had not received the agenda of the special meeting fixed for 23-9-1967 and why her name as a councillor of the municipal council was omitted from the notice. No reply was received to this telegraphic communication from the respondent No. 1. On 24th September 1967 a news item appeared in a daily paper published in Nagpur called "Navaharar" saying that the petitioner had tendered resignation of her office as councillor of the municipal council to the president. The petitioner, therefore, made a report about the matter to the police and also to the Collector, Bhandara, on 24th September 1967. A copy of the report made to the Station Officer and a copy of the complaint in writing addressed to the Collector are filed with the petition. The copy of the complaint to the Collector is dated 28-9-1967 and the application purports to be one under Section 308 of the Act for suspending the meeting and further proceedings of the meeting of the municipal council to be held on 23-9-1967. In paragraph 2 of this application to the Collector, the petitioner has stated that it was impossible for her to submit resignation, much less to think of leaving the post of councillor which she got after a bitter struggle, that some fraud was played and she reserved her right to file further particulars after the documents are filed in this connection, that the meeting called for considering the no-confidence motion against the vice-president is illegal and unlawful, and, therefore, she requested that the meeting convened for 23-9-1967 be suspended by directing the president and other persons concerned till the decision of her application. It appears from the documents filed by the petitioner that it became known that the petitioner was not issued a notice because she was supposed to have resigned her office as councillor, and when this explanation became known, there was considerable commotion and representations were made by different categories of persons to several authorities. The petitioner has filed copies of the representations made

to the Governor, the Chief Minister, the Home Minister, the Police authorities and other persons.

7. The meeting was held as scheduled on 23-9-1967. At this meeting a question was raised as to why the petitioner was not noticed, and on this query, the president is alleged to have explained that the petitioner was no longer a councillor of the municipal council. Thereafter, the member walked out of the meeting and the remaining members passed a resolution of no-confidence against the vice-president.

8. As the petitioner did not get any relief from any of the authorities, she filed this petition on 13-10-1967 in this Court and claimed the reliefs to which we have already adverted.

9. Returns have been filed on behalf of the respondent No. 1, the president, and also the respondents Nos. 4 and 5.

10. The respondent No. 3, the Collector, has also filed a return. With regard to the allegations in paragraphs 6, 7 and 8 of the petition, the Collector states that they do not concern him and he does not want to traverse these allegations. With regard to paragraph 9 of the petition, the Collector has stated that the petitioner had sent a copy of her application dated 24-9-1967, addressed to the Station Officer, Tumsar, to the Collector, that the petitioner was not allowed to enter the hall to attend the meeting convened on 23-9-1967 and the Collector was aware that she had made a complaint about it to higher authorities. It appears that the petitioner was removed from the place of the meeting on her refusal to obey the direction to go away because of mounting tension. The Collector has also admitted in paragraph 6 of the return that the petitioner had made an application to the Collector and prayed for stay, that the Collector thereupon asked for a report from the President, Municipal Council, as the Collector felt that the report from the president was necessary before any order could be passed on that application, and that the report was received from the president on 30-9-1967 by which time the meeting scheduled on 23-9-1967 was already held and, therefore, there was no question of granting stay. The Collector had admitted that on receipt of the report from the President, the Superintendent of Police, Bhandara, was asked to report the result of the investigation already started on the report made to the police by the petitioner. In paragraph 9 of the return, the Collector has stated that it was not necessary to hold any inquiry about the authenticity or the true character of the resignation before it was accepted. The Collector has admitted that the resignation on which action is taken has to be a genuine document, but the resignation, according to the Collector, became effective as soon as it was received by the president and the councillor ceased to hold office. In paragraph 10, the Collector has

stated that it was not correct that the petitioner continued to be a councillor till the vacancy is filled up by the appropriate procedure. According to the Collector, the petitioner ceased to be a councillor as soon as the resignation was received by the president.

11. One of the reliefs asked for by the petitioner in this petition among others is a direction to the respondent No. 3, the Collector, not to treat the petitioner as having ceased to be a councillor.

12. In the course of the arguments, it is suggested that the Collector was bound to hold an inquiry before he could decide whether a vacancy had occurred and whether there was necessity of holding an election for electing a new councillor from the ward from which the petitioner was elected. It is admitted that no such inquiry has been held and it is common ground that the Collector had issued instructions for holding an election of a councillor from Ward No. 21 from which the petitioner was elected. It is stated on behalf of the respondent No. 3 that as soon as the notice of the writ in this Court regarding this petition was received, no further steps have been taken for holding the election.

13. In our opinion, it is not necessary for this Court to adjudicate on the complaint of the petitioner whether she has validly and properly tendered resignation of her office and whether the communication dated 23-9-1967 amounts to a valid resignation of the office by the petitioner. We have come to the conclusion that in view of the provisions of Sections 41 and 48 of the Municipalities Act, Rule 63 of the Maharashtra Municipalities Election Rules, 1966, it is the Collector who is the competent authority to decide whether a vacancy has occurred in the office of a councillor on account of the resignation of his office given by that councillor. How this is so is to be considered by reference to certain provisions of the Municipalities Act.

14. Under the scheme for projecting the municipal councils to be constituted under the new Municipalities Act, the Municipal Council is to be composed of elected, co-opted and nominated members. The mode of election of councillors is provided in Sections 10 to 17. Section 18 provides for nomination of a councillor in a specified contingency and that contingency arises if at a general election or by-election no councillor is elected from any ward, and if there is a failure to elect a councillor at a fresh election by the electorate, then such a vacancy can be filled by nomination of a duly qualified person by the State Government. It is only in such a contingency that a person can be nominated as a councillor by the State Government. Provision is made for co-option of members under Section 31 (6). Section 19 requires the names of elected members to be published in the official Gazette and in certain contin-

gencies the name of a nominated councillor is also required to be published in the official Gazette. Similarly, under Section 20, the names of co-opted councillors are also required to be published by the Collector in the official Gazette. Section 21 provides for resolution of disputes in respect of election, co-option or nomination of councillors. A special feature of the legislation is that it provides for an election dispute being raised even in respect of a co-opted member.

15. The term of office of councillors is provided for in Section 40, and the term of office is deemed to commence on the date of the meeting after the general election held to elect the president and the vice-president under Section 51. The term of office of a nominated councillor is to commence from the date of the meeting also, unless he is nominated under the contingency provided in sub-section (2) of Section 18. Then follows Section 41 regarding resignation of councillors and that section is as follows:—

“41. (1) A councillor may resign his office by tendering his resignation in writing to the president.

(2) Such resignation shall be effective on its receipt by the president.”

16. Section 42 makes provision for circumstances in which a councillor may be removed from office. Under Section 44, provision is made about disqualification of councillors and the consequences of either having such disqualifications or becoming disqualified after he enters upon his office as a councillor. We may notice here the provisions of sub-section (3) of Section 44 which expressly invests a power in the Collector to give a decision whether on his own motion or on an application made to him, regarding a councillor having incurred a disqualification or become disabled from being a councillor. Special provision for defaulting councillors who incur a disqualification for failure to pay taxes is provided in Section 45, and so far as this provision is concerned, procedure is provided for having the question of adjudication of such a councillor being a defaulter or otherwise in sub-sections (4) and (5). Section 48 deals with casual vacancies and the manner in which they are to be filled up. That section is as follows:—

“48. (1) Where a vacancy occurs through the non-acceptance of office by any elected, co-opted or nominated councillor or such person being disqualified for becoming or continuing to be a councillor or any election being set aside under the provisions of Section 21 or the death, resignation, removal or disability of a councillor previous to the expiry of his term of office, the vacancy shall be filled by a by-election or co-option or nomination according as the councillor was elected or co-opted or nominated:

Provided that no by-election shall be held or co-option or nomination made to fill up a vacancy occurring within four months prior to the date on which the term of office of the councillors of the council expires.

(2) The Chief Officer shall report to the Collector every vacancy in the office of a councillor within fifteen days of the occurrence of the vacancy or within fifteen days of his becoming aware of the vacancy, whichever is later."

17. A perusal of Section 48 will show that when a vacancy occurs, among other grounds, by reason of resignation of a councillor, the vacancy is to be filled by a by-election if the resigning councillor was an elected councillor. It is common ground that the procedure for holding a by-election is the same as that for holding an election of a councillor. Special provision has been made in Section 48 enjoining a duty on the Chief Officer to report to the Collector every vacancy in the office of a councillor within a fortnight of the occurrence of the vacancy or within fifteen days of his becoming aware of the vacancy.

18. We may now consider the relevant provision in the rules framed by the State Government, for holding elections. These rules are called the Maharashtra Municipalities Election Rules, 1966. Rule 63 of these Rules is material and relevant. That rule is as follows:—

"Casual vacancies.—Whenever a report is received by the Collector from the Chief Officer under sub-section (2) of Section 48 of a vacancy in the office of councillor, the Collector shall fix a date, as soon as conveniently may be, for holding by-election to fill the vacancy and the provisions of these rules shall thereupon mutatis mutandis apply accordingly."

It is thus obvious that the Rule 63 of the Election Rules casts a statutory duty on the Collector to fix a date for holding a by-election as soon as he receives a report under Section 48 (2) about the vacancy having occurred in the office of a councillor. In other words, this duty is required to be performed by the Collector only when a vacancy has occurred in the office of a councillor but not otherwise. The duty to report about a vacancy having occurred is not the sine qua non for the Collector to exercise his power under Rule 63 but the condition precedent for exercise of that power or performance of the duty is the occurrence of the vacancy. Vacancy in this context must mean a lawful and valid vacancy in the office of the councillor and such a vacancy is brought about by one or several modes to which reference is made under Section 48. A vacancy in the office of a councillor may occur either by—

(1) non-acceptance of office by an elected councillor; or

(2) such person being disqualified for becoming or continuing to be a councillor, or

(3) the election of the councillor being set aside under the provisions of Section 21; or

(4) the death of the councillor; or
(5) the resignation of the councillor; or
(6) the removal of the councillor; or
(7) the disability of the councillor to continue in office.

Whether the vacancy occurs by reason one or the other circumstances enumerated in Section 48 of the Act, no by-election can be held unless there is a vacancy in the office.

19. If the power of the Collector to hold a by-election to the office of a councillor is thus made to depend on there having occurred a vacancy in the office of such a councillor in our opinion, it is implicit in this that the Collector should be satisfied that in fact and in law a vacancy has occurred in the office of the councillor. In other words, the Collector cannot exercise his power of holding a by-election under Rule 63 which he is enjoined to do, unless the Collector is satisfied that there has been a lawful vacancy in the office of the councillor concerned. It cannot, therefore, be said that it is the report of a vacancy having occurred which the Chief Officer is required to give under Section 48 (2) which furnishes a cause of action or ground for the exercise of the power under R. 63 but it is the occurrence of a valid vacancy in the office of a councillor from which springs that power. The power is to be exercised as soon as there is a valid vacancy in the office of a councillor but the power cannot be exercised unless there is a valid vacancy in that office. Thus, there is a twofold obligation on the Collector in exercise of his powers under Rule 63 of the Election Rules.

20. It was urged by the learned counsel on behalf of the Collector that there being no express power in the Collector to hold an inquiry *whether a vacancy has lawfully occurred* in the office of a councillor, the Collector cannot be expected under the scheme of the statute or the rules to exercise such powers. It is argued that in contrast to the contingency of a vacancy occurring on the resignation of his office by a councillor, power is given by the Legislature itself when a vacancy occurs on account of a councillor having incurred a disqualification under Section 44, or the election, co-option or nomination of a councillor is challenged under Section 21. In other words, what is urged is a specific machinery for adjudication of the validity of a vacancy having occurred in the office of a councillor as provided under Sections 44 and 21, and if the Legislature did not think it necessary to make a like provision for adjudication regarding the vacancy occurring in the office of a councillor by reason of death or resignation or under other circumstances, then such a power cannot be read in the duty under Rule 63 coupled

with the provisions of Section 48 to hold a by-election in case of a vacancy occurring in the office of a councillor.

21. A somewhat similar situation arose under the provisions of the Bombay Village Panchayats Act, 1959, and the matter was heard by a Division Bench of this Court to which one of us (Abhyankar J.) was a party in *Ramkrishna v. Secy., Village Panchayat, Borjai*, 1966 Mah LJ 937 = (AIR 1967 Bom 334). In that case, a motion of no-confidence was passed and the question was whether a vacancy had occurred in the post of the office-bearer against whom the motion of no-confidence was alleged to have been passed. Section 43 of the Bombay Village Panchayats Act makes provision for filling up of vacancies and that section is as follows:—

“43. (1) Any vacancy of which notice has been given to the Collector in the prescribed manner due to the disablement, death, resignation, disqualification, absence without leave or removal of a sarpanch or upa-sarpanch or member shall be filled by the election of a sarpanch or upa-sarpanch or member who shall hold office so long only as the sarpanch, upa-sarpanch or member, in whose place he has been elected, would have held office if the vacancy had not occurred:

Provided that if no member is so elected within two months from the date on which notice of the vacancy is given to the Collector the Standing Committee shall, as soon as possible, appoint a person who is qualified to be elected, and the person so appointed shall be deemed to have been duly elected under this sub-section:

Provided further that notwithstanding anything contained in Section 10, if the vacancy occurs within four months preceding the date on which the term of office of the members of the panchayat expires under Section 27, the vacancy shall not be filled.

(2) The meeting for the election of a sarpanch under sub-section (1) shall be convened by the Collector in the manner described in sub-section (1) of Section 33.”

22. The question that arose was whether the Collector could perform his duty on receipt of a notice of vacancy having occurred on account of the removal of an office-bearer by passing of a motion of no-confidence and the Collector was competent to adjudicate on the validity of such action. This Court observed in paragraph 6 (of Mah LJ) = (Pr. 6 of AIR) of that decision as follows:—

“There is no provision in the Act under which the validity of a motion of no-confidence, alleged to have been passed against an office-bearer, or a member of the Village Panchayat, can be challenged as is possible when an election to an office is challengeable by an election petition. In our opinion, however, the provisions of Section 43 itself postulate that the autho-

rity to whom notice of vacancy is required to be given by the Secretary is invested with the power to determine whether the notice that is given to him is a valid notice and is in respect of a valid vacancy having been caused. It is difficult to construe the provisions of Section 43 of the Act as if the Collector is merely required to work as a machine or post office to hold election to an office purported to have fallen vacant, the moment he receives a communication to that effect from the Secretary. In numerous cases that have come to this Court, it is obvious that allegations are frequently made about the validity of the meeting at which a motion of no-confidence is alleged to have been passed, about the sanctity of the proceedings themselves, about the signatures of members who are alleged to have recorded their votes, about the presence of the members, about giving and not giving adequate opportunity to the person concerned to explain the charges brought against him in the motion of no-confidence and further questions of facts which would invalidate the proceedings, and consequently the efficacy of the motion of no-confidence on the basis of which a notice is required to be given by the Secretary of the occurrence of the vacancy to the Collector. The Legislature, in our opinion, having admittedly chosen the Collector as the person to whom notice of the vacancy has to be given and as the authority which should take steps to hold fresh elections for filling the vacancy if validly occurred, must be intended to invest the Collector with all the implied powers in determining about the validity of the notice and also the validity of the resolution which occasioned the giving of such a notice. We are fortified in this view not only because there is no other provision in the Act whereby a person against whom a notice of no-confidence is alleged to have been passed, can seek redress, but also because under the proviso the Standing Committee of the Panchayat is empowered to make an appointment to office of a member which is alleged to have fallen vacant if an election is not held within two months from the date of the notice of election given to the Collector. Cases have sometimes come before this Court where the Secretary whether by design or by mistake failed to give notice, and in that contingency the Standing Committee is empowered to fill in the post by appointment.”

23. In our opinion, the situation arising under the provisions of the Municipalities Act under Section 48 is not different and the duty to hold a by-election on the ground that there has been a resignation of the office by a councillor must imply a duty to be satisfied that there has been a valid vacancy on account of a valid resignation. It is true that the Legislature considered it necessary to make specific provisions for inquiry into disqualifications resulting in unseating of a councillor under

Section 44 or to provide for a special machinery by way of election petition to challenge the initial election, co-option or nomination of a councillor; we are not inclined to agree with the contention that those are the only two contingencies in which an inquiry need be made. If it is correct to say that there can be no by-election unless there is a vacancy in the office of a councillor, then we must find some authority within the Act itself or the rules competent to decide whether there has occurred a vacancy in the office of a councillor. So far as the vacancy occurring as a result of resignation is concerned, Section 41 makes no provision giving any discretion to the president either to accept or not to accept the resignation. The resignation, according to Section 41, sub-section (2), becomes effective on its mere receipt by the president. Therefore, there is no means at that stage, even if the president were so inclined, to find out whether the resignation is genuine, bona fide, valid or otherwise in conformity with the provisions of law. When a piece of paper is brought to the president purporting to be a resignation of a councillor, possibly the president acts as a matter of course receiving it as he must receive any other paper addressed to him, and as soon as such a communication is received, it has the legal effect of the resignation being effective. In our opinion, the Legislature could never have intended that in case of a dispute arising or a doubt arising whether a person who has achieved franchise and had acquired the status of a councillor has, in fact tendered resignation of his office, no machinery should exist to adjudicate when such a question or doubt is raised. That adjudication is possible under the provisions of the Act and the rules when the question of a by-election on account of the alleged tender of resignation arises. The duty to hold a by-election having been cast on the Collector, the Collector in his turn must be satisfied on proper inquiry that in fact the office of the councillor has become vacant by a valid resignation.

24. We are not inclined to accept the contention that the Legislature not having provided specifically as it has done under Sec. 21 or Section 44 of the Municipalities Act for an inquiry or adjudication on the validity of a resignation alleged to be given by a councillor, it should be held that it was not the intention of the Legislature that any such inquiry or adjudication should be made. As is observed in the previous decision arising under the Bombay Village Panchayats Act, the Legislature takes care to make provisions which are self-contained. Even having made provision for certain contingencies which normally arise, such as incurring of disqualification either before or after the election, so as to affect the right of a councillor to continue as a councillor disputes about election, co-

option, or nomination which are fairly common in a democratic election, the duty to fill in an office which has become vacant because a councillor is alleged to be dead or to have resigned must also involve and imply a duty to be satisfied by independent authority that the office has in fact become vacant. If the Collector is that authority, we see no reason why the Collector should be considered powerless to exercise this function. In our opinion, therefore, the provisions of Section 48 read with Section 41 of the Act and Rule 63 of the Election Rules sufficiently warrant the conclusion that in case a vacancy alleged to have occurred in the office of a councillor on account of resignation is challenged either by the councillor concerned or at the instance of any one competent to make such a challenge, and when the matter is before the Collector on a report being received under Section 48 (2) to make arrangements for holding a by-election, the Collector ought to satisfy himself that the vacancy has, in fact, occurred.

25. In the instant case, the Collector was apprised by the communication from the petitioner and other persons also that the so-called resignation alleged to be given by the petitioner is not a conscious act of resignation of her office by the petitioner. The petitioner made several allegations as to the circumstances in which her signature is alleged to have been taken on a document by representing that it was in respect of an altogether different matter. Whether this is so or not is a matter which the Collector at the inquiry to be held may consider and decide.

26. We, therefore, hold that the petitioner has an adequate remedy and the petitioner having made a complaint to the Collector, may be under a wrong section of the Municipalities Act, the Collector ought to have held an inquiry. In fact, the Collector did persuade himself to call for a report both from the president as well as from the police. It is, therefore, undoubtedly a matter which required careful consideration. But possibly, in the absence of a specific provision to respondent No. 3 considered that he had a statutory power to hold an inquiry and decide whether the petitioner had in fact validly tendered resignation of her office as a councillor. In view of what we have stated above, it must be held that the Collector has no such power and is required to exercise it in a case like the present one where the petitioner challenges that she has not voluntarily resigned her office as a councillor.

27. In the result, we dismiss the petition, but we direct that the respondent No. 3 shall hold an inquiry into the allegations made by the petitioner as to the circumstances in which her signature was taken on the communication received by the respondent No. 1 and decide whether the petitioner can be said to have re-

signed her office according to law. The Collector will, therefore, decide whether a vacancy has occurred in the office of the councillor so as to require by-election being held. In the result, the petition fails and is dismissed, but there will be no order as to costs.

Petition dismissed.

AIR 1970 BOMBAY 177 (V 57 C 32)

K. K. DESAI AND VAIDYA, JJ.

S. Kumaran, Petitioner v. The Competent Authority (The Assistant Housing Commissioner, Maharashtra Housing Board, Bombay and another), Opponents.

Special Civil Appln. No. 262 of 1966 D/-12-9-1969.

(A) Houses and Rents — Bombay Housing Board Act (69 of 1948), S. 53-A (1A) — Order of eviction — Competent Authority must disclose details to delinquent.

Sub-section (1A) provides that the Competent Authority should inform the delinquent occupant by a notice in writing of the grounds on which the proposed order was intended to be made. This provision either has the effect of providing that every and all relevant facts come to the knowledge of the Competent Authority will have to be in complete details disclosed and furnished to the delinquent occupant by the notice mentioned in this part of the sub-section or it has the meaning of mentioning of grounds in the notice and furnishing of all the relevant materials in complete details to the delinquent occupant at a subsequent stage. Whatever be the position, it is quite clear, having regard to what is mentioned in this part of the sub-section, that, before any order was passed by the Competent Authority, it was the right of the delinquent occupant to be furnished with complete details of the positive evidence on the basis whereof the Competent Authority proposed that the order would be made against the delinquent occupant. It is after this material was in possession of the delinquent that he would have the reasonable opportunity of tendering an explanation and producing evidence as mentioned in the second part of the sub-section. It is on the basis of the information thus come to the knowledge of the delinquent occupant that he would have a right to show cause and defend himself. It is in connection with these matters that he is given a right to file a written statement and appear before the officer with the assistance of an attorney or pleader.

(Para 10)

(B) Houses and Rents — Bombay Housing Board Act (69 of 1948), S. 53-C — Order of eviction — Appellate authority cannot take note of subsequent events to confirm order.

An appellate authority cannot confirm the order made by the first Tribunal on the basis of the facts and circumstances which are brought to its notice in an irregular manner at the hearing of an appeal. The appellate authority is, therefore, wrong in confirming the eviction order on the basis of facts which had transpired after the date of the order of eviction and were brought to its notice at the stage of the hearing of the appeal. (Para 10)

K. K. Singhavi with M. S. Ramamurty, for Petitioner; M. C. Shah, for Respondent No. 1.

K. K. DESAI, J.: In this petition under Article 227 of the Constitution, the petitioner has challenged the legality of the order of the Competent Authority, being the Assistant Housing Commissioner, South Bombay, dated September 13, 1963, made under Section 53-A of the Bombay Housing Board Act, 1948, directing the petitioner to vacate tenement No. 28/991 situated at Tilak Nagar, Chembur, which was then being occupied by the petitioner as a tenant and the appellate order dated February 10, 1966, made by the State Government confirming the above order of eviction.

2. The facts which require to be noticed are as follows: The petitioner was a tenant of the Housing Board in respect of the above premises from 1954 and was paying rent at the rate of Rs. 28.55. His case is that he got married in 1958 and he had been continuously residing in the tenement. He was served with a show-cause notice dated February 23, 1963, by the Competent Authority whereby he was informed that—

(1) he had sublet without the permission of the Housing Board the whole or part of the premises; and

(2) he had accommodated persons and he himself was not staying in the tenement.

In pursuance of the provisions in sub-section (1)(a) of Sec. 53-A of the Bombay Housing Board Act, 1948, he was called upon to tender an explanation and produce evidence, if any, and show cause within 14 days from the date of service of the notice as to why an order of eviction on the above two grounds should not be made against him. The petitioner by his reply dated April 15, 1963, stated that he was surprised about the two grounds mentioned in the above show-cause notice and stated that the facts mentioned were totally wrong. He further stated that it should be noted that no one except those authorised by the Housing Board were staying with the petitioner in the tenement and he himself was occupying the premises. He submitted that the statements made would meet with the requirements.

3. Nothing further transpired and the above impugned order dated September 13, 1963, was passed against the petitioner directing him to vacate the tenement. The

respondent's case is that the order made in September 1963 was pasted on the tenement. The petitioner's case is that the order was never served on the petitioner and ultimately, an order dated March 5, 1965, was pasted on the tenement stating that the petitioner had not vacated the tenement in spite of Competent Authority's eviction order having been served on him. He was informed that vacant possession of the premises would be taken by execution of warrant of possession unless he handed over the same forthwith to a representative of the Housing Board. By further correspondence the petitioner stated that he had never been served with the above order of eviction and time should be given to him for filing an appeal. He was informed that the eviction order was served on him on September 22, 1963. The petitioner then filed an appeal on March 8, 1965, to the State Government under Section 53-C of the Act. By the appellate order dated February 10, 1966, on behalf of the State Government, it was recited that it had called for a report from the Competent Authority and upon the consideration of the contents of the report after hearing the petitioner, it had formed an opinion that the eviction order was fit and proper on the ground that the petitioner was not found to be staying in the tenement with his family and had accommodated number of unauthorised persons all the time in the tenement and the petitioner's case that he was residing in the tenement with his wife and son was not correct. The order of eviction was confirmed.

4. In the affidavit in reply made by Padmakar Jagannath Tipais, the following further facts were stated: The tenement was checked on various occasions on 7-2-1963, 3-7-1963, 20-3-1964, 27-5-1964, 7-6-1964, 2-7-1964, 21-10-1964, 4-3-1965, 9-7-1965. An unauthorised occupant had given under his signature a statement on February 7, 1963, to the effect that the petitioner was residing in another tenement No. 19/218 at Chembur. One Thankappan and one Surendran were residing in the tenement on February 20, 1964. One K. M. Pillay and N. Jayasingh were similarly residing unauthorisedly in the tenement. The information gathered was that the petitioner was not a married person and in June 1964 he was residing in the tenement with his sister's husband, brother and nephew. The Competent Authority was satisfied that the petitioner had committed breaches of terms and conditions of tenancy and, therefore, the eviction order dated September 13, 1963, was passed.

5. It requires to be stated that the petitioner's case is that the eviction order was never served on the petitioner at any time. He had instituted the appeal to the State Government in the time prescribed.

6. The contentions made on behalf of the petitioner in support of the reliefs claim-

ed in the petition are that in the matter of making of the impugned order of eviction dated September 13, 1963, the Competent Authority had committed breach of the provisions in sub-section (1)(a) of Section 53-A relating to affording of reasonable opportunity to the petitioner before the eviction order could be passed under that section against the petitioner. The contention was that having regard to what is stated in the affidavit in reply, the information on the basis whereof the show-cause notice dated February 23, 1963, was served on the petitioner was a statement in writing under signature of an alleged unauthorised occupant made on February 7, 1963, disclosing that the petitioner had sublet the tenement to some unauthorised persons. Apart from that statement, no other information was the basis of the show-cause notice served on the petitioner. This statement was not disclosed to the petitioner and was not furnished to him at any time either before, along with or after the show-cause notice. Some information appears to have been gathered by the Competent Authority on July 3, 1962. Apart from these two pieces of information evidence, the Competent Authority was not in possession of any facts (at the date of the order of ejectment dated September 13, 1963) towards the allegation of defaults made by the petitioner and mentioned in the show-cause notice. It was obligatory under the provisions of sub-section (1)(a) of Sec. 53-A on the Competent Authority before arriving at any decision about evicting the petitioner from the tenement to convey to the petitioner both the above pieces of evidence to enable the petitioner to show cause and in that connection to tender explanations and produce evidence to prove that the allegations of defaults made against the petitioner were false. Since the order of eviction was made on the basis of the above two pieces of evidence which were not brought to the knowledge of the petitioner, reasonable opportunity was not afforded to the petitioner and the order was in violation of provisions in sub-section 1(a) of Section 53-A in connection with affording of opportunity to the petitioner to show cause. For this reason, the order must be set aside.

7. The further contention was that the scheme of the above sub-section (1)(a) and the provision of appeal as contained in Section 53-C and the withdrawal of jurisdiction of Civil Courts under Sec. 53-D goes to show that in the matter of depriving occupants of the premises belonging to Housing Board by ejectment orders, it was intended by the Legislature that a full and complete opportunity of reasonable hearing similar to that in a Court of law must be provided to the occupants. The appellate authority in this case on the face of the appellate order proceeded to decide on information gathered by the Competent Auth-

ority much subsequent to the date of the order of ejectment. No Tribunal of appeal could proceed to decide any appeal on fresh facts brought on record after the order of the first Tribunal. The order of the appellate authority was accordingly entirely contrary to ordinary principles of law and was liable to be set aside. The second argument was that in fact the two allegations made against the petitioner were false and the petitioner was, therefore, not liable to be ejected.

8. In connection with the above first contention, it requires to be noticed that under Section 53-A (1), the State Government is empowered to appoint officers of certain rank as Competent Authority for performing functions of the Competent Authority as prescribed in Chap. V-A of the Act. Under Section 53-A (1), this authority is empowered notwithstanding anything contained in any law for the time being in force to make an order of eviction against the unauthorised occupant of the premises of the Housing Board on the ground mentioned in sub-section (1). Sub-section (1A) provides:

"Before an order under sub-section (1) is made against any person, the Competent Authority shall inform the person by notice in writing of the grounds for which the proposed order is to be made and give him a reasonable opportunity of tendering an explanation and producing evidence, if any, and to show cause why such order should not be made, within a period to be specified in such notice.....Any written statement put in by such person and documents produced in pursuance of such notice shall be filed with the record of the case and such person shall be entitled to appear before the officer proceeding in this connection by an advocate, attorney or pleader....."

Under sub-section (2) powers of executing ejectment order are conferred on the Competent Authority, Section 53-C provides for an appeal to the State Government within a period of one month from the date of service of the ejectment order. The State Government is under sub-section (3) of that section authorised to stay the execution of the previous orders made. Section 53-D is for depriving the ordinary Civil Courts of jurisdiction in respect of the examination of the correctness and legality of the orders passed by the State Government and Competent Authority.

9. In connection with true construction and effect of the provisions in sub-section (1A) of Section 53-A, it first requires to be remembered that the scheme in the section is for depriving the ordinary Civil Courts of jurisdiction to pass orders of eviction in respect of the premises of the ownership of the Housing Board and creates an administrative tribunal empowering it to eject occupants from premises belonging to the Housing Board. Apparently, the Legis-

lature was desirous that the prescribed administrative tribunal must not act unreasonably and arbitrarily and the rights of occupants must not be affected unreasonably and in that connection reasonable safeguards must be provided. It is towards that objective that right of appeal was created under Section 53-C and provision was made under sub-section (1A) of Section 53-A for compelling the Competent Authority to give reasonable opportunity to show cause to the concerned delinquent occupants. Now, on the language of the sub-section (1A), the submission on behalf of the respondents has been that the opportunity that is afforded to a delinquent occupant is to show cause by himself. The obligation was on such delinquent occupant to produce his evidence in defence. The right given to him is only of tendering explanations by himself. Unless he claimed a hearing, it was not necessary for the Competent Authority to fix any dates for a hearing. It was not necessary that such dates should be fixed and thereby only reasonable opportunity would be available to the delinquent occupant. The obligation was on such a delinquent occupant to tender his explanations and mere denial by his written statement was entirely insufficient. The delinquent occupant would know of his own misconduct and the provision in sub-section (1A) was towards enabling him to tender his own evidence—documentary and oral—towards explaining his misconduct. Now, it appears to us that to construe the provisions in this sub-section in the manner suggested on behalf of the respondents would render the provisions entirely nugatory in respect of the opportunity that the Legislature intended that the delinquent occupant must have and would further render the provisions in the section ultra vires of the Constitution, inasmuch as the occupant's proprietary right of occupation would be liable to be destroyed without any safeguards.

10. In this connection it first requires to be remembered that Legislature could not have forgotten that ordinarily in every trial before any tribunal, the positive will be required to be proved by those who affirmed the positive. The Legislature was always aware that burden of proof could never be imposed by any Tribunal on a defendant to prove the negative that he affirms by way of defence. In the enquiry to be held under sub-section (1A), having regard to sub-section (1), amongst others, the following issues would arise for decision:—

(1) Whether the tenant had failed to pay rent lawfully due from him in respect of the premises in question for a period of more than two months?

(2) Whether the tenant had sublet without the permission of the Board the whole or any part of the premises?

(3) Whether the tenant had committed and was committing acts contrary to the provisions of clause (o) of Section 108 of the Transfer of Property Act?

(4) Whether the tenant had made and was making material additions or alterations in the premises without the previous written permission of the Board?

(5) Whether the tenant had acted in contravention of the directions, express and/or implied, under which he was authorised to occupy the premises?

(6) Whether the person in occupation of the premises of the ownership of the Board was an unauthorised occupant?

The trial before the Competent Authority would, therefore, be to establish the truth of the questions of facts and law raised in the above issues. Affirmatives will have to be the findings of the Competent Authority before it could pass any relevant order by way of decree for rents and/or eviction or of any other alternative nature. In that connection sub-section (1A) provided that the Competent Authority should inform the delinquent occupant by a notice in writing of the grounds on which the proposed order was intended to be made. This provision either has the effect of providing that every and all relevant facts come to the knowledge of the Competent Authority will have to be in complete details disclosed and furnished to the delinquent occupant by the notice mentioned in this part of the sub-section or it has the meaning of mentioning of grounds in the notice and furnishing of all the relevant materials in complete details to the delinquent occupant at a subsequent stage. Whatever be the position, it is quite clear, having regard to what is mentioned in this part of the sub-section that before any order was passed by the Competent Authority, it was the right of the delinquent occupant to be furnished with complete details of the positive evidence on the basis whereof the Competent Authority proposed that the order would be made against the delinquent occupant. It is after this material was in possession of the delinquent occupant that he would have the reasonable opportunity of tendering an explanation and producing evidence as mentioned in the second part of the sub-section. It is on the basis of the information thus come to the knowledge of the delinquent occupant that he would have a right to show cause and defend himself. It is in connection with these matters that he is given a right to file a written statement and appear before the officer with the assistance of an attorney or pleader. It is in this connection that he has been given right to produce all his evidence including documentary evidence. This being the scheme of sub-section (1A), it is surprising that an argument is advanced on behalf of the respondents that the delinquent occupant under sub-section (1A) was himself and by

himself required to lead his own evidence in the first instance without having any opportunity to cross-examine the positive evidence which could be led in support of the issues which arise for decision in the enquiry to be held under the sub-section. We have no doubt that in this case the Competent Authority entirely failed to furnish to the petitioner any facts on which reliance had been placed on behalf of the Competent Authority to make the proposed order of eviction. The Competent Authority, therefore, failed to furnish an opportunity within the meaning of sub-section (1A) to the petitioner when it passed the eviction order dated September 13, 1963. That order having been made in the above circumstances could not justifiably and lawfully be confirmed by the State Government as appellate authority. It is trite that an appellate authority cannot confirm the order made by the first Tribunal on the basis of the facts and circumstances which are brought to its notice in an irregular manner at the hearing of an appeal. The appellate authority was, therefore, wrong in confirming the eviction order on the basis of facts which had transpired after the date of the order of eviction and were brought to its notice at the stage of the hearing of the appeal. The order of the appellate authority is, therefore, liable to be set aside.

11. In this petition under Article 227 of the Constitution, we are not concerned to make any findings on the above second contention made on behalf of the petitioner.

12. For the reasons mentioned above, petition succeeds. Rule is made absolute with costs.

Petition allowed.

AIR 1970 BOMBAY 180 (V 57 C 33)

PATEL AND MADAN, JJ.

Shri Jai Nath Wanchoo, Petitioner v. The Union of India and others, Respondents.

Spl. Civil Appln. No. 2900 of 1967 D/- 16-4-1969.

Constitution of India, Arts. 310, 309, 311 — Expression "Holds office during the pleasure of the President or Governor" in Article 310 — Exceptions — Provisions of Art. 309 and Rules made thereunder cannot impinge on the overriding power of the President or the Governor under Art. 310 — Contractual employee working as a lecturer in National Defence Academy under contract with President of the Union — Termination of services for insubordination under relevant clause of contract following enquiry under R. 14 of Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Breach of Rule not justifiable at the instance of employee. (1967) 2 Lab LJ 783 (Cal), Dissented.

LM/AN/G75/69/GGM/M

The phrase "during the pleasure of the President or Governor" is not a new phrase introduced for the first time in our Constitution; it is an adaptation in phraseology appropriate to our Constitution of the well-known and familiar phrase "at the pleasure of the Crown" in English law. From the earliest times the well-established rule of English law was that public officers and servants of the Crown hold office at the pleasure of the Crown, the theory of English constitutional law being that the king can do no wrong, and accordingly the services of a servant of the Crown could be terminated without assigning any reason and no action can be maintained in the King's Court for wrongful dismissal. The same rule appears to have been applied to the servants of the East India Company. It certainly applied to servants of the Crown after the territories of the East India Company and their administration was taken over by the British Crown. The phrase "at the pleasure of the Crown" has its origin in the Latin phrase "*durante bene placito*" (during pleasure) which means that the tenure of the office of a Civil Servant, except where it is otherwise provided by statute, can be terminated at any time without cause assigned. (Para 8)

A plain reading of Arts. 309, 310 and 311 of the Constitution shows that Art. 310 is the dominant Article. The power conferred by Article 309 upon appropriate Legislatures to pass Acts and upon the President in the case of the Union and on the Governor in the case of State to make rules regulating the recruitment and conditions of service of Government servants is expressly made subject to the provisions of the Constitution. The Acts and rules so made would, therefore, be subject to what is provided by Articles 310 and 311. Article 310 is not made subject to the other provisions of the Constitution in the same manner as Article 309 is. Article 310 operates in its own right and by itself, the only restriction to be found therein being in the opening words "Except as expressly provided by this Constitution". Thus, apart from the cases expressly provided for in the Constitution itself, the rule laid down in Article 310 that every Government servant holds office during the pleasure of the President or the Governor, as the case may be, remains paramount. Such exceptions in the Constitution are to be found in Articles 124, 148, 218 and 324 in the case of tenure of Supreme Court Judges, Comptroller and Auditor-General, High Court Judges and the Chief Election Commissioner. An exception is also to be found in Article 311 in respect of the classes of Government servants specified in that Article, namely, members of the Union Civil Service or an all-India service or a State service or holders of civil post under the Union or a State. Thus, under our Constitution, as

under the Government of India Act, 1935, the rigour of the English rule of common law regarding the holding of office of a public servant only during the pleasure of the Crown has been mitigated to the extent provided for by Article 311. Since, however, Article 311 does not include within the scope of its constitutional safeguards a member of a defence service or the holder of any post connected with defence, the constitutional safeguards available to other Government servants are not available to members of the defence service or to civilians in the defence services. The reason for this is obvious. At all times and in all countries it has been recognised that the safety and the defence of a country and even its very freedom and independence depend upon an efficient defence service. Far stricter discipline and instant unquestioning obedience are, therefore, required from those in any manner connected with the defence of the country. The vast complex machine which the armed forces have become in modern times require such discipline and obedience not only from the actual combat forces but from all persons in any manner connected with defence. (Para 9)

A reading of Articles 309 and 310 makes it obvious that Article 309 does not operate as an exception or a proviso to Article 310 just as Article 311 does. As Article 309 is expressly made subject to the provisions of the Constitution, no Act of a Legislature and no rule made by the President or a Governor under Article 309 can impinge upon the overriding power of the President or the Governor under Article 310 except in so far as such Act or rule reproduces the provisions of an exception to Article 310 enacted in the Constitution itself. Except in these cases, any Act of a Legislature or a rule made by the President or the Governor under Article 309 must remain subordinate to the overriding power conferred upon the President and the Governor by Article 310. The 1965 Rules have been made by the President under Article 309 and they can, therefore, operate only within the scope of Article 309 and cannot travel beyond its ambit. Thus, any provision in the 1965 Rules which impinges upon the pleasure of the President or the Governor under Article 310, except to the extent the same is curtailed by Article 311, would not be operative. Any action in violation of Article 311 would be a violation of the Constitution itself and would be actionable inasmuch as the aggrieved Government servant would then be seeking to enforce his constitutional right; but where Article 311 does not apply, the Government servant can have no remedy at law either by way of a suit or a writ petition. To say that he has such a remedy in the absence of a provision in that behalf in the Constitution itself would be to negative the overriding operation of Article 310. AIR 1961 SC

751, Rel. on; AIR 1937 PC 31 and AIR 1954 SC 245 and AIR 1948 PC 121 and AIR 1954 SC 369 and AIR 1956 SC 36 and AIR 1958 SC 300 and AIR 1964 SC 600 and AIR 1965 SC 868 and AIR 1969 SC 118 and O.S. Appeal No. 52 of 1956 D/-11-4-1958 (Bom.) and AIR 1960 Bom 14 and AIR 1960 Bom 101 and AIR 1960 Bom 431, Ref.; F.A. No. 109 of 1959 D/-16-12-1964 (Bom.) and Misc. Petn. No. 256 of 1964 D/-19/20-10-1965 (Bom.), Dist.; AIR 1966 Madh Pra 82 and C.A. No. 1185 of 1965 D/-6-2-1967 (SC) and AIR 1968 Pmij 312 (FB) and AIR 1960 Madh Pra 119, Ref.; (1967) 2 Lab LJ 782 (Cal), Dissented.
(Paras 6, 9, 10, 15, 16 and 23)

Where the contractual services of a lecturer in National Defence Academy are terminated for insubordination resulting in his reversion under the relevant clause of contract following a departmental enquiry under R. 14 of the Central Civil Services (Classification, Control and Appeal) Rules, such order of termination is made in the exercise of the pleasure of the President under Article 310 and the employee not being entitled to the protection conferred by Article 311, any breach of the 1965 Rules is not justiciable at his instance.

(Para 23)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 118 (V 56) = 1969 Lab IC 100, B. S. Vadera v. Union of India 18
(1969) AIR 1969 SC 1302 (V 56) = Civil Appeal No. 647 of 1966, D/-10-3-1969 = 1969 Lab IC 1534, State of Maharashtra v. Baishankar Avalram Joshi 27
(1968) AIR 1968 Pmij 312 (V 55) = 1968 Lab IC 987 (FB), Sham Lal v. Director, Military Farms, Army Headquarters, New Delhi 22
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K. K. Singhavi with A. V. Sawant, for Petitioner; H. G. Advani with V. N. Lokur and J. G. Sawant, for Respondents.

MADAN J.—The Petitioner is a civilian in the defence services. He has filed this petition under Article 226 of the Constitution to set aside an order passed by the President of India terminating his services as Lecturer in the National Defence Academy, Khadakvasla, and reverting him to the post of Section Master, Rashtriya Indian Military College, Dehra Dun, his parent department, on which post he held a lien, and a consequential order directing him to proceed to Dehra Dun on reversion to his parent department.

2. In September 1947 the Petitioner was appointed as Section Master in the Prince of Wales Royal Indian Military College at Dehra Dun (now known as "The Rashtriya Indian Military College") in the grade of Rs. 275-50-800- with duty allowance of Rs. 100/- per month and free accommodation. This appointment was for a period of one year pending recruitment of a candidate through the Federal Public Service Commission. In 1948 three posts of Section Master and six posts of Senior Master in the Prince of Wales Royal Indian Military College, Dehra Dun, were advertised for recruitment. The revised grade of pay shown for the posts of Section Master was Rs. 350-25-500-30-560 and that for the posts of Senior Master was Rs. 250-15-400. The Petitioner submitted his application for both posts. He was, however, selected as a Senior Master by an order dated August 14, 1948 on the salary of Rs. 295/- per month in the grade of Rs. 250-15-400. Originally the said appointment was stated to be on probation, but by a subsequent order dated August 21/23, 1948 the said condition of probation was removed. On his appointment to this post, the facilities of free accommodation and allowance of Rs. 100/- per month which the petitioner was given as Section Master were not allowed to him, and further a sum of Rs. 183/- per month was directed to be deducted from his future salary. In the same year the posts of Readers and Lecturers in the National Defence Academy, Khadakvasla, (hereinafter for brevity's sake referred to as "the Academy") were advertised by the Federal Public Service Commission. The petitioner applied for both these posts also. The Commission selected him for the post of a Lecturer, and by the letter dated December 14, 1948 from the Deputy Secretary to the Government of India he was offered a temporary appointment on five years contract as a Lecturer in English subject to the condition that he would be on probation for twelve months and would hold a lien on his permanent post of Senior Master in the Prince of Wales Royal Indian Military College for the period of this appointment. The salary offered to him was a starting pay of Rs. 500/- per month in

the scale of Rs. 500-30-800. The Petitioner accepted this appointment and joined the Academy. Thereafter a contract containing the terms and conditions of his appointment was forwarded to the Petitioner for his signature. The petitioner has contended in the Petition that this contract never came into effect inasmuch as though the Petitioner signed it the same was not signed on behalf of the President. During the course of hearing the original of this contract was produced by Mr. Advani, learned counsel for the Respondents, and as it bore the signature of the Joint Secretary to the Government of India, Ministry of Finance, for and on behalf of the President, the Petitioner abandoned this contention. From the original it appears that the date typed in the body of the contract is December 16, 1948, but the stamps have been cancelled on August 16, 1952. It further appears that the contract was signed by the Petitioner on September 13, 1952. There is, however, no date under the signature of the Joint Secretary. Before advertent to the relevant terms of this contract it is necessary to refer to an order by which the terms of this contract were varied in one material respect. By a letter dated January 15, 1964 addressed to the Chief of the Army Staff and the Commander-in-Chief, Army, it was directed that candidates selected for the appointment of civilian readers and lecturers at the Academy who held permanent posts under the Central or a State Government would not be required to execute any agreement but would be treated as on deputation to the Academy from their parent service of office. Along with this letter a list of such persons was enclosed. That list contained the Petitioner's name. It was further stated in the said letter that in cases where agreements had already been executed, the phrase "termination of services" in the contract would mean "reversion to parent office". A copy of this letter was forwarded to the Petitioner. Even if this letter were not there, the position would have been the same, for under the said contract the service which could be terminated would be the particular contractual service, and on such termination the petitioner would automatically revert to the post on which he held a lien in his parent department.

3. The said contract is expressed to be between the petitioner and the President of India. The said contract was to be for a period of five years commencing from December 16, 1948, and under clause 3 right was reserved to either party to terminate the contract at any time before the expiry of that period by a notice of three calendar months in writing without any cause being assigned. In the case of termination by the Govt. without such notice provision is made for payment of compensation to the petitioner equivalent to his pay for three months and in the event of termination by

notice of a shorter period, compensation for the period by which such notice fell short of three calendar months' period. Under clause 11, if the petitioner's service is not terminated under clause 3, the petitioner is to be continued in service on the same terms and conditions until his service is terminated by notice or payment of compensation in like manner. Clause 4 reserves the right to the Government in case the petitioner proves unsuitable for the efficient performance of his duties to terminate his service by giving one calendar month's notice or in lieu thereof, one month's pay. Clause 5 is material and requires to be set out fully. It provides as follows:—

"If the party of the first part shall be guilty of any insubordination, intemperance or other misconduct or of any breach or non-performance of any of the provisions of these presents or of any rules pertaining to his service, it shall be lawful for the Government or their officers having authority for that purpose, immediately and without any previous notice to terminate the service of the party of the first part." By reason of the said letter dated January, 1954, the word "terminate" in the clause above referred to is to be read as "revert" to the parent department."

4. The petitioner felt that the deduction of Rs. 183 per month from his salary was not justified. He also felt himself unjustly treated in the matter of promotion. Accordingly, the petitioner made repeated representations to higher authorities each of which was turned down. It appears that he received two warnings in connection with the performance of his duties, the first in February 1959 and the second in April 1959. In November 1959, he was interviewed by the Joint Secretary, Defence Ministry, and it was explained to him that the representations made by him were not justified. He, therefore, submitted further representations to the President of India and the authorities. By the letter dated November 18, 1960, it was intimated to him that his representations contained incorrect statements and improper allegations and that he should not persist in sending them. On November 18, 1960, he was charge-sheeted for disobedience of order and after an inquiry his pay was reduced by one stage in his time-scale for a period of one year. The representations by the petitioner, however, continued. His representations were ultimately considered by the Defence Minister and by the letter dated March 4, 1963, he was informed that he had no valid grounds for complaints. Thereafter he made further representations to the Defence Minister, the Home Minister and, the President of India. By the letter of September 17, 1963, from the Deputy Secretary to the Government of India, the above facts were placed on record and he was informed that his representations repeating the same allegations

would not be taken note of in the Ministry of Defence. By the said letter he was "advised to desist from making such representations". By way of reply to the said letter the petitioner made another representation dated October 14, 1963, to the President of India copies of which were forwarded to the Prime Minister, the Home Minister, the Defence Minister, the Chief of the Army Staff, the Chairman, Union Public Service Commission, and the former Home Minister asking for an independent judicial inquiry. In the said letter he charged that the higher-ups in the administration had not only wronged and ruined him but also meant to destroy him mentally. This was followed by another representation dated 2-4-1964, with copies thereof sent to the same Ministers in which he described the said memorandum dated September 17, 1963, as "most arbitrary, mala fide and vilifying" and characterised the fact that his said representation dated October 14, 1963, was not replied to as being "sheer tyranny—undeserved, unjustified, unmitigated and unwarranted" and as being "against the laws of humanity". On July 13, 1964, he sent another representation to the President of India, again with copies to the Prime Minister, the Defence Minister and the Chairman of the Union Public Service Commission, in which he requested that his case should be referred to the Central Sadachar Samiti of the Home Minister. This letter is headed "Appeal for Justice and Fairplay to the victim of bureaucratic mala fides and arbitrariness culminating in the ruin of his (that is, the petitioner's) name, reputation, career and profession". On August 31, 1964 a Guest Night was held at the Academy. By the Academy Order No. 1031 dated August 28, 1964, all officers (service and civilians) and cadets were required to attend. The petitioner admittedly did not attend the Guest Night nor did he take any permission for not attending. By his letter dated September 10/18, 1964, the Principal of the Academy called upon the petitioner to intimate the specific reasons for not attending the Guest Night. By his letter dated September 21, 1964, the petitioner forwarded the original of the Principal's said letter to the Commandant of the Academy as he stated "to reiterate the farcical and-to-me wrong use the departmental channel is being put to in dealing with personal and confidential matters, and for which there is no legal or administrative validity". He further pointed out that he would not like to be treated as a cadet to be trained in correct attitudes and postures. He further stated that if since 1961 he had attended any Guest Night it was only to honour the Passing-Out Cadets or the Commandants on their arrival or departure on account of the love and interest which he once had for the Academy, implying that he has no love or interest for the Academy

left any longer. He requested the Commandant to inform the Principal that the question of obtaining prior permission in the circumstances was not only absurd but improper and that he thought that silence on his part was the only decent thing. In the said letter he expressed his regret that he had been rendered incapable of social obligations towards the Academy. Thereafter a charge-sheet dated December 10, 1964, was served upon the petitioner. The said charge-sheet contains four charges: The first, second and the fourth charges related to the said representations respectively dated October 14, 1963, April 2, 1964, and July 13, 1964, made by the petitioner and the third charge related to his said letter dated September 21, 1964. By the said charge-sheet the petitioner was charged with submitting copies of the said representations to those not directly connected with his case in total disregard of the normal procedure and continuing to make representations and sending copies thereof to various high officials in spite of instructions to the contrary and with using intemperate and disrespectful language in the said representations. The third charge related to his not attending the Guest Night on August 31, 1964, in spite of the said Academy Order No. 1081 of August 28, 1964 and behaving in an insolent and arrogant manner not becoming an officer of his status by giving an impertinent and provocative reply in his letter dated September 21, 1964. Copies of the documents referred to in the said charge-sheet were enclosed along with such representations. He was asked to submit his written statement of defence which the petitioner did by his letter dated December 24, 1964. In that letter, he admitted having violated the normal channels of representations and using language which was not proper to such representations. He, however, stated that these faults were natural to a person who had felt strongly all these years that justice had been denied to him. So far as the letter of September 21, 1964, was concerned, he sought to extenuate himself on the ground that at that time he was undergoing a period of intense mental and emotional strain. In the said written statement he requested that the contemplated disciplinary proceedings against him should be dropped. By an order dated June 29, 1966, after stating that an inquiry was being held against the petitioner and that the President considered that an Inquiry Officer should be appointed to inquire into the charges framed against him, the President appointed K. V. Ramanamurthi, Deputy Secretary (C.P.), Ministry of Defence, the third respondent, as Inquiry Officer to inquire into the said charges. By another order dated July 1, 1966, the President appointed the Principal of the Academy to present the case in support of the said charges before the Inquiring Officer.

The said order recites that the inquiry was being held under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (hereinafter referred to as 'The 1965 Rules'). On July 15, 1966, the inquiring officer recorded the petitioner's oral statement. In that statement the petitioner contended that the said memorandum dated September 27, 1963, did not contain any direction but merely purported to give him advice only. He also denied that the language used by him was impertinent or disrespectful and denied that he was guilty of any indiscipline in not attending the said Guest Night. On November 26, 1967, the petitioner was served with the said impugned order dated November 15, 1967. That order refers to the said charge-sheet, the petitioner's written statement of defence, correspondence and the statement made by the petitioner at the oral inquiry. By the said order, in accordance with the provisions of clause 5 of the said agreement, the President terminated the services of the petitioner with effect from the date he was relieved of his duties at the Academy and it was further ordered that thereafter the petitioner would revert to the post of Section Master, Rashtriya Indian Military College, Dehra Dun, on which post it was stated he had a lien. That order is signed by the Deputy Secretary to the Government of India, for and on behalf of the President of India. This was followed by a movement order dated December 2, 1967, signed by the Registrar of the Academy on behalf of the Commandant granting the petitioner time up till December 21, 1967, to proceed to Dehra Dun on his reversion to his parent department, namely, the Rashtriya Indian Military College. On December 7, 1967, the petitioner filed this petition against the Union of India under Article 226 of the Constitution to set aside the said two orders and for a writ of mandamus directing the respondent to drop the said disciplinary proceedings. The original respondents to this petition were the Union of India, the Commandant of the Academy, the Inquiry Officer and the Registrar of the Academy. In view of the objection taken by the respondents in their affidavits in reply that no writ petition can lie against the President of India, the description of the first respondent was amended so as to read "The Union of India".

5. In the petition the petitioner has alleged that after the said inquiry was completed, no further notice was issued to him proposing to show cause against the penalty proposed to be imposed upon him nor was a copy of the Inquiry Officer's report supplied to him before the said impugned orders were passed. He has contended that the said order amounts to a reduction in rank. By the amendments which he was allowed to make in the petition, the petitioner has contended that the 1965 Rules apply to him and that the said inquiry pro-

ceedings were conducted and the said impugned orders were passed in a manner which constituted a breach of the relevant rules and a violation of the principles of natural justice. The defence of the respondents is that the petitioner's service at the Academy was contractual and the 1965 Rules did not apply to him, that his service was terminated in accordance with the terms of contract and that there was no violation of the 1965 Rules or of the principles of natural justice assuming they applied to the petitioner and assuming there was any breach or violation, the same was not justifiable.

5-A. On these rival submissions the first question that arises for determination is whether the 1965 Rules apply to the petitioner. It is common ground that the petitioner holds a post connected with defence within the meaning of that expression in Article 310 of the Constitution and is a civilian in Defence services. Prior to 1965 civilians in Defence services were governed by the Civilians in Defence Services (Classification, Control and Appeal) Rules, 1952, while other civilians were governed by the Central Civil Services (Classification, Control and Appeal) Rules, 1957. Both these sets of Rules, like the 1965 Rules, were made by the President under the proviso to Article 309 of the Constitution. The 1965 Rules repealed both these sets of Rules and now Rule 3 of the 1965 Rules applied to every Government servant including every civilian Government servant in the Defence services, except those classes of Government servants specifically excluded by the said R.3. The only exception with which we are concerned in the present petition is that contained in clause (e) of Rule 3 (1) which excludes from the application of the 1965 Rules "any person for whom special provision is made, in respect of matter covered by these Rules, by or under any law for the time being in force or by or under any agreement entered into by or with the previous approval of the President before or after the commencement of these Rules, in regard to matters covered by such special provisions". Thus, under clause (e), two categories of persons are excluded: (1) those for whom special provision is made by or under any law, and (2) those in respect of whom special provision is made by or under any agreement entered into by the or with the previous approval of the President. It is immaterial whether such law was made or agreement entered into before or after the commencement of the 1965 Rules. The application of the 1965 Rules is, however, not totally excluded but excluded only in regard to matters covered by such special provisions. Thus, even in the case of Government servants for whom a special provision is made by or under any law or agreement, the 1965 Rules will apply except in so far as they are not inconsistent with what is

provided in such law or agreement. Accordingly, in the case of the petitioner, the 1965 Rules will apply in so far as they are not inconsistent with the provisions of the said contract dated December 18, 1948. In support of the submission that the 1965 Rules do not apply to the petitioner, Mr. Advani, learned counsel for the respondents, has relied upon the judgment of a learned single Judge of the Calcutta High Court in Subodh Ranjan Ghosh v. Major N. A. Callaghan, AIR 1956 Cal 532. In that case an agreement was entered into between an employee in the Military Engineering Service and the General Engineer, Ishapore, which provided for termination of the employee's service on giving him either three calendar months' notice or payment of three months' salary. The agreement also provided for termination of service in case of gross misconduct at any time without notice. Disciplinary proceedings were started against the employee and a three months' notice of termination of his service was given to him. The employee filed a petition in the Calcutta High Court for a writ of mandamus. It was contended on behalf of the Government that by reason of Rule 3 of the Defence Services (Classification, Control and Appeal) Rules, 1952, the application of the said Rules was excluded. Clause (c) of that rule excluded from the application of the said Rules "persons in respect of whose conditions of service, pay and allowances, pension, discipline and conduct, or any of them, special provision had been made by agreement". The proviso to Rule 3 was as follows:—

"Provision that in respect of any matter not covered by the provisions special to him, his service or his post, these rules shall apply to any person coming within the scope of Exception (b) or (c) to whom but for either of these exceptions these rules would apply."

The Court held that though normally a civilian employed in defence service would be governed by the said Rules, by virtue of clause 3 (c) the said Rules had been made inapplicable to persons in respect of whose conditions of service special provision had been made by agreement, except as to matters not covered by such an agreement. Since the service of the employee was terminated by three calendar months' notice as provided by the agreement, the Court held that he could not avail himself of the provisions of the 1952 Rules. This authority, therefore, does not lay down the proposition in such wide terms as has been canvassed by Mr. Advani. Though clause (c) of R.3 of the 1952 Rules is couched in language different from that to be found in clause (e) of Rule 3 (1) of the 1965 Rules, the effect of both these clauses is the same, namely, that the Rules will apply in respect of all matters not covered by the agreement, and in so far as they are not inconsistent with

the agreement entered into between the Government servant and the Government;

6. In the present case the petitioner's service with the Academy was not terminated in pursuance of clause 11 which gives to the President the right to terminate the petitioner's service by giving three calendar months' notice or payment of compensation of three months' salary. The petitioner's service is terminated under clause 5 and he has been reverted to his parent department. We have, therefore, to consider whether clause 5 of the agreement is inconsistent with the 1965 Rules, and, if so, to what extent. Rule 11 of the 1965 Rules provides for penalties. It defines what are minor penalties and what are major penalties. Penalty (vi), which is a major penalty, is "reduction to a lower time-scale of pay, grade, post or service which shall ordinarily be a bar to the promotion of the Government servant to the time-scale of pay, grade, post or service from which he was reduced, with or without further directions regarding conditions of restoration to the grade or post or service from which the Government servant was reduced and his seniority and pay on such restoration to that grade, post or service". It is not disputed that by terminating the petitioner's service with the Academy and reverting him to his parent department he has been reduced to a lower grade or post and if the 1965 Rules apply in their entirety to the petitioner, the impugned order would amount to reduction to a lower grade or post within the meaning of penalty (vi) in Rule 11. It is, however, contended by the respondent relying upon the Explanation to Rule 11 that the petitioner was on deputation to the Academy and for the said reason his reversion to the parent department did not amount to a penalty. The material portion of the said Explanation is as follows:—

"The following shall not amount to a penalty within the meaning of this rule, namely:—

x x x x

(iv) reversion of a Government servant officiating in a higher service, grade or post to a lower service, grade or post, on the ground that he is considered to be unsuitable for such higher service, grade or post or any administrative ground unconnected with his conduct;

x x x x

It cannot be said that the petitioner was reverted to his parent department because he was considered to be unsuitable for the higher grade or post or on any administrative ground unconnected with his conduct. On the contrary, clause 5 of the contract has specific reference to the petitioner's conduct and provides for termination of his service or rather reversion to his parent department when he is guilty of any insubordination, intemperance or other misconduct or of any breach of non-performance

of any of the provisions of the agreement or of any rules pertaining to his service. The affidavit in reply expressly avers that the plaintiff was found guilty as provided by clause 5 of the agreement. The plaintiff's reversion was, therefore, on grounds connected with his conduct and it cannot be said this reversion was not a penalty.

7. Clause 5 of the contract, however, comes into operation only when the petitioner is found guilty of any of the acts set out in that clause since it only provides for the penalty to be imposed upon him in such an event and the mode of imposing such penalty. We shall consider later the effect of the petitioner's case of this special provisions. Neither clause 5 nor any other clause in the contract makes any provision with respect to the manner in which the petitioner's guilt is to be proved or found or the mode of finding him guilty. Thus, the contract is silent on this point, and to the extent it is silent the 1965 Rules will apply. Since the contract is silent as to the mode in which plaintiff's guilt is to be found or proved, the provisions in that behalf in the 1965 Rules will apply upto the ascertainment of the petitioner's guilt. These provisions are to be found in Rule 14 of the 1965 Rules. In fact, as shown by the recital in the said order dated July 1, 1966, appointing a Presenting Officer, the inquiry against the petitioner was held under Rule 14. Rule 14(5)(c) provides for the appointment of a Government servant or a legal practitioner to present the case in support of the articles of charge. The appointment of the Inquiry Presenting Officer is also made under the 1965 Rules.

7-A. It is the petitioner's case that in the conduct of the inquiry against him, there has been violation of several provisions of Rules 14 and 15 of the 1965 Rules which vitiate the inquiry and entitled the petitioner to have the said impugned orders and the inquiry proceedings set aside. Before we consider the factual aspect of this part of the case, it is necessary to consider the constitutional question which has been raised by the respondents in answer thereto. In the respondents' submission the petitioner, being a Government servant in the service of the Union of India, holds office under Article 310 of the Constitution "during the pleasure of the President" as he holds a post connected with defence, Article 311 does not apply to him; the impugned order terminating his service with the Academy and reverting him to his parent department was passed by the President; and assuming there was any breach or violation of the 1965 Rules, the same cannot furnish a cause of action to the petitioner and would give him no legal right to approach the Court either by way of a suit or a writ petition to redress his grievance. This is sought to be countered by the petitioner by submitting that the 1965 Rules have been made by the President

under Article 309 of the Constitution and a breach of these rules is justiciable even in cases where Article 311 does not apply. This question has been strenuously and at length debated at the Bar and a large number of authorities has been cited on both sides.

8. The phrase "during the pleasure of the President" is not a new phrase introduced for the first time in our Constitution. It is an adaptation in phraseology appropriate to our Constitution of the well-known and familiar phrase "at the pleasure of the Crown" in English law. From the earliest times the well-established rule of English law was that public officers and servants of the Crown hold office at the pleasure of the Crown, the theory of English constitutional law being that the king can do no wrong, and accordingly the services of a servant of the Crown could be terminated without assigning any reason and no action can be maintained in the King's Court for wrongful dismissal. The same rule appears to have been applied to the servants of the East India Company. It certainly applied to servants of the Crown after the territories of the East India Company and their administration was taken over by the British Crown. The phrase "at the pleasure of the Crown" has its origin in the Latin phrase "durante bene placito" (during pleasure) which means that the tenure of the office of a Civil Servant, except where it is otherwise provided by statute, can be terminated at any time without cause assigned. The Government of India Act, 1915, as originally enacted, contained no provision embodying this doctrine. The first statutory recognition of this rule in India is to be found in Section 96-B which was inserted along with other amendments in the Government of India Act, 1915, by the Government of India Act, 1919. Section 96-B affirmed the position that every person in the civil service of the Crown in India held office during his Majesty's pleasure subject to the provisions of the said Act and of the rules made thereunder. By sub-section (1) of Section 96-B, one restriction was, however, introduced on the power of dismissal by providing that no civil servant could be dismissed by any authority subordinate to that by which he was appointed. Sub-section (1) also provided for a complaint by a Government servant thinking himself wronged by an order of an official superior in a Governor's province to complain to the Governor in order to obtain justice without prejudice to any other right of redress which he might have. By sub-section (2) the Secretary of State in Council was empowered to make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of services, pay and allowances and discipline and conduct. The Classification of Rules made under Section 96-B (1) inter alia provides for holding of

a disciplinary inquiry at which a definite charge in writing was required to be framed, evidence in support thereof to be led, and such evidence along with any evidence which the Government servant might adduce was required to be recorded in his presence. A finding along with discussion was required to be recorded on each charge. In *R. Venkata Rao v. Secy. of State*, AIR 1937 PC 31, the Privy Council held that a Government servant dismissed without any inquiry being held could not obtain redress by an action in Court but only by way of appeal of official kind. The Privy Council further pointed out that if service under the Crown would not have been at the pleasure of the Crown, the remedy by suit against the Secretary of State in Council for a breach of contract of service would have been available to the Government servant aggrieved by his wrongful dismissal from service. The Government of India Act, 1919, was replaced by the Government of India Act, 1935. Sub-section (1) of Section 240 of the Government of India Act, 1935, enacted that except as expressly provided by that Act, every person who was a member of a civil service of the Crown in India, or held any civil post under the Crown in India, held office during His Majesty's pleasure. Sub-section (2) reproduced the restriction introduced by Section 96-B (1) of the 1919 Act. Sub-section (3) gave a further statutory protection to a Government servant from dismissal or reduction in rank by providing that he should be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The rights thus conferred by the rules made by the Secretary of State for India in Council under the 1919 Act were given constitutional recognition by Section 240 (3).

9. Part XIV of the Constitution of India deals with services under the Union and the States. The relevant Articles in this part are Articles 309, 310 and 311. Articles 309 and 310 require to be quoted in extenso in view of the arguments advanced at the Bar. These articles are in the following terms:—

"309. Recruitment and conditions of service of persons serving the Union or a State.—Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the

recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

"310. Tenure of office of persons serving the Union or State.—(1) Except expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India Service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of Civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

Article 311 provides certain constitutional safeguards to particular categories of Government servants against their dismissal, removal or reduction in rank. These safeguards are that such a Government servant cannot be dismissed or removed by an authority subordinate to that by which he was appointed and that he cannot be dismissed, removed or reduced in rank except after being informed of the charges against him and being given a reasonable opportunity of being heard in respect of those charges. Article 311 further provides that where it is proposed to impose penalty on such a Government servant of dismissal, removal or reduction in rank, he must be given a reasonable opportunity of making representation on the penalty proposed. Article 311 in express terms applies only to members of a civil service of the Union or an all-India service or a civil service of a State or who hold a civil post under the Union or a State. In the case of such civil servants, Article 311 enacts constitutional curtailments or restrictions on the rule embodied in Article 310 that civil servant holds office during the pleasure of the President or the Governor, as the case may be. Article 311, however, does not apply to a member of a defence service or to a person who holds any post connected

with defence. A plain reading of these three Articles shows that Article 310 is the dominant Article. The power conferred by Article 309 upon appropriate Legislatures to pass Acts and upon the President in the case of the Union and on the Governor in the case of a State to make rules regulating the recruitment and conditions of service of Government servants is expressly made subject to the provisions of the Constitution. The Act and Rules so made would, therefore, be subject to what is provided by Articles 310 and 311. Article 310 is not made subject to the other provisions of the Constitution in the same manner as Article 309 is. Article 310 operates in its own right and by itself, the only restriction to be found therein being in the opening words "Except as expressly provided by this Constitution". Thus, apart from the cases expressly provided for in the Constitution itself, the rule laid down in Art. 310 that every Government servant holds office during the pleasure of the President or the Governor, as the case may be, remains paramount. Such exceptions in the Constitution are to be found in Articles 124, 148, 218 and 324 in the case of tenure of Supreme Court Judges, Comptroller and Auditor-General, High Court Judges and the Chief Election Commissioner. An exception is also to be found in Article 311 in respect of the classes of Government servants specified in that Article, namely, members of the Union civil service or an all-India service or a State service or holders of a civil post under the Union or a State. Thus, under our Constitution, as under the Government of India Act, 1935, the rigour of the English rule of common law regarding the holding of the office of a public servant only during the pleasure of the Crown has been mitigated to the extent provided for by Art. 311. Since, however, Article 311 does not include within the scope of its constitutional safeguards a member of a defence service or the holder of any post connected with defence, the constitutional safeguards available to other Government servants are not available to members of the defence service or to civilians in the defence services. The reason for this is obvious. At all times and in all countries it has been recognised that the safety and the defence of a country and even its very freedom and independence depend upon an efficient defence service. Far stricter discipline and instant unquestioning obedience are, therefore, required from those in any manner connected with the defence of the country. The vast complex machine which the Armed Forces have become in modern times require such discipline and obedience not only from the actual combat forces but from all persons in any manner connected with defence. If it were otherwise, the consequences would be too frightening to contemplate. Not only would insubordination and indiscipline

run rampant amongst the defence forces but the defence forces would lose all efficiency as a fighting machine and even the country may fall an easy prey to aggressor.

10. Even a plain reading of Arts. 309 and 310 makes it obvious that Article 309 does not operate as an exception or a proviso to Art. 310 just as Art. 311 does. As Article 309 is expressly made subject to the provisions of the Constitution, or Act of a Legislature and no Rule made by the President or a Governor under Article 309 can impinge upon the overriding power of the President or the Governor under Art. 310 except in so far as such Act or rule reproduces the provisions of an exception to Article 310 enacted in the Constitution itself. Except in these cases, any Act of a Legislature or a rule made by the President or the Governor under Article 309 must remain subordinate to the overriding power conferred upon the President and the Governor by Article 310. The 1965 Rules have been made by the President under Article 309 and they can, therefore, operate only within the scope of Article 309 and cannot travel beyond its ambit. Thus, any provision in the 1965 Rules which impinges upon the pleasure of the President or the Governor under Article 310 except to the extent the same is curtailed by Art. 311 would not be operative. Any action in violation of Article 311 would be a violation of the Constitution itself and would be actionable inasmuch as the aggrieved Government servant would then be seeking to enforce his constitutional right; but where Article 311 does not apply, the Government servant can have no remedy at law either by way of a suit or a writ petition. To say that he has such a remedy in the absence of a provision in that behalf in the Constitution itself would be to negate the overriding operation of Article 310.

11. The question has at times arisen whether when an authority other than the President imposes upon a Government servant the penalty of dismissal, removal or reduction in rank, he is exercising the pleasure of the President untrammelled by any restrictions other than those to be found in the Constitution itself or is exercising a power subject to the conditions contained in the Act or the Rules made under Article 309 under which he derives his power and whether in such cases the violation of the relevant statutory provisions would be justiciable in a Court of law. This question has led to a conflict of opinion among the High Courts. In the present case, however, since the impugned order is made by the President, this question does not arise for our consideration.

12. We will now examine the relevant case-law on the subject. The first important case is State of Bihar v. Abdul Majid, AIR 1954 SC 245. In that case, a Sub-Inspec-

tor of Police appointed by the Inspector-General of Police, Bihar and Orissa, was dismissed from service. He filed a suit against the State of Bihar for a declaration that the order of dismissal was void and for arrears of salary. The Government being of the opinion that the order was untenable, reinstated him. The question which survived for determination in the suit was whether the plaintiff had a right to recover arrears of salary. The case was governed by the provisions of the Government of India Act, 1935. The High Court in second appeal passed a decree in favour of the plaintiff against which the State preferred an appeal to the Supreme Court. On behalf of the State, the decision of the Privy Council in High Commr. for India v. I. M. Lall, AIR 1948 PC 121, was relied upon. In Lall's case, AIR 1948 PC 121, the Privy Council held that the rule of English law that a civil servant served the Crown *ex gratia* or in other words, that his salary was in the nature of a bounty of the Crown and not a contractual right applied in India and a civil servant could not, therefore, recover arrears of salary by an action at law. Mahajan, C.J., delivering the unanimous judgment of the Court, said:

"In our judgment, these suggestions are based on a misconception of the scope of this expression. The expression concerns itself with the tenure of office of the civil servant and it is not implicit in it that a civil servant serves the Crown '*ex gratia*', or that his salary is in the nature of a bounty. It has again no relation or connection with the question whether an action can be filed to recover arrears of salary against the Crown. The origin of the two rules is different and they operate on two different fields.

The rule that a civil servant holds office at the pleasure of the Crown has its origin in the Latin phrase "*durante bene placito*" (during pleasure), meaning that the tenure of office of a civil servant except where it is otherwise provided by statute, can be terminated at any time without cause assigned. The true scope and effect of this expression is that even if a special contract has been made with the civil servant, the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is that they cannot claim damages for premature termination of their services. (See Fraser's Constitutional Law, p. 186.—Shenton v. Smith, 1895 AC 229 at p. 234.—Dunn v. The Queen, (1896) 1 QB 116).

This rule of English law has not been fully adopted in S. 240. Section 240 itself places restrictions and limitations on the exercise of that pleasure and those restrictions must be given effect to. They are imperative and mandatory. It follows, therefore, that whenever there is a breach of restrictions imposed by the statute by

the Government or the Crown, the matter is justiciable and the party aggrieved is entitled to suitable relief at the hands of the Court. As pointed out earlier in this judgment, there is no warrant for the proposition that the relief must be limited to the declaration and cannot go beyond it. To the extent that the rule that Government servants hold office during pleasure has been departed from by the statute, the Government servants are entitled to relief like any other persons under the ordinary law, and that relief, therefore, must be regulated by the Code of Civil Procedure."

In the further discussion the Supreme Court pointed out that in England there was no provision for suing the Crown. The Supreme Court held that where the Constitution itself made the matter justiciable, the party aggrieved was entitled to receive at the hands of the Court all suitable reliefs which the procedural law of the country permitted him to sue for. In England prior to the Crown Proceedings Act, 1947, the Crown could not be sued in a Court of law, but any claim against the Crown could only be sought to be recovered by way of a petition of right. Such a restriction did not exist in Indian Law and therefore, there was no bar to the plaintiff seeking to recover his arrears of salary when his dismissal from service was unconstitutional. What could be claimed in England by a petition of right could be claimed in India by the ordinary process. This case has at times been erroneously referred to as laying down in India further restriction on the pleasure of the President so far as recovery of arrears of salary is concerned. A careful perusal of the judgment of the Supreme Court, however, does not bear this out. In express words in the passage quoted above Mahajan C. J., has stated that the expression "Pleasure of the Crown" concerns itself with the tenure of office of the Civil servant and it is not implicit in that expression that a civil servant serves the Crown 'ex gratia' or that his salary is in the nature of a bounty. The learned Chief Justice has expressly pointed out that these are two different rules having different origins and operating in two different fields. The ground on which the Supreme Court held that arrears of salary could be recovered was that, unlike in English law, in Indian law there was no restriction on suing the Crown and, therefore, when there was a breach of the Constitution itself, the aggrieved Government servant was entitled to all his normal remedies at law. It should further be borne in mind that when the Supreme Court observed that the tenure of office of the Civil servant was during the pleasure of the Crown, except where otherwise provided by statute, it did not refer to any Act passed by an Indian Legislature. There is a vital difference between English and Indian Constitutional law. In England there is no written Constitution and the

Parliament is supreme and can by legislation restrict, modify or even abrogate the rule as to the pleasure of the Crown. In India we have a written Constitution and hence no Act of a Legislature can override the Constitution. The rule as to holding of office during the pleasure of the President is enacted in the Constitution itself and, therefore, when it is said that this rule can be modified by statute, what is meant is it can be modified only by a provision made in the Constitution itself.

13. In *Shyam Lal v. State of Uttar Pradesh*, AIR 1954 SC 369, a Government servant was compulsorily retired. The Supreme Court held that since compulsory retirement did not fall within the ambit of Article 311, not being a dismissal or removal within the meaning of that Article, the order of retirement could not be challenged on the grounds that the Government servant had not been afforded full opportunity of showing cause against the action sought to be taken as provided by the Civil Services Regulations, 1920.

14. In *Parshottam Lal Dhingra v. Union of India*, AIR 1958 SC 36, the Supreme Court pointed out that the opening words of Article 310 (1), namely, "except as expressly provided by the Constitution", quite clearly referred, *inter alia*, to Articles 124, 148, 218 and 324 of the Constitution and that these Articles were clearly exceptions to the rules embodied in Art. 311 that public servants hold office during the pleasure of the President or the Governor, as the case may be. Subject to these exceptions the Constitution, by Article 310 (1) has adopted the English Common Law rule and enacted that public servants hold office during the pleasure of the President or the Governor, as the case may be, and has, by Article 311, imposed two qualifications on the exercise of such pleasure. Though these two qualifications are set out in a separate Article, they quite clearly restrict the operation of the rule embodied in Article 310 (1), that is, in other words, the provisions of Article 311 operate as a proviso to Article 310 (1). In *Khem Chand v. Union of India*, AIR 1958 SC 300, the Supreme Court reaffirmed the position that the provisions of Article 311 were qualifications or provisos to Article 310 (1) and that the limitations thus imposed on the exercise of the power of the President or the Governor in the matter of dismissal, removal or reduction in rank constituted the measure of the constitutional protection afforded to the Government servants by Article 311 (2).

15. The next important case of the Supreme Court is *State of Uttar Pradesh v. Babu Ram Upadhyaya*, AIR 1961 SC 751. It was contended before us on behalf of the Petitioner that this case makes a departure from the earlier decision of the Supreme

Court and according to the true ratio in that case, a breach of the service rules, even in cases where Article 311 does not apply, will also be justiciable. It, therefore, becomes necessary to refer to Babu Ram's case, AIR 1981 SC 751 = (1981) 2 SCR 679 in some detail. The Respondent in that case was a Sub-Inspector of Police. He was charge-sheeted under Section 7 of the Police Act for misappropriating a part of the moneys found on the person of a suspect. A notice was served upon him to show cause why he should not be reduced to the lowest grade of Sub-Inspector for a period of three years. In due course, after cause was shown against the action proposed to be taken against him, the Superintendent of Police, Sitapur, reduced the respondent to the lowest grade of Sub-Inspector for a period of three years. When this order came to the notice of the Deputy Inspector General of Police, Uttar Pradesh, he came to the conclusion on a consideration of the entire report that the respondent should be dismissed from service. Accordingly he made the order dismissing the respondent from service. This order was confirmed by the Inspector General of Police. The respondent thereupon filed a petition under Article 226 of the Constitution before the Allahabad High Court for quashing the said order. The Allahabad High Court held that the provisions of the Police Regulations were not complied with and quashed the impugned order. Against that judgment the State of Uttar Pradesh, the Deputy Inspector-General of Police, Lucknow, and the Inspector-General of Police, Uttar Pradesh, preferred an appeal to the Supreme Court. The Supreme Court by a majority judgment dismissed the appeal. It was argued on behalf of the appellants that the opening words of Article 310, namely, "except as expressly provided by the Constitution" refer to the different tenures prescribed by the Constitution, namely, by Articles 124, 148, 218 and 324, and that if these provisions of the Constitution were excluded from Article 310, the purpose of the clause "except as otherwise provided by this Constitution" would be exhausted and thereafter Article 310 would be free from any other restrictive operation and in that event Articles 309 and 310 should be read together excluding the opening words of Article 310. It was also contended by the appellants that the operation of the opening words in Article 309, namely, "Subject to the provisions of this Constitution" is confined to the provisions of the Constitution which empowers other authorities to make rules regulating the conditions of service of certain class of public servants, namely, Articles 145 (2), 148 (5) and 229 (2). Negating this contention, Subba Rao J., who spoke for the majority of the Court, said in paragraph 13 of judgment:

"That may be so but there is no reason why Art. 310 should be excluded therefrom. It follows that while Art. 310 provides for a tenure at pleasure of the President or the Governor, Art. 309 enables the Legislature or the executive, as the case may be, to make any law or rule in regard inter alia, to conditions of service 'without impinging upon the overriding power recognised under Article 310.' (The underlining (here into ') is ours.)

Thus, far from departing from what was till then held by the Court, in Babu Ram's case, AIR 1981 SC 751 = (1981) 2 SCR 679, the Supreme Court expressly reaffirmed the overriding operation of Article 310. After discussing the various provisions under the earlier Government of India Acts and the Constitution and the decision of the Privy Council and the earlier decisions of the Supreme Court, Subba Rao, J., in paragraph 22 of the judgment, stated the conclusion which the Court had reached in the following seven propositions:

"(1) In India, every person who is member of a public service described in Article 310 of the Constitution holds office during the pleasure of the President or the Governor, as the case may be, subject to the express provisions therein.

(2) The power to dismiss a public servant at pleasure is outside the scope of Art. 154 and, therefore, cannot be delegated by the Governor to a subordinate officer, and can be exercised by him, only in the manner prescribed by the Constitution.

(3) This tenure is subject to the limitations or qualifications mentioned in Article 311 of the Constitution.

(4) The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Art. 310, as qualified by Article 311.

(5) The Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Art. 310 of the Constitution read with Article 311 thereof.

(6) The Parliament and the Legislature also can make a law laying down and regulating the scope and content of the doctrine of "reasonable opportunity" embodied in Art. 311 of the Constitution; but the said law would be subject to judicial review.

(7) If a statute could be made by Legislatures within the foregoing permissible limits, the rule made by an authority in exercise of the power conferred thereunder would likewise be efficacious within the said limits."

Calcutta Dock Workers (Regulation of Employment) Scheme authorises raising and holding of fund—Section 5C of Dock Workers (Regulation of Employment) Act, 1948 deals with accounts and audits of such fund — Board thus answers the definition of local authority under Section 3 (31) of General Clauses Act — Hence, Small Cause Court at Calcutta can itself attach salary of a winchman of the Board drawing it at Kidderpore without transferring the decree to Alipore Court — (General Clauses Act (1897), S. 3 (31)) — (Dock Workers (Regulation of Employment) Act (1948) Section 5C inserted by Amendment Act 8 of 1962) — (Calcutta Dock Workers (Regulation of Employment) Scheme 1956, Rules 38 and 52.)

The Court of Small Causes at Calcutta can itself order attachment of the salary of a winchman working under the Calcutta Dock Labour Board drawing his salary at Kidderpore without transferring the decree to the Court at Alipore within whose local limits of jurisdiction Kidderpore is situate. The Calcutta Dock Labour Board is a local authority within the meaning of Order 21, Rule 48 (1) of Civil P. C. and hence the above position. The Calcutta Dock Labour Board answers the definition of Local authority under Section 3 (31) of the General Clauses Act in that Rule 38 read with Rule 52 of the Calcutta Dock Workers (Regulation of Employment) Scheme authorises the Board, a statutory body, to raise, hold and manage a fund and Section 5C as inserted in Dock Workers (Regulation of Employment) Act, 1948 by the Amendment Act 8 of 1962 deals with the accounts and audits of such fund.

(Paras 6 and 7)

(C) Civil P. C. (1908), Section 115 — Irregularity, a minor one — No interference to aid a judgment-debtor in his delaying tactics.

(Para 8)

Cases Referred : Chronological Paras

- (1957) AIR 1957 Mad 773 (V 44)
= 1957-2 Mad LJ 400, Muni-
swami v. Viswanatha 4
(1956) AIR 1956 Bom 276 (V 43),
Mansuri Ibrahim Mahamed v.
Shetti Kantilal Balabhai 5
P. K. Sanyal and K. K. Guha, for Peti-
tioner; B. C. Mitter and Miss Aruna
Mukherji, for Opp. Party.

ORDER:— This is a rule obtained under Section 115 of the Code of Civil Procedure, 5 of 1908, by the judgment-debtor whose application under Section 47 *ibid* fails in the court of first instance and thereafter before the Full Bench of the Small Cause Court, Calcutta.

2. The judgment-debtor, the petitioner before me, is a winchman working under the Calcutta Dock Labour Board. And

the interesting question Mr. Sanyal, appearing in support of the rule, has raised is: can he be regarded as a labourer within the meaning of S. 60, Sub-section (1), Clause (h), of the Code of Civil Procedure. To the language in the statute first. The proviso to Section 60, sub-sec. (1), lists properties which shall not be liable to attachment in execution of a decree. Clause (h) comes thereunder. It bears:

"(h) the wages of labourers and domestic servants, whether payable in money or kind."

3. Such then is the language of the statute. Does the petitioner, a winchman under the Dock Labour Board, come under this? A domestic servant he is not. But, is he or is he not a labourer? If he is a labourer, Mr. Sanyal is right; his wages are not liable to be attached. If, however, he is not a labourer, Mr. Mitter who opposes this rule is equally right, his wages are not exempt from attachment.

4. The fact that labourers and domestic servants have been placed in the same category, has a significance all its own. And, as pointed out in *Muniswami v. Viswanatha*, AIR 1957 Mad 773, a "labourer" is a person who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education. If the yardstick be that, it goes without saying that the Courts below are right. And the petitioner before me cannot be regarded as a labourer within the meaning of Section 60, sub-section (1), Clause (h) of the proviso thereto. Because evidence is overwhelming that he is not a manual labourer only. He has had to undergo a training. Without training, no one can serve as a winchman. That is the evidence which has been accepted by the two Courts of facts. Mr. Sanyal, on the other hand, invites my attention to the evidence of an Inspector of the Dock Labour Board, Arun Roy by name. He is the petitioner's witness No. 1. But his evidence is such that it has not inspired belief in the Courts below, though, I am free to confess, as rightly pointed out by Mr. Sanyal, the Full Bench of Calcutta Small Cause Court is silent about it. All the same, his evidence is such that it cannot stand. He asks the Court to believe that no sort of a training is a precondition for the appointment of a winchman. In that, he appears to be wrong, whether deliberately or not, I need not say. Because, Rule 21 of the Calcutta Dock Workers (Regulation of Employment) Scheme, 1956, Mr. Sanyal has been good enough to hand over to me, bears:

"21. Facilities for Training. — The Board shall make provision for training

of suitable registered workers in the duties of Winchmen and Riggers or in any other duties like signalling etc., that it may deem necessary".

And, still, an Inspector of the Board will have the Court believe that no manner of training is required for employment as a winchman: So, that way Mr. Sanyal's point cannot succeed.

5. But, he has been good enough to refer me to a decision of the Bombay High Court, namely, *Mansuri Ibrahim Mahamed v. Shetti Kantilal Balabhai*, AIR 1956 Bom 276, where Gajendragadkar J., as he then was, held that a weaver in a textile mill is a labourer within the meaning of Section 60, sub-section (1), Clause (h) of the proviso thereto. Gajendragadkar J. referred to certain earlier cases of the Bombay High Court as well. But, can I equate a weaver with a winchman, as I see before me, on the basis of the Calcutta Dock Workers (Regulation of Employment) Scheme, 1956? A weaver is a weaver and a winchman is a winchman. I shall not deny that some skill is required in the work of a weaver too. Even then, it will not be right on my part to treat a weaver and a winchman of the type I see before me on the same footing. Keeping in the forefront of my consideration the entire expression as it occurs in Clause (h), namely, "the wages of labourers and domestic servants", I find it impossible to say either on facts or at law that a winchman can be regarded as a labourer within the meaning of that clause. I shall not deny either that it is so hard to draw the dividing line, as Mr. Sanyal submits. How much skill will you require to take a labourer out of Clause (h). Mr. Sanyal asks, and very pertinently too. Even then, upon the whole of the evidence and the evidence of a fellow winchman, the second witness for the opposite party, it appears to be clear enough that the petitioner cannot be regarded as a labourer within the meaning of Cl. (h). So, this point upon which the rule has been opened fails.

6. There is, still, another point, and an interesting point at that which Mr. Sanyal has been good enough to raise. The petitioner before me does draw his wages, as I am told, from Kidderpore. The decree under execution is a decree of the Calcutta Small Cause Court. Kidderpore is outside the limits of such a Court. How can the Small Cause Court levy execution of the decree without transferring it to the Alipore Court within the jurisdiction of which Kidderpore is? A point as this merits two answers. The first answer is that O. 21 Rule 48, sub-rule (1), seems to be attracted here very, very much. To go by the

words material for the present purpose, as they occur in the provision just mentioned:

"Where the property to be attached is the salary or allowances of a servant of local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of Section 60, be withheld from such salary or allowances etc".

7. Now, if the petitioner before me can be regarded as a servant of a local authority, this provision is a complete answer to Mr. Sanyal's point. But can he be so regarded? Mr. Sanyal submits that the Dock Labour Board cannot be regarded as a local authority. But, going through the relevant statutes, I hold, with respect, that it can be so regarded. First to the definition of a 'local authority' in Section 3, Clause (31), of the General Clauses Act, 10 of 1897. Here, also, to quote the words which are material for the present purpose, "local authority shall mean an authority legally entitled to or entrusted by the Government with the control or management of a local fund". Now, the Dock Labour Board does not thrive on air. It has a good enough fund at its disposal to do the various statutory duties imposed upon it. Reference may be made inter alia to Section 5-C as inserted by the Dock Workers (Regulation of Employment) Amendment Act, 8 of 1962. It deals with the accounts and audits. But accounts and audits of what? Obviously of funds. How do those funds come in here in the hands of the Dock Labour Board? The answer is to be found in R. 38 read with Rule 52, of the Calcutta Dock Workers (Regulation of Employment) Scheme, 1956. It is hardly necessary to go through all that these rules contain. Suffice it to say that the nucleus of the funds is supplied by registered employers upon whom a suitable levy has been imposed under the command of the statute. I, therefore, see no difficulty whatever in treating such a fund as a local fund which the Calcutta Dock Labour Board is legally entitled to, and even entrusted by the State under the command of the statute, to control and manage. So soon as that is said, the Dock Labour Board at once elevates itself to the height of a local authority within the meaning of Section 3, Clause (31), of the General Clauses Act. This, then, is the first answer I return to Mr. Sanyal's second point.

8. The second answer is: Say, the Courts below have gone wrong. But, then, I am exercising a discretionary jurisdiction under Section 115 of the

Code. I am not bound to interfere only because the Courts below have gone wrong. And what is the result of such a wrong, if that? The result is that the execution shall be transferred from the Calcutta Small Cause Court to the Alipore Court. That is all. So, for such a jejune thing as that, why shall I go out of my way to interfere under Sec. 115 and thus put a premium upon the delaying tactics resorted to by the judgment-debtor? I see no reason whatever to do so.

9. Thus, the second point fails too.

10. In the result, the rule fails and do stand discharged with costs to the opposite party. I assess the hearing fee at four gold mohurs.

Petition dismissed.

AIR 1970 CALCUTTA 179 (V 57 C 30)

A. K. SINHA, J.

Monoranjan Das, Petitioner v. Commissioner, Presidency Division and others, Respondents.

C. R. 1086 (W) of 1965, D/- 20-12-1968.

Constitution of India, Article 311 (2) — Domestic enquiry — Disciplinary Authority may disagree with the finding of Enquiring Officer — But Disciplinary Authority has to give notice of such disagreement to delinquent before taking final decision — Punishment imposed without prior notice set aside.

Whether or not the charge or charges levelled against the delinquent servant have been established is the ultimate concern of the Disciplinary Authority. He is to enquire into the charges as a quasi-judicial body. An enquiry for establishment of such charges by another Officer is permissible but it is open to the Disciplinary Authority either to agree or to differ from the findings that may be made by the Enquiring Officer. In case of disagreement, only thing required is that he would give an opportunity to the delinquent servant before he finally takes a decision that such of the charges as were found not to have been established by the Enquiring Officer were also proved. In case of such disagreement it is essential that this should be recorded expressly along with his tentative decision regarding these charges in issuing second show cause notice upon the delinquent servant. For, the rules and principles of natural justice demand that before the Government servant is punished, he must

not only know what the charges are but must also get an opportunity to show that such charges are not proved. So, if the Disciplinary Authority in spite of the report of the Enquiring Officer to the contrary, thinks that the impugned charges stand proved, there is no doubt that the delinquent servant must be told so expressly and should be given an opportunity at the second stage to show that such a finding made by the Disciplinary Authority had no foundation in fact. This seems to be essential procedure consistent with rules and principles of natural justice implicit in Article 311 (2) of the Constitution. (Paras 6 & 8)

In a case the Enquiring Officer found that the charge regarding acceptance of illegal gratification was not proved but that the one that he had demanded such payment stood proved. While issuing the second show cause notice under Article 311 (2) of the Constitution, the Disciplinary Authority stated that he had tentatively decided to dismiss the delinquent Officer from service on the basis that both demand and acceptance of illegal gratification were found to have been established by the Enquiring Officer and which he had accepted. The Officer showed cause against the action proposed and the Officer was thereupon dismissed from service.

Held, that the second show cause notice suffered from the vice of non-compliance with the rules and principles of natural justice consistent with the provisions of Art. 311 (2) of the Constitution in the sense that the Disciplinary Authority failed to state expressly that he differed from the findings made by the Enquiring Officer and further according to him, the petitioner was guilty of charge of acceptance of illegal gratification with the result that the petitioner was deprived of getting reasonable opportunity to make representation against the proposed order of dismissal. The entire disciplinary proceeding from the stage of issue of second show cause notice culminating in the order of dismissal was quashed. AIR 1963 SC 1612 and AIR 1964 SC 506, Foll.; AIR 1963 SC 779, Dist.

(Paras 6, 11 and 12)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 SC 506 (V 51) = | |
| (1964) 1 SCWR 7, State of Mysore | |
| v. Munche Gowda | 9 |
| (1963) AIR 1963 SC 779 (V 50) = | |
| (1963) Supp 1 SCR 648, State of Orissa v. Bidya Bhusan | 11 |
| (1963) AIR 1963 SC 1612 (V 50) = | |
| (1964) 2 SCR 1, State of Assam | |
| v. Bimal Kumar | 6, 8 |
| S. K. Acharya, Tapashi Ch. Roy, for Petitioner; S. C. Bose, J. L. Saha, for Respondents. | |

ORDER:— In this Rule the petitioner prays for quashing an order of his dismissal from service. Briefly, the facts set out are as follows:

2. The petitioner was a process server in the office of the Income Tax Certificate at No. 169, Lower Circular Road, Calcutta. While so working there he was criminally prosecuted for accepting illegal gratification from one Hiralal Ghosh, Accountant of a Firm E. R. Joseph and Co., at No. 9, Waterloo Street. On or about 21st April, 1961 the Investigating Officer made an application for discharge of the petitioner on the ground that no sanction of the petitioner's appointing authority could be obtained on the ground of insufficient evidence. The petitioner was accordingly discharged by the Chief Presidency Magistrate, Calcutta.

3. In the meantime a disciplinary proceeding was started. Charge-sheet was issued by the Collector, 24 Parganas charging the petitioner with "taking illegal gratification of Rs. 150/- from said Hiralal Ghosh of the said firm". The petitioner submitted his written explanation. Thereafter, an enquiry was held by Sri A. Sen, Deputy Collector and eventually a report was submitted recommending the petitioner's dismissal from service on a finding that the petitioner at least demanded illegal gratification from Hiralal.

4. Upon this report a second show cause notice was issued upon the petitioner by the Collector against his tentative decision of dismissal of the petitioner from his service on the basis that both demand and acceptance of illegal gratification were found to have been established by the Enquiring Officer and he accepted them. In response to this notice the petitioner again submitted an explanation. The Collector, thereafter, by an order dated 18th March, 1965 dismissed him from his service on a finding that the petitioner was guilty of acceptance of illegal gratification. An appeal was preferred to the Commissioner, Presidency Division, who, however, by his order dated 24th June, 1965 dismissed the appeal. That is how the petitioner felt aggrieved and obtained the present Rule.

5. Upon these facts several grounds were taken but I find that the Rule was issued only on two limited grounds viz., (B) and (C) of the petition.

6. In support of the first ground Mr. Acharya on behalf of the petitioner contended that the Enquiring Officer only found the petitioner guilty of demanding and not of 'accepting illegal gratification'. He drew my attention to the penultimate paragraph of the report of the Enquiring

Officer to show that acceptance of illegal gratification by the petitioner was not proved but relying on "preponderance of probabilities" the Enquiring Officer concluded that Monoranjan must have demanded illegal gratification. That being so, it was contended that the petitioner could not be dismissed from his service on a finding by the Disciplinary Authority that he accepted illegal gratification. I cannot accept the contention. Admittedly, the charge against the petitioner was that "he took illegal gratification of Rs. 150/- only from Hiralal Ghosh, Accountant of the aforesaid firm". So, it was open to the Disciplinary Authority to inflict punishment of dismissal provided such a charge was established. It may be that according to the Enquiring Officer the evidence was not sufficient to conclude that such a charge of accepting illegal gratification was established but that by no means could prevent the Disciplinary Authority to come to his own conclusion and impose penalty accordingly. Whether or not the charge or charges levelled against the delinquent servant have been established is the ultimate concern of the Disciplinary Authority. He is to enquire into the charges as a quasi-judicial body. An enquiry for establishment of such charges by another Officer is permissible but it is open to the Disciplinary Authority either to agree or to differ from the findings that may be made by the Enquiring Officer. In case of disagreement, only thing required is that he would give an opportunity to the delinquent servant before he finally takes a decision that such of the charges as were found not to have been established by the Enquiring Officer were also proved. This is the view taken by the Supreme Court in *State of Assam v. Bimal Kumar*, AIR 1963 SC 1612. While dealing with the scope, effect and implication of Article 311 (2) of the Constitution Gajendra-gadkar, J. observed inter alia (at pages 1614-1615, para 6):

"In issuing the second notice, the dismissing authority naturally has to come to a tentative or provisional conclusion about the guilt of the public officer as well as about the punishment which would meet the requirement of justice in his case, and it is only after reaching conclusions in both these matters provisionally that the dismissing authority issues the second notice. There is no doubt that in response to this notice, the public officer is entitled to show cause not only against the action proposed to be taken against him, but also against the validity or the correctness of the findings recorded by the enquiring officer and provisionally accepted by the dismissing authority. In other words, the

second opportunity enables the public officer to cover the whole ground and to plead that no case had been made out against him for taking any disciplinary action and then to urge that if he fails in substantiating his innocence, the action proposed to be taken against him is either unduly severe or not called for. This position is not in dispute".

7. That being so, the Disciplinary Authority was quite competent to come to his own finding regarding these charges which according to Enquiry Officer were not established.

8. Mr. Acharya then contended in support of the next ground that no reasonable opportunity was given to the petitioner inasmuch as the Collector did not give any indication in his second show cause notice that he disagreed with the findings of the Enquiring Officer and proposed to inflict punishment of dismissal of the petitioner on his own conclusion that charge of acceptance of illegal gratification was proved. What he did was that he accepted charge of illegal gratification as finding of the Enquiring Officer but the report of enquiry would at once reveal that this was patently erroneous. It was clear, therefore, that in issuing second show cause notice the Collector never applied his mind. This failure on the part of the Collector resulted in violation of principles of natural justice in the sense that the petitioner was deprived of a reasonable opportunity being given to make representation against any such proposed finding of the Collector and therefore, the entire disciplinary proceeding leading to dismissal of the petitioner was bad. On principle, I think, Mr. Acharya is right. It is open to the Disciplinary Authority either to accept the finding of the Enquiring Officer in its entirety or to disagree with such finding in respect of some or all of the charges. In case of such disagreement it is essential that this should be recorded expressly along with his tentative decision regarding these charges in issuing second show cause notice upon the delinquent servant. For, the rules and principles of natural justice demand that before the Government servant is punished, he must not only know what the charges are but must also get an opportunity to show that such charges are not proved. So, if the Disciplinary Authority in spite of the report of the Enquiring Officer to the contrary, thinks that the impugned charges stand proved, there is no doubt that the delinquent servant must be told so expressly and should be given an opportunity at the second stage to show that such a finding made by the Disciplinary Authority had no foundation in fact. This

seems to me to be essential procedure consistent with rules and principles of natural justice implicit in Art. 311 (2) of the Constitution. Gajendragadkar, J. dealing with similar question though under different set of circumstances expressed himself in the very same decision, AIR 1963 SC 1612 (at p. 1615 para 8):

"We ought, however, to add that if the dismissing authority differs from the findings recorded in the enquiry report, it is necessary that its provisional conclusions in that behalf should be specified in the second notice. It may be that the report makes findings in favour of the delinquent officer, but the dismissing authority disagrees with the said findings and proceeds to issue the notice under Article 311 (2). In such a case, it would obviously be necessary that the dismissing authority should expressly state that it differs from the findings recorded in the enquiry report and then indicate the nature of the action proposed to be taken against the delinquent officer. Without such an express statement in the notice, it would be impossible to issue the notice at all. There may also be cases in which the enquiry report may make findings in favour of the delinquent officer on some issues and against him on other issues. That is precisely what has happened in the present case. If the dismissing authority accepts all the findings in their entirety, it is another matter; but if the dismissing authority accepts the findings recorded against the delinquent officer and differs from some or all of those recorded in his favour and proceeds to specify the nature of the action proposed to be taken on its conclusions, it would be necessary that the said conclusions should be briefly indicated in the notice. In this category of cases, the action proposed to be taken would be based not only on the findings recorded against the delinquent officer in the enquiry report, but also on the view of the dismissing authority that the other charges not held proved by the enquiring officer are according to the dismissing authority, proved. In order to give the delinquent officer a reasonable opportunity to show cause under Article 311 (2), it is essential that the conclusion provisionally reached by the dismissing authority must, in such cases, be specified in the notice."

9. Then again, relying on this Assam case substantially the same view was adopted in a later decision of the Supreme Court reported in AIR 1964 SC 506. Subba Rao, J. while dealing with question as to infirmities of a second show cause notice for not mentioning the past records of the delinquent servant observ-

ed inter alia (at Page 510 Para 9) of the report—

"In the present case the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary, the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, a comparison of Paragraphs 3 and 4 of the order of dismissal shows that but for the previous record of the Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendation of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the respondent from service. This notice clearly contravened the provision of Article 311 (2) of the Constitution as interpreted by Court."

10. Such being the position in law, it remains to be seen as to whether the petitioner did get a reasonable opportunity to show cause at the second stage. From the enquiry report it appears that the finding of the Enquiring Officer was that demand of illegal gratification of Monoranjan was proved but not the charge of acceptance of illegal gratification. In spite of this finding the Collector in issuing second show cause notice proceeded on the view that the charges of demand and acceptance of illegal gratification were held to have been proved by the Enquiring Officer and on accepting such finding he tentatively decided to dismiss the petitioner. This in my view, was manifestly erroneous. There cannot be any question of accepting a finding which really did not exist. In the instant case there was clearly a disagreement between the Enquiring Officer and the Collector so far as the charge of acceptance of illegal gratification was concerned but this was not expressly stated by the Collector nor any tentative decision following such disagreement was recorded in the second show cause notice. On the contrary, such a notice put the petitioner on a wrong track, for, the Collector told him that he was wanted to dismiss on the charges which were held to have been proved by the Enquiring Officer. It is true that the petitioner submitted an explanation against the second show cause notice and this explanation was considered in detail and the Collector came to his own conclusion that the petitioner was guilty of acceptance of illegal gratification. It is also true that he preferred an appeal against the order made

by the Collector which was dismissed but these facts by themselves could not cure the infirmities of the impugned notice at the second stage in giving reasonable opportunity to the petitioner. This, in my view, "clearly contravened provisions of Article 311 (2) of the Constitution."

11. Mr. Bose on behalf of the respondents, however, contended relying on a decision of the Supreme Court reported in AIR 1963 SC 779, State of Orissa v. Bidya Bhusan that if the order of dismissal could be made on any finding on any of the charges, the Court could not consider whether that finding alone would have weighed with the Authority in dismissing the public servant. I fail to see how this case is of any assistance to the petitioner. What happened in this case was that in an enquiry held by the Tribunal against the petitioner Bidya Bhusan on two charges there being four specific heads under the first charge charging the respondents with having received illegal gratification and the single item on the second charge alleging possession of means disproportionate to his income, as a Sub-Registrar, it was held that four out of the five heads under the first charge of "corruption" and also the charge of possession of means disproportionate to the income were established and dismissal of the petitioner from service was recommended. Upon this report of the Tribunal the Governor of Orissa after consulting the Public Service Commission dismissed the petitioner from his service. The High Court of Orissa upon a writ petition made by Bidya Bhusan held that the findings on two of the heads under charge (1) could not be sustained and therefore, directed the Government of Orissa to decide whether on the basis of those charges the punishment of dismissal should be maintained or a lesser punishment would suffice. In that context, the Supreme Court held that the reasons which induced the Punishing Authority if there had been an enquiry consistent with the prescribed rules, were not justifiable nor was a penalty open to review by the Court. In the instant case, the disciplinary proceedings at the stage of issuing second show cause notice suffered from vice of non-compliance with the rules and principles of natural justice consistent with the provisions of Art. 311 (2) of the Constitution in the sense that the Disciplinary authority failed to state expressly that he differed from the findings made by the Enquiring Officer and further according to him, the petitioner was guilty of charge of acceptance of illegal gratification with the result that the petitioner was deprived of getting reasonable opportunity to make representation against the proposed order of dismissal. So, principle indicated in

this case has no bearing to the question involved in the facts and circumstances of the present case. I, therefore, do not find any substance in the contention raised.

12. For the reasons, however, already given the only conclusion I come to is that the entire disciplinary proceeding from the stage of issuing second show cause notice culminating in the order of dismissal of the petitioner affirmed by the order of the Commissioner respondent No. 1 suffers from serious infirmities and cannot be sustained as valid.

13. The result is, the petition succeeds. The entire proceedings from the stage of second show cause notice culminating in the order of dismissal affirmed by the respondent No. 1 are quashed. The Rule is made absolute to the extent indicated above.

14. I, however, make it clear that nothing in this judgment will prevent the Disciplinary Authority to issue a fresh second show cause notice and complete the disciplinary proceeding against the petitioner in accordance with law and take such decision as it is entitled to take.

15. There will be no order as to costs.

16. Let a writ both in the nature of mandamus and certiorari issue accordingly.

Petition allowed.

AIR 1970 CALCUTTA 183 (V 57 C 31)

D. N. SINHA, C. J.
AND B. C. MITRA, J.

New Central Jute Mills Co., Ltd., Appellant v. Dy. Secretary, Ministry of Finance, Dept. of Revenue and Company Law, Govt. of India and others, Respondents.

A. F. O. O. No. 236 of 1965, D/- 7-3-1969, from Judgment of Banerjee J. reported in AIR 1966 Cal. 151.

Companies Act (1956), S. 237 (b) — Order under — Prima facie reasons for, must exist — Order cannot be made to commence fishing expedition—Reasons if found afterwards cannot justify order in retrospect, AIR 1966 Cal 151, Reversed.

The order under S. 237 (b) made by the Central Government for inspection and investigation of the affairs of a Company, upon being challenged by the Company, the Authorities must show that prima facie reasons existed and were considered before the order was made, in conformity with the provisions of clause (b) of Section 237. It is obvious that these reasons must exist when the order was made. An order cannot be made to commence a fishing expedition in order to

find the reasons for making an order. Reasons, if found afterwards cannot justify the order in retrospect, if they were not available to the authority exercising its powers, in arriving at an opinion in conformity with the provisions, AIR 1966 Cal 151, Reversed; AIR 1967 SC 295 and AIR 1969 SC 707, Applied.

(Para 16)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 707 (V 56) = Civil Appeals Nos. 2274 to 2276 of 1966, D/. 16-12-1968, Rohtas Industries Ltd. v. S. D. Agarwalla 5, 12

(1967) AIR 1967 SC 295 (V 54) = (1966) Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board 5, 14

(1965) C. R. No. 203 of 1965 (Cal), Deputy Secy. Ministry of Finance v. Sahu Jain Ltd. 4, 17

Advocate General and Bonmali Das, for Appellant; Bhola Nath Sen and B. Basak, for Respondents.

SINHA, C. J.: The appellant in this case is Messrs. New Central Jute Mills Co. Ltd. which is a public limited company incorporated under the Indian Companies Act, 1913 (hereinafter referred to as the "appellant") and is an existing company under the Companies Act, 1956 (hereinafter referred to as the "said Act") having its registered office at 11, Clive Row, Calcutta. It carries on business inter alia as manufacturers of jute goods, chemicals and fertilizers. It owns two jute mills called Albion Jute Mills and Lothian Jute Mills situate at Budge Budge, West Bengal. It owns a factory at Varanasi known as Sahu Chemicals & Fertilizers in which soda ash and ammonium chloride are produced.

2. Messrs. Sahu Jain Ltd. of 11 Clive Row, Calcutta was at all material times and still are the managing agents of the appellant. The authorised capital of the appellant is rupees five crores divided into 30,00,000 ordinary shares of Rs. 10/- each and 20,00,000 preference shares of Rs. 100/- each. The paid-up capital of the appellant is Rs. 2,89,00,000/- divided into 33,000 preference shares of Rs. 100/- each fully called-up and 25,60,000 ordinary shares of Rs. 10/- each fully called-up. The capital of the appellant was increased by Rs. 42,75,000/- in 1958 and further by Rs. 42,75,000/- in 1959 and again by Rs. 85,00,000/- in 1961. These figures are mentioned to show that the appellant is a substantial company. In the petition it is stated that at all material times the business of the appellant was run on sound principles resulting in substantial profits, declaration of good dividends and provision for sufficient reserve. For example it is stated that the appellant made a net

profit of Rs. 1,32,55,724/- for the year ended 31st March 1963 after meeting all expenses and interest, charges and after providing Rs. 53,55,584/- for depreciation. The appellant declared as dividend a sum of Rs. 28,60,000/- in addition to payment of interim dividend of Rs. 12,80,000/- for the year ended 31st March 1963. In other words, during the said year the appellant declared 15% dividend on ordinary shares and 9.1% on preference shares. On or about 11th April 1963, the Central Government purported to pass an order under sub-cl. (i) and (ii) of clause (b) of Section 237 of the said Act. The relevant part of Section 237 of the said Act runs as follows:—

237. Without prejudice to its powers under Section 235, the Central Government—

(a) shall appoint one or more competent persons as Inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if—

(i) the company, by special resolution, or

(ii) the Court, by order, declares that the affairs of the company ought to be investigated by an Inspector appointed by the Central Government; and

(b) may do so if, in the opinion of the Central Government, there are circumstances suggesting—

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any, of its members, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) that the persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or”.

It would be interesting to relate here shortly how provisions as to inspection and investigation of the affairs of companies came to be incorporated in the said Act. The Indian Companies Act, 1913 was extensively amended in 1936 and thereafter further amended from time to time. After the World War II, there was a demand for its drastic revision. In the report of the Company Law Committee, 1952 it was stated:

“No law, however well conceived or well drafted can be altogether fool and knave proof and it is impossible for any law to protect the fool from the consequences of his acts and omissions. Nevertheless, we consider that it is the function of law to prevent dishonest and

unscrupulous people from creating conditions and circumstances, which will enable them to make fools of others. The powers of inspection and investigation into the affairs of a company, which the Companies Acts of most countries confer on Government or a quasi-independent authority are intended primarily as a check on the activities of such people. We recognise that, in some cases, the use of the powers of inspection and investigation may initially tend to shake the credit of a company and thereby adversely affect its competitive position, although the allegations against the company may in the end be found to have been largely unfounded. It is therefore, necessary that the investigation provisions of the Act should be so conceived as to reduce this threat to the credit of companies to a minimum. This risk should not, however, deter us from considering the desirability of conferring adequate powers on an appropriate authority to investigate the affairs of a company where such investigation is *Prima facie* called for. On the contrary we consider it to be in the long term interest of the trade and industry of this country that such powers should be vested in a competent authority and exercised energetically albeit with due caution and fairness in all cases which require investigation”. (Report of the Company Law Committee, 1952 p. 133).

3. The demand for drastic action was sought to be made by enacting the Companies Act, 1956 which came into operation from April 1, 1956. The said Act has been amended several times. Section 209 (4) of the said Act contains provisions for inspection and Sections 235 to 251 contain provisions for investigation. I have already mentioned that on or about the 11th April, 1963 an order was passed under sub-clauses (i) and (ii) of Clause (b) of Section 237 of the said Act upon the appellant. The relevant part of the said order runs as follows:—

“Whereas the Central Government is of the opinion that there are circumstances suggesting that the business of the New Central Jute Mills Ltd., a company having its Registered Office at 11, Clive Row, Calcutta (hereinafter referred to as the said Company) is being conducted with intent to defraud its creditors, members or other persons and the persons concerned in the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the said company or its members;

And whereas the Central Government consider it desirable that an Inspector should be appointed to investigate the affairs of the said company and to report thereon;

Now therefore, in exercise of the several powers conferred by sub-clauses (i) and (ii) of Clause (b) of Section 237 of the Companies Act, 1956 (Act 1 of 1956), the Central Government hereby appointed Shri S. Prakash Chopra of M/s. S. P. Chopra and Co., Chartered Accountants, 31-F Connaught Place, New Delhi as Inspector to investigate the affairs of the said Company for the period from 1-4-58 to date and should the Inspectors so consider it necessary also for the period prior to 1-4-58 and to report thereon to the Central Government pointing out inter alia irregularities and contraventions in respect of the provisions of the Companies Act 1956 or of the Indian Companies Act, 1913 or any other law for the time being in force and person or persons who are responsible for such irregularities and contraventions.

The Inspector shall complete the investigation and submit six copies of his final report to the Central Government not later than four months from the date of issue of this order unless time in that behalf is extended by the Central Government.

A separate order will issue with regard to the remuneration and other incidental expenses of the Inspector".

4. On receipt of the said order the appellant wrote to the respondent No. 1 objecting to the investigation, inter alia on the ground that the order was unwarranted, without jurisdiction and made on consideration of extraneous circumstances, and requested the said respondent to furnish to the appellant the materials on the basis of which the order had been made. The said respondent by his letter dated 17th June, 1963 repudiated the allegation and refused to disclose any material as asked for. The said Mr. S. P. Chopra who was appointed Inspector was however, allowed to commence the investigation but could not complete it within the period originally fixed and by an order dated 9th August, 1963, the period originally fixed was extended to 31st October, 1963. On or about the 6th September, 1963 an order was made for inspection by Mr. I. N. Puri under sub-section (4) of Sec. 209 of the said Act. The appellant company objected to this order also, but the objection was overruled. By an order dated 31st Oct. 1963, a further extension was given to Mr. S. P. Chopra to complete his investigation and report upto 31st January, 1964. By an order dated 29th January, 1964, a third extension was given upto 30th June, 1964. By an order dated 12th June, 1964 an Additional Inspector Mr. U. N. Puri was appointed and the two Inspectors were directed to complete the investigation and report by 30th June,

1964 or such date as may be extended from time to time, if and when necessary. By an order dated 30th June, 1964, Mr. S. P. Chopra was relieved of his duties at his own request. In that order, it was stated that it had been represented to the Central Government that the investigation and report could not be completed within the extended time due to the refusal of the company and its officers to produce all books and papers or to appear before the Inspector for the purpose of examination, and due to other non-co-operative dilatory tactics. In his place, Mr. S. C. Bafna was appointed co-Inspector with Mr. I. N. Puri and they were directed to complete investigation and report by the 31st December, 1964. On or about the 21st July, 1964 the appellant made an application to this Court under Article 226 of the Constitution, praying for a writ of certiorari for quashing of the order dated 11th April, 1963 and also the orders dated 6th September 1963, 12th June 1964 and 30th June 1964, and for a writ of mandamus directing the respondent to recall or rescind the said orders and for a writ of prohibition restraining the respondents from taking further steps in the impugned proceedings. A rule was issued on 21st July, 1964. I might mention here that a similar rule was issued in C. R. No. 203 of 1965 (Deputy Secretary Ministry of Finance etc. v. Sahu Jain Ltd.). In both these applications the grounds are similar. The rule in Sahu Jain's case was heard by Banerjee, J. and by his order dated 6th August, 1965 the rule was made absolute and the impugned orders in that case were quashed and appropriate writs were issued, making it clear however, that nothing contained in the said order would stand in the way of the Central Government making a fresh investigation according to law. In both these rules, a common point of law was raised, namely as to whether, the Central Government, in making an order was bound to satisfy the Court on the point as to whether, prima facie grounds existed for taking action against the companies concerned, in terms of sub-cl. (i) and (ii) of Clause (b) of Section 237. In Sahu Jain's case, C. R. No. 203 of 1965 (Cal) (supra), the stand taken by the respondent was that the "opinion" of the Central Government, based on circumstances mentioned in sub-clauses (i) and (ii) of Clause (b) were subjective and it was not bound to disclose either to the party concerned or the Court, even the prima facie grounds upon which the opinion was based. In Sahu Jain's case, C. R. No. 203 of 1965 (Cal) (supra) a complete blanket was drawn and although affidavits were filed no grounds were disclosed to the Court. By his

judgment and order dated 6th August, 1965 the rule in that case was made absolute and the impugned orders were quashed mainly on the ground that the respondents were bound to satisfy the Court that there existed prima facie grounds for making an order under sub-clauses (i) and (ii) of Clause (b) of Section 237, and as this was not done the orders were defective and without jurisdiction. In the instant case, the very same attitude has been taken, namely that the "opinion" of the Central Government was subjective and needed no disclosure either to the party or to the Court. By an elaborate judgment the learned Judge negated this contention, but held that in the affidavit-in-opposition filed by Mr. D. S. Dang, Deputy Secretary to the Government of India affirmed on 29th August, 1964, materials were disclosed, making out a prima facie case that circumstances existed in this case satisfying the provisions of sub-clauses (i) and (ii) of Clause (b) of Section 237. This information is stated to be contained in paragraph 4 of the said affidavit-in-opposition of Mr. Dang, which runs as follows:—

"Further for the greater part of the period under investigation, Messrs. N. C. Jain and Co., a firm of Chartered Accountants were the statutory auditors of the petitioner. In the same period, members of such firm were also acting as employees in some of the other concerns belonging to or controlled by Shanti Prasad Jain and/or members of his family who also control and manage the petitioner. In the premises, it is contended that the statutory auditors of the petitioner were not at material times independent and at no material time there has been a just audit of the petitioner's affairs".

5. Banerjee, J. was of the opinion that this statement was sufficient to make the impugned orders valid. The learned Judge said as follows:—

"It appears from the Annual Report of the petitioner company for the years 1955 to 1962-63 all annexed to the petition that Sahu Jain Ltd., is and has been the Managing Agent of the petitioner company. It is not disputed that Shanti Prasad Jain is the Chairman of the Board of Directors of Sahu Jain Ltd. The Central Government appears to entertain the opinion that there are circumstances suggesting that members of the firm of N. C. Jain and Co., Statutory Auditors to the petitioner company, are employed in other concerns belonging to or controlled by Shanti Prasad Jain. Now, the value of the audit report depends upon the independence and integrity of the auditors. If it appears that auditors are under some sort of obligation to the

company, the accounts of which they audit, there may arise a doubt that the auditors might have discharged their functions much too indulgently. If such a doubt arises, it cannot be ignored as a doubt which no reasonable man should entertain. In the affidavit-in-reply the petitioner no doubt denies that any member or members of the firm of auditors were employed as alleged. I am not in a position to decide which version is correct. Be that as it may, paragraph 4 of the affidavit-in-opposition makes one definite allegation against the petitioner company and the nature of the allegation is not such as does not make a reasonable man inquisitive. The petitioner company controls very large capital contributed by the public. Its liabilities by way of loan and otherwise are also considerable. If it does not do its business honestly and properly, the repercussions on the economics of the country may be pretty severe. If in the opinion of the Central Government there are circumstances suggesting that the petitioner company has been employing an obliging firm of auditors, which may cover up its malpractices, it cannot be said that the Government did not act reasonably in taking action under Section 237 (b) or must have proceeded on a fundamental misconception of the law and the matter in regard to which the opinion was to be formed".

There were other grounds argued in support of the rule, but mainly on the ground stated above, the application failed and the rule was discharged on 4th August, 1965 although no order as to costs was made. It is against this order that this appeal is directed. In both the cases, a number of authorities were cited, but the learned Judge did not have the opportunity of considering two Supreme Court decisions which have since come into existence and which are decisive on the points involved in the two cases, namely Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295 and an unreported decision, Rohtas Industries Ltd. v. S. D. Agarwalla (Civil Appeals Nos. 2274 to 2276 of 1966, D/- 16-12-1968 = (Since reported in AIR 1969 SC 707). In fact, in Sahu Jain's case, C. R. No. 203 of 1965 (Cal) (supra) an appeal was preferred against the order of Banerjee, J. dated 6th August, 1965, and following the decision in Barium Chemicals Ltd. and the other authorities mentioned in the judgment of Mitra, J. dated 18th February, 1969 the decision of Banerjee, J. was upheld and the appeal has been dismissed with costs. In this appeal, we have received further assistance from the recent judgment of the Supreme Court in Rohtas Industries Ltd. (Civil Appeals

Nos. 2274 to 2276 of 1966, D/- 16-12-1968 = (Since reported in AIR 1969 SC 707) (supra). I will now proceed to summarise the findings in these two cases and apply them to the facts of the instant case, to see whether the order of Banerjee, J. in the instant case dated 4th August, 1965 can be supported or should be set aside. In the case of AIR 1967 SC 295 the facts were briefly as follows: In 1959/60 the appellant No. 2, Balasubramaniam obtained from the Central Government two licences for the manufacture of 2,500 and 1,900 tonnes of barium chemicals per year in the name of Transworld Traders of which he was the proprietor. He then started negotiations with Kali Chemie of Hanover, West Germany to collaborate with him in setting up a plant. While he was so negotiating, M/s T. T. Krishnamachari and Co., who were the sole selling agents of the said German Company for some of their products, approached the second appellant for the sole selling agency of barium products of the plant proposed to be put up by the second appellant. This second appellant did not agree. On December 5, 1960 M/s. T. T. K. and Co. applied to the Central Government for a licence for manufacture of barium chemicals. The second appellant objected to it but in spite of his objections the licence was granted. In the year 1961, the Barium Chemicals Ltd., the appellant No. 1, was incorporated with an authorised capital of Rupees one crore and an issued capital of rupees fifty lakhs. Its primary object was to carry on the business of manufacturing all types of barium compounds. Balasubramaniam, the appellant No. 2 was appointed the managing director of the company from December 5, 1961. The erection of the plant was undertaken by M/s. L. A. Mitchell Ltd. Manchester, in pursuance of a collaboration agreement approved by the Central Government. In November, 1961 the Central Government granted a licence to the said company for import of machinery. On or about this time Mr. T. T. Krishnamachari, the respondent No. 2 was appointed a minister and rejoined the cabinet later on becoming the Minister of Finance and Economic Co-ordination and thereafter the Finance Minister of India. On August 30, 1962 the licence granted to M/s. T. T. K. Ltd. was revoked. It is stated that the appellant No. 2 was instrumental in having this done, by speaking to Prime Minister Nehru. On the other hand, it was stated that M/s. T. T. K. Ltd., had themselves decided to surrender it. Meanwhile, the appellant No. 1 was not faring well. It was not able to start work in full capacity and it was found on a survey report made by M/s. Humphreys and Glasgow

(Overseas) Ltd., Bombay that the planning and design of the plant erected by the collaborators was defective. The appellant No. 1 gave notice to M/s Mitchell Ltd., on April 2, 1965 that if the plant was not completely installed by June 1, 1965 the company would terminate the arrangements and seek damages. As a result of it, the chairman of L. A. Mitchell Ltd. Lord Poole visited India and it was agreed that the necessary repairs would be carried out by the collaborators at an expenditure of £2,50,000/- in addition to the amount already invested by it, and that production would commence from June 1965. In the meantime M/s. Kali Chemie of Hanover started negotiations for a collaboration agreement and the proposal was that the appellant No. 1 should be reorganised and its share capital distributed between Kali Chemie and M/s. T. T. K. Chemicals Ltd. It was also proposed that Kali Chemie should take over the responsibility of production; the appellant No. 1 would be responsible for the management and M/s. T. T. K. Chemicals Ltd., should take over the sales promotion. These negotiations however came to nothing owing to the agreement with original collaborators. On May 19, 1965 the Secretary of the Company Law Board under the direction of the Chairman thereof issued an order on behalf of the Company Law Board under Section 237 (b) of the said Act. The relevant part of the order ran as follows:—

"In the opinion of the Company Law Board there are circumstances suggesting that the business of M/s. Barium Chemicals Ltd. is being conducted with intent to defraud its creditors, members and other persons; and further that the affairs of the company have in connection therewith been guilty of fraud, misfeasance and other misconduct towards the company and its members.

Therefore, in exercise of the powers vested by Clause (b) of Section 237 of the Companies Act, 1956 (Act 1 of 1956) read with the Government of India, Department of Revenue Notification No. GSR 178, dated the 1st February, 1964, the Company Law Board hereby appoint,

* * * * *

as inspectors to investigate the affairs of the company since its incorporation in 1961".

Pursuant to the notice, search warrants were obtained and searches were carried out and documents were seized. The second appellant submitted a representation to the Board that the Company was a first of its kind in India, that it could not go into production because of defec-

tive planning by the collaborators and that the impugned order had been made on account of trade rivalry between the company and M/s. T. T. K. and Co., in which the minister Mr. T. T. Krishnamachari was interested. It was stated that the order was mala fide and it was made on grounds extraneous to the provisions of Section 237 (b) of the said Act and at the instance of the second respondent, Mr. Krishnamachari. As the Board was determined to proceed with the implementation of the order, an application was made before the Punjab High Court under Art. 226 for having the impugned order quashed and for certain other reliefs. This application failed and thereupon the appellants appealed to the Supreme Court. On behalf of the appellants four contentions were raised:—

1. That the impugned order dated May 19, 1963 was mala fide and was the result of the personal hostility of the minister.

2. The circumstances said to have been found were extraneous to Section 237 (b) and could not constitute a basis for the impugned order and the order was, therefore, ultra vires the section.

3. That the impugned order was in any case bad as it was passed by the chairman alone.

4. That the impugned order was bad because Section 237 itself was bad as offending against Arts. 14 and 19 (1) (g).

6. In the case, there was a majority judgment delivered by Shelat, J., allowing the appeal and setting aside the impugned order, which was agreed with by Hidayatullah, J., (as he then was) and Bachawat, J. According to the minority judgment delivered by Mudholkar, J., for himself and Sarkar, C. J., it was held that the exercise of the power did not violate any fundamental rights, that the opinion to be formed under Section 237 (b) was subjective, but that if the grounds were disclosed by the Board, the Court could examine them for considering whether they were relevant. That in the facts of the case they appeared to be relevant. It was not shown that it was made mala fide and the appeal should be dismissed. All the three learned Judges constituting the majority, gave their reasons and I shall now refer to the same. All the learned Judges agreed that the impugned provisions were not ultra vires Articles 14 and 19 (1) (g) of the Constitution and also upon the fact that the charge of mala fides had not been established. In the present case we need not deal with these points. In the present case we are concerned only with the question as to whether the provisions of Section 237 (b) (i) and (ii) are entirely subjective and cannot be gone into by the Court or if the order was objected to on the ground of

mala fides or relevance, the Court has jurisdiction to go into the question and to what extent. If it has jurisdiction to go into the matter, can it be said in the instant case that the respondents have given a satisfactory answer as to the objections raised, so as to make out a prima facie case. The observation of Shelat, J., so far as they are relevant on these points may be summarised as follows:

(1) The object of Section 237 is to safeguard the interests of those dealing with a company by providing for an investigation whether the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object.

(2) There is no doubt that the formation of the opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the Government and not of the Court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency.

(3) But the authority is required to arrive at such an opinion from circumstances suggesting the existence of circumstances set out in sub-clauses (i), (ii) or (iii). The expression "circumstances suggesting" means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or an illegal purpose. The proof of such intent or purpura is still to be deduced through an investigation. But it does not mean that even the existence of circumstances is a matter of subjective opinion. The law requires that there must exist circumstances from which the authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. The legislature could not have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded.

(4) There must exist circumstances which in the opinion of the authority suggests what has been set out in sub-clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid opinion, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

(5) The words "reason to believe" or "in the opinion of", do not always lead to the construction that these processes do not lend themselves even to a limited scrutiny by the Court.

(6) Of course, if there is any question of mala fides, dishonesty or corrupt purpose, it can be challenged in Court and set aside, but even if it is based on good faith, the authority has to act in accordance with and within the limits of the legislative powers and its order can be challenged if it is beyond those limits or if it is based on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these circumstances, it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind.

7. In the judgment of Shelat, J. it was pointed out that the chairman of the Board had filed an affidavit-in-opposition in which it was stated that the circumstances upon which the Board arrived at the opinion resulting in the impugned order were as follows:—

"(i) there had been delay, bungling and faulty planning of the project, resulting in double expenditure for which the collaborators had put the responsibility upon the Managing Director, Petitioner No. 2;

(ii) since its floatation the company had been continuously showing losses and nearly 1/3rd of its share capital had been wiped off;

(iii) that the shares of the company which to start with were at premium were being quoted on the stock exchange at half their face value; and

(iv) some eminent persons who had initially accepted seats on the Board of Directors of the company had subsequently severed their connections with it due to differences with Petitioner No. 2 on account of the manner in which the affairs of the company were being conducted".

8. It was held that the grounds disclosed in the affidavit of the chairman did not establish any intent to defraud or unlawful purpose either in the formation or conduct of the company or misfeasance or misconduct towards the company or its members. Delay, bungling or faulty planning could not constitute fraud, misfeasance or misconduct.

9. The relevant findings of Hidayatullah, J. (as he then was) may be summarised as follows:—

(1) The power contained in Sec. 237 (b) of the said Act is discretionary and its exercise depends upon the honest formation of an opinion that an investigation is necessary. The words "in the opinion of the Central Government" indicate that the opinion must be formed by the Cen-

tral Government and it is implicit that the opinion must be an honest opinion.

(2) The next requirement is that "there are circumstances suggesting etc". These words indicate that before the Central Government forms its opinion it must have before it circumstances suggesting certain inferences. These inferences are as follows:—

"(a) that the business is being conducted with intent to defraud—

(i) creditors of the company, or

(ii) any other person;

(b) that the business is being conducted—

(i) for a fraudulent purpose, or

(ii) for an unlawful purpose;

(c) that persons who formed the company or manage its affairs have been guilty of—

(i) fraud, or

(ii) misfeasance or other misconduct—towards the company or towards any of its members.

(d) That information has been withheld from the members about its affairs which might reasonably be expected including information relating to the calculation of commission payable to—

(i) managing or other director

(ii) managing agent

(iii) secretaries and treasurers

(iv) the managers."

(3) The abovementioned grounds limit the jurisdiction of the Central Government, outside which the power cannot be exercised. An action not based on circumstances suggesting inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on fishing expeditions to find evidence.

(4) The formation of the opinion is subjective, but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. It is not reasonable to say that the clause permits the Government to say that it has formed the opinion on circumstances which it thinks exist.

(5) Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned in court, has to be proved at least prima facie. It is not sufficient to say that the circumstances exist and give no clue to what they are, because the circumstances must be such as to lead to conclusion of certain definiteness.

(6) When it is challenged that the opinion has been formed mala fide or upon extraneous or irrelevant matters, the respondent must disclose before the court, the circumstances which will indicate that his action was within the four cor-

ners of his own powers.

10. On the facts, the majority view was that this onus has not been discharged and that the order was made on extraneous circumstances and the charge of mala fides was not substantiated. The affidavit of the Chairman showed that he relied on circumstances which showed "delay, bungling and faulty planning" resulting in "double expenditure", for which the collaborators had put the responsibility on the second appellant. There was admitted loss in the running of the undertaking, for which the blame was put on faulty planning and design by the collaborators. None of these circumstances showed intent to defraud. That some directors had resigned did not also establish fraud or misconduct. There might be other reasons for their resignation. The affidavit of Mr. Dang merely repeated the allegations made by the Chairman and stated that a "deeper probe" was necessary. It did not prove the existence of circumstances under which the power could be exercised.

11. On the relevant point, Bachawat, J. agreed with the views stated above. He expressed different views on the question of delegation, but we are not concerned with it in this case.

12. The next case to be considered is the unreported decision of Civil Appeals Nos. 2274 to 2276 of 1966, D/-16-12-1968= (Since reported in AIR 1969 SC 707) (supra). The facts in that case were briefly as follows: The appellant in the appeals was a company incorporated under the Indian Companies Act, 1913 some time in 1933 having its registered office at Dalmianagar in Bihar. The authorised capital was 15 crores and paid-up capital about 6 crores. On or about the 11th April, 1963 a notice was issued at the instance of the Board upon the said company under sub-clauses (i) and (ii) of clause (b) of Section 237 of the said Act. Inspectors were appointed and like the previous case, time was repeatedly extended. The company applied before the Patna High Court, challenging the said order and a rule was issued under Article 226. In that case also the Chairman, Company Law Board, filed an affidavit-in-opposition. The circumstances disclosed therein issuing the said order were as follows:—

"(a) Shri S. P. Jain together with his friends, relations and associates is principally in charge of the management of the petitioner company. Over a long period, several complaints had been received by the Deptt. as to the misconduct of the said Shri S. P. Jain towards companies under his control and management. Some of these were referred to and enquired into by a commission of Inquiry headed by Mr. Justice Vivian

Bose of the Supreme Court of India, which in its report dated 15-6-62 made adverse findings and observations against Shri S. P. Jain. Shri Jain is being prosecuted in the Court of District Magistrate, Delhi under S. 120B read with Ss. 409, 456, 467 and 477 of the Indian Penal Code in regard to his misconduct in the management of what are known as the Dalmia Jain group of companies, and most of the material upon the basis of which this prosecution was launched was available to the Central Government on 11-4-63. Shri Jain is also being prosecuted in Calcutta for misconduct in the Management of Messrs. New Central Jute Mills Co. Ltd., a company under the same management as the petitioner on the basis of an F. I. R. lodged by the Department with the Special Judge Police Establishment just before the 11th April 1963. Shri Jain is also being proceeded against before the Companies Tribunal under Sections 388-B and 398 for misconduct in managing the affairs of M/s Bennett Coleman & Co. Ltd. and details as to Shri Jain's misconduct were with the Central Government as on 11th April 1963.

(b) Complaints had also been received by the Department before 11th April 1963 specifically as to the misconduct on the part of the management of the petitioner company in the conduct of its affairs."

13. The High Court dismissed the writ petition, holding that the opinion formed by the Central Government was not open to judicial review. From that order there was an appeal to the Supreme Court. In the Supreme Court, a further affidavit was filed and the only additional material that was placed before the Court were three complaints received by Government which were marked as annexures A, B and C. At the hearing it was conceded that the allegations made in annexure "A" were too vague and could not have been the basis for making the impugned order. One concrete allegation made therein related to an event prior to the date from which an enquiry had been ordered. In fact, it had occurred in 1939 whereas the enquiry was ordered for a period subsequent to 1-4-50. The allegations in annexure "B" were also found to be vague and not relied on. The following complaint in annexure "C" was relied on:

"The Investment of the Company in Albion Plywoods Ltd. and their variations by the Company's Managing Agents appear to have been done to benefit the Managing Agents, their friends and brokers, at the expense of the shareholders. It appears that the preference shares in this Company were sold at the market rate of Rs. 100/- each when these could be converted into ordinary shares of Rupees

10/- each which were then quoting at Rs. 15/- in the stock market. This and various other acts of deliberate commissions and omissions require a thorough investigation so that shareholders in general may have a feeling of security in the company."

With regard to the abovementioned allegations, it appeared that there was no material before the Board when it issued the order as to who were the partners of Bagla and Co. to whom the 3000 preference shares were sold, and consequently whether the transaction could be said to have been made with a view to profit the directors of the appellant company or their relations. Hegde, J. held as follows:

"From the facts placed before us, it is clear that the Government had not bestowed sufficient attention to the material before it before passing the impugned order. It seems to have been oppressed by the opinion that it had formed about Shri S. P. Jain. From the arguments advanced by Mr. Attorney, it is clear that but for the association of Mr. S. P. Jain with the appellant-company, the investigation in question, in all probabilities would not have been ordered. Hence, it is clear that in making the impugned order irrelevant considerations have played an important part."

14. The learned Judge then proceeded to uphold the vires of the section agreeing with the decision in Barium Chemical's case, AIR 1967 SC 295 (supra) and then proceeded to state as follows:

"Next question is whether any reasonable authority much less expert body like the Central Government could have reasonably made the impugned order on the basis of the material before it. Admittedly the only relevant material on the basis of which the impugned order can be said to have been made is the transaction of sale of preference shares of Albion Plywoods Ltd. At the time when the Government made the impugned order, it did not know the market quotation for the ordinary shares of that company as on the sale of those shares or immediately before that date. They did not care to find out that they were sold for inadequate consideration. If as is now proved that the market price of those shares on or about May 6, 1960 was only Rs. 11/- per share then the transaction in question could not have afforded any basis for forming the opinion required by S. 237 (b). If the market price of an ordinary share of that company on or about May 6, 1960 was only Rs. 11/- it was quite reasonable for the Directors to conclude that the price of the ordinary shares is likely to go down in view of the company's proposal to put on the market another 50,000 shares as a result of the

conversion of the preference shares into ordinary shares. We do not think that any reasonable person much less any expert body like the Government, on the material before it, could have jumped to the conclusion that there was any fraud involved in the sale of the shares in question. If the Government had any suspicion about the transaction it should have probed into the matter further before directing any investigation. We are convinced that the precipitate action taken by the Government was not called for nor could be justified on the basis of the material before it. The opinion formed by the Government was a wholly irrational opinion. The fact that one of the leading Directors of the appellant company was a suspect in the eye of the Government because of his antecedents, assuming without deciding, that the allegations against him are true, was not a relevant circumstance. That circumstance should not have been allowed to cloud the opinion of the Government. The Government is charged with the responsibility to form a bona fide opinion on the basis of relevant material. The opinion formed in this case cannot be held to have been formed in accordance with law."

15. In the result the appeals were allowed and the orders were set aside. Bachawat, J. described it as a "border line case." He held that the Court had no power to review the facts as an appellate body, nor could it substitute its opinion for that of the Government. He however, came to the conclusion that there were no materials before the Government on which it could form the opinion that there were circumstances suggesting fraud etc, as mentioned in the impugned order dated May 11, 1963. It can therefore be said that it had formed the opinion without applying its mind to the materials before it and therefore, the opinion formed was in excess of its powers. The learned Judge agreed with the proposed order of Hegde, J.

16. It is clear therefore from the principles which have now been firmly established in the two Supreme Court decisions mentioned above, that upon being challenged the respondents must show to court that prima facie reasons existed and were considered before the order was made, in conformity with the provisions of sub-clauses (i) and (ii) of clause (b) of section 237 of the said Act. It is obvious that these reasons must exist when the order was made. It has been definitely laid down that an order could not be made to commence a fishing expedition in order to find the reasons for making an order. Reasons, if found afterwards cannot justify the order in retrospect, if they were not available

to the authority exercising its powers, in arriving at an opinion in conformity with the provisions stated above.

17. I have already stated above that there were two cases which were decided by Banerjee, J. In Sahu Jain's case, C. R. No. 203 of 1965 (Cal) (supra) the respondent authorities refused to disclose any reason to this Court for forming the opinion, although it was charged that the reasons were mala fide, extraneous and irrelevant. That order was manifestly against the principles laid down in the two cases mentioned above and has now been set aside. The only distinction in this case is that the learned Judge in the court below had found that in paragraph 4 of the affidavit-in-opposition, certain statements were made which have been set out above. According to the learned Judge, these were sufficient reasons to uphold the legality of the order made. We have some doubts as to whether the allegations made, amount to fraud, misfeasance or misconduct as is required under sub-clauses (i) and (ii) of clause (b) of section 237. Be that as it may, an objection has been taken by Advocate General, which appears to be fatal to the respondents. He argues with great force that if the law is that the respondent authorities must show to the court that prima facie reasons existed for arriving at the opinion upon which the impugned order is based, it must be averred and shown that these circumstances existed at the time when the order was made and that the authority making the order was aware of them and based its opinion on these circumstances. Briefly put, the allegation in paragraph 4 is that there has not been adequate and proper audit of accounts of the appellant, as the auditor's reports were based on informations furnished to them which were defective and the audit was not made by an independent auditor. It is nowhere stated that this fact came to be known to the authorities at or before the time when the impugned order was made, and that the impugned order was made upon the basis of these facts which came to be known prior to the making of the order. This of course would be fatal because the respondent authorities could not possibly justify the making of the impugned orders until such an averment was made and substantiated. The learned Judge in relying on the statements made in paragraph 4 of the affidavit of Mr. D. S. Dang affirmed on 29th August 1964 completely overlooked this aspect of the matter. The learned counsel on behalf of the respondents asked for an opportunity to file further affidavits and in spite of opposition by the counsel for the appellant, we for the ends of justice permitted additional affidavits to be filed upon this

point and adjourned the hearing of the case. In fact, the matter was adjourned several times in order to enable such affidavit to be filed. Now however, learned counsel for the respondent is constrained to admit before the court that his clients are not in a position to file any such affidavit in court. In our opinion, there can be now no doubt that the respondent authorities have failed to discharge the onus of proving even a prima facie case to support the impugned order. The learned Judge in the court below has relied on only one paragraph of the affidavit-in-opposition and this does not contain the necessary averments, and is useless for the purpose of the respondents.

18. The result is that applying the tests set out in the two Supreme Court decisions mentioned above, this appeal should succeed and the judgment and order of the Court below are set aside and the rule is made absolute and the impugned orders are set aside and/or quashed by appropriate writs and the respondents are restrained by a writ in the nature of Mandamus from giving effect to the same. This will not however prevent them from issuing any further orders in accordance with law. The appellants are entitled to the costs of the appeal. Certified for two counsel.

19. The operation of this order will remain stayed for six weeks from this date.

20. B. C. MITRA, J.: I agree.
Appeal allowed.

AIR 1970 CALCUTTA 192 (V 57 C 32)
P. N. MOOKERJEE AND
S. K. CHAKRAVARTI, JJ.

Sohanlal Salman, Petitioner v. Smt. Shyama Debi and others, Opposite Parties.

Civil Revn. Case No. 4494 of 1967, D/- 2-1-1969.

Evidence Act (1872), S. 91 — Partition — Court refusing to admit proof of unregistered deed — Commission to ascertain details of partition, held, could not be issued. (Civil P. C. (1908), O. 26, R. 9). (Para 3)

Rabindra Nath Mitra, Hrishikesh Gupta, for Petitioner; Mohan Lal De and Tarun Kr. Manna, for Opposite Parties.

P. N. MOOKERJEE, J.:— This Rule was obtained by the petitioner who was defendant No. 3 in the connected suit under Order 21, Rule 63 of the Code of Civil Procedure.

2. One of the issues between the parties was whether there was a partition, as alleged by the plaintiffs opposite parties. For proving this partition, origi-

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nally an unregistered deed was produced by the plaintiffs, but, that having been found by the court not to be admissible in evidence under the law, the alleged partition could not be proved by the said deed. Thereafter, the plaintiffs applied for issue of a Commission for ascertaining the local features, for proving, in essence, the details of the above partition, which could not be proved, as aforesaid. The present petitioner objected to the issue of such a commission on the ground that the Commissioner's evidence, if any, would be hit by Sec. 91 of the Indian Evidence Act and would not be admissible for the purpose of proving the said details of the alleged partition. This objection was rejected by the learned trial Judge.

3. In our view, the purpose of the commission would be to prove the details of the alleged partition, for which there was, admittedly, an unregistered deed of partition, which was inadmissible for want of registration. In the circumstances, the commission, for the purpose, for which it was sought to be taken out, would not be permissible under the law.

4. We, accordingly, make this Rule absolute, set aside the order of the learned trial Judge and reject the plaintiffs' prayer for issue of a commission for local inspection, as made by them.

5. There will be no order for costs in this Rule.

6. S. K. CHAKRAVARTI, J.: I agree.
Petition allowed.

AIR 1970 CALCUTTA 193 (V 57 C 33)
K. L. ROY, J.

Eastern Agency, Plaintiff v. Life Insurance Corporation of India, Defendant.
Suit No. 1566 of 1965, D/- 29-1-1969.

Life Insurance Corporation Act (1956), Ss. 7, 36 — Insurance Act (1938), Ss. 40, 31-A — Plaintiff firm appointed as special representative of Insurance Company under an agreement dated 1-6-1954, for procuring business through employment of agents or field workers — Certain monthly allowance and flat rate commission fixed under agreement — Plaintiff neither insurance agent nor principal, chief or special agent of insurance company — Held as the Insurance Company was prohibited under S. 40 (1) of Insurance Act from making any payment to plaintiff in terms of agreement and as there was no legal liability on it no such liability could be binding on Life Insurance Corporation.

Under an agreement dated June 1, 1954, the plaintiff firm was appointed by an Insurance Company as its special representative for the purpose of procuring

business through the employment of agents or field workers and the plaintiff was required to procure business to a certain extent and in consideration thereof it was entitled to certain monthly allowance and a flat rate commission. Further, under the agreement the firm was made responsible for the conduct of all the field workers under its organisation and was directed to secure deposits from the parties in advance along with the proposal. The firm also undertook not to represent any other life insurance company nor to divulge any of the business secrets of the company. The plaintiff firm was neither an insurance agent nor a principal agent nor a chief agent nor a special agent of the insurance company as mentioned in S. 40(1) of the Insurance Act.

Held that the plaintiff firm was being employed by the insurance company for the purpose of securing business whatever designation might have been used for such employment and as any payment of remuneration to any person employed for securing business except the persons of the four categories mentioned in the Section was prohibited under Section 40(1) of the Life Insurance Act, the Insurance Company was prohibited by the provisions of the Act from making any payment to the plaintiff firm in terms of the said agreement and as there was no legal liability on the insurance company no such liability could be binding on the Life Insurance Corporation. AIR 1961 Punj 253, Disting. (Paras 9, 11)

Under the provisions of S. 31-A (1) (b) no contract or agreement could be entered into by an insurance company after 1950 employing in any capacity any person whose remuneration or any part thereof takes the form of commission in respect of the life insurance business of the insurer. Under the proviso to the aforesaid Section the prohibition did not apply to the payment of commission to a principal Agent or an Insurance Agent in respect of any insurance business procured by or through him.

(Para 10)

Cases Referred: Chronological Paras
(1961) AIR 1961 Punj 253 (V 48)=
ILR (1961) 1 Punj 553, Lakshmi Insurance Co. Ltd. v. Bibi Padmawati

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B. C. Dutt with Mrs. Banerjee, for Plaintiff; M. M. Sen with H. M. Dhar, for Defendant.

JUDGMENT:— This is a suit by the plaintiff firm against the Life Insurance Corporation of India for arrears of remuneration or in the alternative for damages in respect of an agreement between the plaintiff firm and Aryya Insurance Company Limited. The case for the plaintiff is that on or about the 1st June, 1954 Aryya Insurance Company Limited ap-

pointed the plaintiff firm as its special representative for the purpose of introducing persons willing to act as insurance agents of the company. It was further agreed that on the acceptance by the company and appointment of any such persons as its agents the plaintiff guaranteed that insurance business worth at least Rupees five lacs annually would be procured by such agents yielding a premium collection of about Rs. 20,000/-, and in consideration thereof the plaintiff firm would be entitled to an allowance of Rs. 200/- per month and in addition a flat rate of commission of 65 per cent on the first year's premium collection including agency commission and special agent's commission. It is further claimed that pursuant to the said agreement the plaintiff firm acted as such special representative of the insurance company till January, 1956 and was duly paid its remuneration and commission by the insurance company. The Life Insurance (Emergency Provisions) Ordinance, 1956 was promulgated in January, 1956 and in pursuance thereof a Custodian was appointed in respect of the company's life insurance business and the management of such business vested in the said Custodian. The Custodian wrongfully and illegally denied the validity of the said agreement between the plaintiff and the said insurance company and stopped payment of any further remuneration or commission agreed upon by the insurance company. Thereafter on coming into effect of the Life Insurance Corporation Act (XXX of 1956) on and from the 1st September, 1956 the Corporation also refused to recognise the agreement entered into between the plaintiff firm and the insurance company and rejected the plaintiff firm's claim for remuneration and commission. In the premises, the plaintiff claims Rs. 36,500/- as damages in respect of the monthly remuneration up to August, 1957 and commission as provided for in the said agreement or in the alternative damages for Rs. 48,000/- on the basis of monthly allowance of Rs. 200/- for 20 years.

2. The defence of the Corporation in the written statement is, inter alia, that the alleged agreement of the 1st June, 1954 between the plaintiff firm and Aryya Insurance Company Limited was void, inoperative and invalid in law being in violation of the provisions of the Insurance Act, 1938, and as the plaintiff was never employed as Chief Agent, Special Agent, Principal Agent or an Insurance Agent of the said Insurance Company it was not entitled to payment of any remuneration under the aforesaid agreement.

3. The correspondence contained in the brief of documents in this suit was admitted in evidence without formal proof by consent of learned counsel for

the parties and the brief is marked Ex. A. It would be necessary to set out the purported agreement between the plaintiff firm and Aryya Insurance Company Limited dated the 1st June 1954 in some detail. The said agreement provided that the Insurance Company did thereby appoint the plaintiff firm as its special representative on inter alia the following terms and conditions, namely:—

- (1) Designation — Special Representative,
- (2) Date of effect — 1st June, 1954.
- (3) Power — To introduce ordinary licensed agents, special agents and organisers on the company's usual terms.
- (4) Guarantee — 5 lacs worth of paid for business within a year yielding premium collection of Rs. 20,000/- approximately in due course after completion of which there would be no guarantee of business so long as the total business of 5 lacs remains in force.
- (5) Remuneration — That the plaintiff firm would be entitled to an allowance of Rs. 200/- per month in addition to a flat rate of commission of 65 per cent on the first year's premium collection including agency commission and special agent's commission.
- (6) That if the business was found to be unsatisfactory the payment made should be subject to necessary modification with mutual consent after periodical review of the business done by the plaintiff firm from time to time.
- (7) That the plaintiff firm would observe the following terms and conditions:—
 - (a) It would be primarily responsible for the conduct of all the field workers under its organisation with respect to quality and quantity and the review of business to be made from time to time.

(b) The plaintiff firm would try to secure the initial deposit from the party in advance along with the proposal before the proponent could be introduced to the examining doctor. If the proposal was not completed by payment, no medical fees would be payable by the company.

(c) That the plaintiff firm would strictly carry out all the instructions issued by the company for its guidance from time to time.

(d) That the plaintiff firm would not directly or indirectly represent any other life office and shall not divulge any of the business secrets of the company.

4. There is a letter dated July 6, 1955 from the Agency Manager of Aryya Insurance Company Limited recording the company's satisfaction with the work done by the plaintiff firm for the year 1954-55. The next letter is dated February 9, 1956 and is from the plaintiff firm to the Custodian claiming the amount of Rs. 200/- per month under the aforesaid agreement with the insurance company. In reply the Custodian by his letter dated

March 23, 1956 required whether the plaintiff was an employee or an agent of the insurance company, and if an employee whether it was employed in a clerical or subordinate capacity. The letter further pointed out that under Section 31-A of the Insurance Act no commission was payable to any person by way of remuneration except to one of the categories of agents mentioned in that section. Similarly, Section 40 of the said Act also prohibited such payment. As the plaintiff firm was neither an employee nor an agent of the insurance company any remuneration paid would be illegal and as such the Custodian refused to entertain the claim of the plaintiff firm. In reply to the aforesaid letter the plaintiff firm wrote on April 5, 1956 that it was neither an agent nor an employee in any clerical or subordinate capacity of the insurance company but was appointed as special representative on certain specific terms and conditions. There was, therefore, no question of taking out any licence under the Insurance Act. The letter proceeded to point out that neither Section 31-A nor Section 40 of the Insurance Act was applicable to the case of the plaintiff and requested the Custodian to consider the plaintiff's claim and issue orders for payment. There are further correspondence between the Custodian and the plaintiff firm each reiterating the position it had already taken up and finally, on May 17, 1956 the Solicitor for the plaintiff firm wrote to the Custodian stating the plaintiff's case and contending that as the said remuneration was not by way of commission, bonus or a share in valuation surplus but was payable to the plaintiff as special representative for its business organisation and expenses it was not hit by any of the provisions of the Insurance Act. The letter concluded with a demand for payment of the monthly allowance for 4 months. Further correspondence was carried on between the Life Insurance Corporation and the Solicitor for the plaintiff each reiterating the position taken up previously and ultimately this suit was filed on the 5th September, 1957.

5. The issues that were raised and settled are as follows:—

1. Is the agreement recorded in the letter dated June 1, 1954 set out in annexure "A" to the plaint lawful, valid and binding on the defendant Corporation?

2. If issue No. 1 is answered in the affirmative, should there be a decree in terms of prayer (f) of the plaint?

3. To what relief, if any, is the plaintiff entitled?

Though, as Mr. Dutt the learned counsel for the plaintiff pointed out, in view of the issues raised oral evidence was not very material, one Dilip Kumar Mukherjee, a partner of the plaintiff firm, gave

evidence on its behalf. He proved the letter of appointment from Aryya Insurance Company dated the 1st June, 1954 containing the terms of the agreement between the plaintiff firm and the insurance company. He stated that the plaintiff firm acted in terms of the said agreement and received its remuneration and commission for the first year from the insurance company. But thereafter on and from January, 1956 no such remuneration or commission was paid as the company's controlled business had been taken over by the Custodian under the Ordinance and the Custodian refused to recognize the right of the plaintiff firm to any payment under the aforesaid agreement. The witness also stated that in this suit the plaintiff was claiming damages at the rate of Rs. 200/- for the whole year 1956 and up to August, 1957 and the anticipated commission that would have been earned on the plaintiff introducing agents to procure work of about ten lakhs of rupees. In the alternative the plaintiff claimed damages of Rs. 48,000/- on the basis of the monthly allowance for twenty years as the appointment was "almost of a permanent nature." The witness explained that the plaintiff firm never procured any business directly and its modus operandi was to introduce men to the company who were willing to act as agents for the company if approved by the company. After the agent was appointed by the company, the company used to arrange for licence for such agents. The plaintiff simply introduced these persons to the company. At first the witness said that the plaintiff firm was constituted after June 1954 but on being reminded by the Court that the purported agreement was on 1st June, 1954 he amended his evidence by saying that possibly the plaintiff firm had been constituted earlier and without consulting the records he could not say when it was actually constituted. He also admitted that after January 1956 the plaintiff firm had done no business whatsoever though the room at 77-B Harish Mukherjee Road which was rented for its business originally still continued to be in its possession. In cross-examination the witness stated that the plaintiff firm was neither a special agent nor a chief agent or a principal agent or an insurance agent of the Aryya Insurance Company Ltd. (qq. 126-129) but was only its special representative for the purpose of procuring persons to be appointed by the company as its insurance agents.

6. Before I discuss the arguments advanced in this case it would be necessary to set out the relevant provisions of the Insurance Act and the Life Insurance Corporation Act. The definition section, S. 2 of the first Act defines inter alia a chief agent, an insurance agent, a principal agent and a special agent as follows:

"S. 2 (5-A): 'Chief agent' means a person who not being a salaried employee of an insurer, in consideration of any commission— (i) performs any administrative and organising functions for the insurer and (ii) procures Life Insurance business for the insurer by employing or causing to be employed insurance agents on behalf of the insurer.

S. 2 (10): 'Insurance Agent' means an insurance agent licensed under S. 42 who receives or agrees to receive payment by way of commission or other remuneration in consideration of its soliciting or procuring insurance business including business relating to the continuance, renewal or revival of policies of insurance.

S. 10 (15): 'Principal Agent' means a person who, not being a salaried employee of an insurer, in consideration of any commission— (i) performs any administrative and organizing functions for the insurer and (ii) procures general insurance business whether wholly or in part by employing or causing to be employed insurance agents on behalf of the insurer. The other relevant provisions of the Act are as follows:—

S. 31-A (i): Notwithstanding anything to the contrary contained in the Indian Companies Act, 1956 or in the Articles of Association of the insurer, or in any contract or agreement, no insurer shall after the expiry of one year from the commencement of the Insurance (Amendment) Act, 1950

(b) be directed or managed by or employ as manager or as officer or in any capacity any person whose remuneration or any part thereof takes the form of commission or bonus or a share in the valuation surplus in respect of the life insurance business of the insurer

S. 40(1): No person shall, after the expiry of six months from the commencement of this Act, pay or contract to pay any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent or a principal, chief or special agent

7. Ss. 42-B and 42-C lay down the regulations for the employment of principal agents, chief agents and special agents. It is provided that every contract between the insurer carrying on life insurance business and a chief agent or a special agent or between a chief agent and a special agent shall be in writing in terms contained in Parts B and C of the Sixth Schedule to the Act.

8. The other relevant provision to be referred to is S. 36 of the Life Insurance Corporation Act (Act 31 of 1956) which provides that notwithstanding anything contained in the Insurance Act or in any other law for the time being in force

every contract appertaining to control business subsisting immediately before the appointed day (1st September, 1956) (a) between an insurer and its chief agent or between an insurer and its special agent, or (b) between the chief agent of an insurer and a special agent, shall as from the appointed day, cease to have effect and any rights accruing to the chief agent or the special agent under any such contract shall terminate on that day. Then there is a proviso providing for compensation by the Corporation to such agents on the termination of their appointment.

9. Mr. B. C. Dutt, the learned counsel for the plaintiff firm, submitted that the remuneration provided for in the agreement of June 1, 1954 was for payment to the plaintiff as special representative for introducing agents to the insurance company. The plaintiff was neither an insurance agent, chief agent or principal agent, and according to the learned counsel the aforesaid agreement imposed no obligation on the plaintiff to procure any business; its function being only to introduce ordinary and special agents or organisers. The learned counsel pointed out that under S. 2 (a) (iii) of the Insurance Act an insurer could employ a representative or maintain a place of business in India with the object of obtaining insurance business. As pointed out to Mr. Dutt by the Court, this provision obviously applies to foreign insurance companies and has no application to the case of Indian insurance companies. Mr. Dutt, however, drew inspiration from the aforesaid provision for his argument that apart from employing chief, ordinary, special and insurance agents an insurer was at liberty to engage special organisers for facilitating the carrying on of its business. Mr. Dutt, then advanced a somewhat strange argument. He submitted that S. 40 (1) of the Insurance Act, even if it applied to this case, did not operate to make the agreement itself illegal or void because the Act itself provides for the consequence of a breach of the provisions of that section. As learned counsel himself pointed out, S. 102 of the Act did not provide for any penalty for the breach of the observance of the conditions in S. 40(1) and there was no other provision in the Act providing for non-compliance with S. 40. As S. 40 itself prohibits the insurer from making any payment of remuneration except to person mentioned therein, I do not see the point in Mr. Dutt's argument that the said section did not make the agreement illegal or void. If the insurer could not act in terms of the agreement obviously it could not be given effect to. Mr. Dutt submitted that in any event the agreement should be interpreted in a liberal manner and for that proposition he relied on a decision of the Punjab High Court

reported in AIR 1961 Punj 253. But that was a case of interpretation of a contract of insurance and has no application to the facts of the present case. Mr. Dutt also submitted that in case of any doubt the construction favouring the plaintiff should be adopted because the contract was contained in a letter written by the insurance company. I am again at a loss to appreciate this argument of Mr. Dutt. Mr. Dutt pointed out that under the Life Insurance Emergency Provision Ordinance (1 of 1956) only the right of management was taken away from the insurer in respect of the controlled business for the purpose of meeting the routine day to day expenditures to be incurred by the insurer. Mr. Dutt referred me to S. 7 of the Life Insurance Corporation Act and pointed out that as from the appointed day, i.e., 1st September, 1956, all the assets and liabilities of the insurer appertaining to the controlled business vested in the Corporation and such liabilities were deemed to include all debts, liabilities and obligations of whatever kind then existing and appertaining to the controlled business of the insurer and submitted that the liability which the Corporation took over from the insurer included the liability under the agreement in this suit. Mr. Dutt pointed out that S. 52-C of the Insurance Act specifically gave the Administrator appointed under that Act the power to cancel or vary any contract or agreement entered into by the insurer where the Administrator was satisfied that such a contract or agreement was prejudicial to the interest of the policy-holders and that similar power of cancellation had not been conferred on the Corporation under the Life Insurance Corporation Act. It was accordingly submitted that as the agreement would have been binding on the insurer and as the Life Insurance Corporation had not been given any power to terminate such agreements, the refusal of the Corporation to pay the plaintiff in terms of the said agreement was not according to law. Mr. Dutt submitted further that even if the Court came to the opinion that S. 40(1) of the Insurance Act applied to this case and the payment of the commission was barred the plaintiff was still entitled to the payment of Rs. 200/- per month as allowance and for damages from being prevented from earning the remuneration by carrying out the terms of the agreement. It was further submitted that as the agreement was an obligation binding on the Insurance Company and as such was also an obligation imposed on the Corporation, the Corporation was not entitled to challenge the existence or validity of such an agreement. Mr. Dutt referred me to certain passages from A. K. Bhattacharjee's Commentaries on the Insurance Act, 1954 Edn. at p. 222 where the learned author quotes certain

passages from the "Insurance World", of August 1939 to the following effect:—

"From the wording of S. 40 (1) it will appear that soliciting or procuring of insurance business may be a function of employer of agents also, for that section permits payment of remuneration for soliciting or procuring insurance business in India; (2) on an insurance agent or a person acting on behalf of an insurer who for the purpose of insurance business employs insurance agents.

So, when soliciting or procuring of insurance itself is recognized as a function of an employer of agents and at the same time the law makes it specifically compulsory for insurance agents only to take out licences it will not be unreasonable to conclude that an employer of agents is not required by the letter of the law to take out a licence for the purpose of soliciting personal business. If this interpretation stands, an employer of agents will be excluded also from the operation of S. 40 (1) for the limitation clause does not apply to an employer of agents at all." I am afraid, I am unable to accept the above proposition. As pointed out by Mr. Sen the wording of S. 40 (1) is quite clear and it prohibits the payment of any remuneration or reward to any person, whether by way of commission or otherwise.

10. Mr. Sen, the learned Counsel for the defendant Corporation, was equally precise and brief in his reply. His main contention was that the agreement of June 1, 1954 was not a valid and lawful agreement and was as such not binding on the defendant Corporation. When the agreement was entered into with Aryya Insurance Company Limited it was not and could not be a valid agreement as it was hit by the provisions of Section 40 (1) and S. 31-A (1)(b) of the Insurance Act. The first of these sections prohibits payment of any remuneration by way of commission or otherwise for soliciting or procuring insurance business in India to any person except to an insurance agent or a principal, chief or special agent. Such prohibition is applicable except in the case of the four categories of persons mentioned in the section, and the plaintiff's case clearly is that it was neither an insurance agent nor a principal agent nor a chief agent nor a special agent of the insurance company. This position is made quite clear in the correspondence and also in the evidence of the plaintiff's witness, Mukherji, in QQ. 126 to 129. Mr. Sen also referred to the terms of the said agreement and particularly to clause 4 which provides for a guarantee, Clause 5 which provides for remuneration, clause 7 which provides that the appointment would be subject to modification if the business procured by the plaintiff is found to be unsatisfactory, and clause 8 which requires the plaintiff to fulfil the

quota of business. The conditions to be observed by the plaintiff are contained in clause 9 and the various sub-clauses of that clause make it quite clear that it was the plaintiff's organisation which would be responsible for the field workers under it, which would secure the initial deposits from the parties and which would also strictly carry out the instructions issued by the insurance company from time to time. Paragraph 3 of the agreement also prohibits the plaintiff from collecting premium or pledging the credit of the insurance company or in any way vary the terms of the contract of insurance. Mr. Sen submitted that these clauses clearly showed that the duties of the plaintiff firm under the said agreement was to procure agents and field workers for the purpose of acquiring business for the insurance company for which the plaintiff was also made responsible and for collecting premium thereof and for these services rendered the plaintiff firm would be remunerated by way of a sum of Rs. 200/- per month and a commission of 65 per cent on the amount of premium received in the first year providing the business secured was not less than rupees ten lacs. If the payments under the agreement to be made by Aryya Insurance Company Limited to the plaintiff firm were payments by way of remuneration or reward for procuring insurance business, then such payments were prohibited under Section 40(1) as the plaintiff firm was admittedly not one of the categories of persons exempted from the operation of that section. Mr. Sen next pointed out that under the provisions of Section 31-A (1) (b) no contract or agreement could be entered into by an insurance company after 1930 employing in any capacity any person whose remuneration or any part thereof takes the form of commission in respect of the life insurance business of the insurer. Under the proviso to the aforesaid section the prohibition does not apply to the payment of commission to a Principal Agent or an Insurance Agent in respect of any insurance business procured by or through him. These two sections in Mr. Sen's submission prohibited the Aryya Insurance Co. Ltd. from making any payments to the plaintiff firm in accordance with the agreement of June 1, 1954 and as such, such an agreement could not have been a liability within the meaning of Section 7 of the Life Insurance Corporation Act as contended for by Mr. Dutt. Mr. Sen further pointed out that apart from the admission of the plaintiff's witness the correspondence disclosed clearly shows that this point was specifically raised by the Custodian and the plaintiff's solicitor had categorically denied that the plaintiff firm was either an Insurance Agent or a Principal Agent or any of the other agents mentioned in Section 40,

sub-section (1) of the Insurance Act. As the plaintiff firm is not claiming to be an agent of the Aryya Insurance Co. Ltd. under any of the provisions of Sections 2 (5-A), 2 (10), 2 (15) and 2 (17). It is not necessary to consider the provisions of the aforesaid sections. Mr. Sen, however, pointed out that in most of these definitions salaried employees are not to be included within the designation of an agent of the insurer. Mr. Sen also referred to the provisions in the Sixth Schedule to the Insurance Act to show how payments to such agents are to be made under the Act. Finally, Mr. Sen referred to Section 31-A (4) of the Insurance Act for the proposition that no person has any right either in contract or otherwise to compensation for any loss incurred by reason of the operation of any of the provisions of that Act. Mr. Sen submitted that as under the provisions of the Insurance Act the payment of the remuneration under the agreement dated June 1, 1954 was prohibited the plaintiff firm could not have any cause of action in damages against the Corporation which was the successor to the insurer. Mr. Sen finally submitted that the evidence given by a partner of the plaintiff firm shows that the suit is speculative and that no demands had been made on Aryya Insurance Co. Ltd. which was in existence at the time the suit was filed and it was admitted that neither were any enquiries made nor any legal advice sought in respect thereof. Mr. Sen finally submitted that Issue No. 1 should be answered against the plaintiff and the suit should be dismissed.

11. I agree with and accept the submissions made by Mr. Sen. It is quite clear that under the agreement dated June 1, 1954 the plaintiff firm was being employed by the insurance company for the purpose of procuring business through the employment of agents or field workers and the plaintiff was required to procure business to the extent of Rs. 10,00,000/- for the first year. Further, under the agreement the plaintiff was made responsible for the conduct of all the field workers under its organisation and was directed to secure the deposits from the parties in advance along with the proposal. The plaintiff firm also undertook not to represent any other life insurance company nor to divulge any of the business secrets of the company. These terms leave no doubt in my mind that the plaintiff firm was being employed by the insurance company for the purpose of securing business whatever designation might have been used for such employment. As any payment of remuneration to any person employed for securing business except the persons of the four categories mentioned in the section is prohibited under Section 40(1) of

the Life Insurance Act, the Insurance Company was prohibited by the provisions of the Act from making any payment to the plaintiff firm in terms of the said agreement and as there was no legal liability on the insurance company no such liability could be binding on the defendant Corporation. For the above reasons the Issue No. 1 must be answered in the negative and against the plaintiff. In this view it is not necessary to answer Issues Nos. 2 and 3. The suit is accordingly dismissed with costs.

Suit dismissed.

AIR 1970 CALCUTTA 199 (V 57 C 34)

**P. N. MOOKERJEE, A.C.J. AND
AMIYA KUMAR MOOKERJI, J.**

Jadabendra Nath Mishra, Petitioner v. Smt. Manorama Debya, Opposite Party.

Civil Revn. Case No. 3553 of 1964, D/-24-7-1969.

Civil P. C. (1908), Ss. 148 and 151 — Parties to suit fixing by consent time to make a deposit and also on default failure was to result in a forfeiture — No statutory time limit laid down for making that deposit — Court has ample power to grant relief against such forfeiture even without the consent of the parties. AIR 1921 Cal 356 (2), Foll.; AIR 1968 SC 86, Dist. (Para 5)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 86 (V 55)=

(1967) 3 SCR 695, Hukum Chand v. Bansilal 4, 5
(1921) AIR 1921 Cal 356 (2) (V 8)=
33 Cal LJ 244, Kandarp Nag v. Banwari Lal Nag 4, 5, 6

Rabindra Nath Mitra, M. B. Mallick and Binode Bhusan Roy, for Petitioner; Swadesh Bhusan Bhunia, for Opposite Party.

P. N. MOOKERJEE, A.C.J.:— This Rule was obtained against an order of the learned trial Judge, dismissing the petitioner's application under Sections 148 and 151 of the Code of Civil Procedure upon the view that, in the circumstances of this case, the Court had, as a matter of law, no power to extend the time, as prayed for in the said application.

2. Broadly speaking, the relevant facts are as follows: The original suit for partition was decreed ex parte. Thereafter, the present petitioner, who was a defendant in the said suit, made an application for setting aside the said ex parte decree under Order 9, Rule 13, of the Code of Civil Procedure. This gave rise to the Misc. case in question and, in the said Misc. case, the parties eventually came to terms and filed a petition of compromise, under which the petitioner was to

pay a certain amount within a certain time to have the Misc. case allowed and the suit restored to file after the setting aside of the relative ex parte decree. There was also a default clause providing, inter alia, that, in case the above payment was not made within the specified time, the Misc. case would stand dismissed and the ex parte decree in question would stand affirmed. On account of his illness, the petitioner could not make the above deposit in time with the result that the Misc. case stood dismissed and, accordingly, the petitioner made his present application under Sections 148 and 151 of the Code of Civil Procedure.

3. The opposite party filed his objections to the same, both on the merits and on the technical ground that the previous order, fixing the time-limit for the deposit in question, was by consent and, accordingly, the said time could not be extended without consent of parties. The Court below has accepted the opposite party's above contention on the point of law and appears to have rejected the petitioner's application upon the preliminary ground that the time, fixed for deposit of money, as aforesaid, by consent, could not be extended except by consent of parties, which, obviously, was not there in the instant case. The point now is whether, apart from consent, the Court can, in the instant case, extend the time for the deposit in question, provided it is satisfied on the merits that there was a case for such extension.

4. On behalf of the petitioner, our attention has been drawn to the leading decision of this Court, reported in Kandarp Nag v. Banwari Lal Nag, 33 Cal LJ 244=(AIR 1921 Cal 356 (2)). On behalf of the opposite party, reference has been made to the decision of the Supreme Court, reported in Hukumchand v. Bansilal, AIR 1968 SC 86. We have to consider now whether the two types of cases dealt with by the above two decisions are distinct and separate, and, if so, within which class the instant case would fall.

5. The case before the Supreme Court was one, where there was a statutory time-limit, which could not be extended by the Court in any event, except by consent of parties. In the case, reported in 33 Cal LJ 244=(AIR 1921 Cal 356 (2)), there was no such restriction on the time, so fixed by consent of parties or on the power of the Court, and their Lordships held that, as, on the expiry of the time, so fixed, the question of forfeiture arose, the Court had ample power, in an appropriate case, to grant relief against forfeiture even without the consent of the parties. In the instant case, we do not find that there was any statutory time limit, standing in the way of the Court in adopting the above principle, laid down

in the above-cited decision of this Court. In our view, the instant case falls within the scope of the decision, 33 Cal LJ 244= (AIR 1921 Cal 356 (2)) and the decision of the Supreme Court, AIR 1968 SC 86, is distinguishable from the present one.

6. There is, no doubt, that, as a result of non-deposit of the money within the time, fixed by consent, the petitioner was losing a valuable right in respect of immovable property, or, in other words, it is a case of forfeiture, in which relief against forfeiture is available from the Court under the authority of the above decision, 33 Cal LJ 244=(AIR 1921 Cal 356 (2)).

7. We would, accordingly, make this Rule absolute, set aside the impugned order of the Court below and direct that the petitioner's application be considered on the merits and be dealt with and disposed of by the Court below in accordance with law, in the light of this judgment, as quickly as possible.

8. There will be no order for costs in this Rule.

9. Let the records go down as quickly as possible.

10. AMIYA KUMAR MOOKERJI, J.: I agree.

Petition allowed.

AIR 1970 CALCUTTA 200 (V 57 C 35)

BIJAYESH MUKHERJI, J.

Life Insurance Corporation of India, Plaintiff v. Smt. Nandaram Dassi, Defendant.

Suit No. 136 of 1958, D/- 20-8-1969.

Transfer of Property Act (1882), S. 58 — Mortgage by purdanashin lady — Transaction found to be her spontaneous and well-understood act — Cannot be disregarded even if she had no independent advice from lawyer — (Contract Act (1872), Section 16).

The defendant, a pardanashin lady, executed a mortgage deed, and later a deed of further charge, in favour of the mortgagee. The property mortgaged was the undivided share of a house which had been allotted to her in a suit for partition and to separate which and make it independent she had to expend money. She was advised by a solicitor, who was in possession of the full facts and was also independent of the mortgagee, to raise the money required by the mortgage. Further she was also assisted and advised by her husband who was himself a pleader both on the occasion of the execution of the mortgage and the deed of further charge. There was no evidence to show that there was any undue influence by the husband or of any hostility

between her and him. The transaction itself was of a simple nature, a bare mortgage with no complications anywhere. The defendant did not at any time impeach the mortgages and abode by them until she filed her written statement on the mortgages.

Held that the defendant had independent advice at the relevant time and that the dispositions were substantially understood by her and were her mental acts as their execution was her physical acts.

(Para 20)

The defendant needed money to make her allotment viable which she had not and her solicitor who was in possession of those facts had earned competence to give proper advice, (1903) 1 Ch 27, Rel. on.

(Para 12)

In the circumstances the advice given by him to raise money by mortgaging the property, which was in the very hub of trade and commerce, was one which a competent and honest adviser acting solely in her interest would give. AIR 1929 PC 3, Rel. on.

(Para 12)

Further the facts of the case established that the two dispositions were the spontaneous and well-understood acts of the defendant, inevitable in the circumstances in which she found herself placed and therefore there was no reason for disregarding them even if there was no independent advice from a lawyer. AIR 1929 PC 3, Rel. on.

(Para 16)

Law, no doubt, threw a cloak of protection round a pardanashin woman such as the defendant. But then her solicitor explained the first mortgage, and the mortgagee company's solicitor the second one, her husband having been present on each occasion and nothing more was needed to prove free and intelligent execution of the two instruments by her. The doctrine of law throwing a cloak of protection around a pardanashin woman should not be pushed to the extreme verge so "as to demand the impossible." AIR 1925 PC 204 & (1906) 33 Ind App 86 (PC) & AIR 1919 PC 24 & AIR 1936 PC 207 & AIR 1963 SC 1203, Rel. on; AIR 1952 Pat 19, Distinguished.

(Para 17)

Cases Referred: Chronological Paras

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|----------------------------------|--------|
| (1963) AIR 1963 SC 1203 (V 50)= | |
| 1963-1 SCR 456, Mt. Kharbuja | |
| Kuer v. Jang Bahadur Rai | 19 |
| (1952) AIR 1952 Pat 19 (V 39), | |
| Amir Alam v. Bibi Salma | 18 |
| (1936) AIR 1936 PC 207 (V 23)= | |
| 63 Ind App 326, Kundan Lal v. | |
| Mt. Mushrafi Begam | 19 |
| (1929) AIR 1929 PC 3 (V 16)=1929 | |
| AC 127, Inche Noriah v. Shaikh | |
| Allie | 12, 16 |
| (1927) AIR 1927 PC 148 (V 14)= | |
| 39 Mad LT 105, Daing Sahara | |
| Binte Daing Tadaleh v. Chabak | |
| Binte Zasalho | 15 |

(1925) AIR 1925 PC 204 (V 12)=
52 Ind App 342, Farid-un-nisa v.
Mukhtar Ahmad 17
(1919) AIR 1919 PC 24 (V 6)=46
Ind App 272=24 Cal WN 297,
Sunitibala Debi v. Dhara Sundari
Debi 18
(1906) 33 Ind App 86=ILR 33 Cal
773 (PC), Ismail Mussaji Mooker-
dam v. Hafiz Boo 19
(1903) 1903-1 Ch. 27=72 LJ Ch 138,
Wright v. Carter 12
(1887) 36 Ch D 145=56 LJ Ch 1052,
Allcard v. Skinner 15
(1856) 8 De GM & G 133=44 ER
340, Wright v. Vanderplank 15
M. M. Sen and H. M. Dhar, for Plain-
tiff; A. K. Guha, for Defendant.

JUDGMENT:— By this suit raised on January 28, 1958, the Life Insurance Corporation of India (shortened into LIC hereafter, as far as possible), prays for a decree under Order 34, R. 4 of the Civil Procedure Code (5 of 1908) in form No. 5-A in appendix D in the first schedule thereto, on the foot of two mortgages, the details whereof are set out below:

1. Mortgage-deed bearing date November 29, 1946 exhibit A: principal sum Rs. 25,000.00
2. Deed of further charge bearing date January 19, 1949, exhibit B: principal sum — Rs. 5,000.00
3. Annual interest at 7% a compound up to January 27, 1958, minus credit of sums received towards interest — Rs. 20,247.71
4. Total — Rs. 50,247.71

2. The mortgagor is the sole defendant to this suit, Smt. Nandorani Dassi qua trustee to the estate of late Modhoo Sooden Sain, her father-in-law. The property mortgaged is the divided 4/21st share in the then 116 Cotton Street, now numbered as "114/1B", and admeasuring 1 cottah 14 chittacks and 3 square feet. The mortgagee is India Provident Company, Ltd., the statutory successor of which is LIC, the present plaintiff.

3. The pleas, Nandorani, the defendant, resists the suit with, are—

One, she had not received the full consideration money for either of the two mortgages.

Two, a pardanashin lady, with little education, she had had no independent advice ever.

Three, she never fully understood the import or effect of the two mortgages.

4. The issues raised at the trial are:
1. Did the India Provident Co., Ltd., the predecessor in interest of the present plaintiff, Life Insurance Corporation of India, advance to the defendant a sum aggregating Rs. 30,000?

2. Had the defendant independent advice at the relevant time?

3. Was the disposition evinced by the two mortgages — one dated November 29, 1946, and another dated January 19, 1949 — substantially understood by her, and her mental act, as the execution thereof was her physical act, if that?

4. What reliefs, if any, is the plaintiff entitled to?

5-10. To the first issue first. Evidence is overwhelming that Nandorani did receive Rs. 30,000 in full. [After discussing the evidence his Lordship continued.]

11. So, nothing shakes the authentic evidence led on behalf of LIC to prove payment of Rs. 30,000 in full by the mortgagee company to Nandorani. It is, I hold, evidence of standing. And I find the first issue against Nandorani, the sole defendant.

12. The second and the third issues are taken together, as the facts they traverse run into one another. At the time of the first mortgage, Nandorani's solicitor, Mr. H. N. Sen, was there to advise her and to protect her interest. Her husband Moti Lal, a pleader too, was there as well. What better advice and legal advice at that, could she have at that point of time? It was so independent advice too. The solicitor who was advising so, in regard to a simple mortgage transaction, was not in any way dependent on the mortgagee company, taking the mortgage, and represented by a separate and independent solicitor of its own, namely, Mr. N. K. Roy. More, such a one, Mr. H. N. Sen, in possession of full facts, was giving real advice, and not sham advice. And how simple were the facts he was in possession of! The 4/21st undivided share in the then 116 Cotton Street was to be partitioned in view of the allotment made to Nandorani by the Commissioner of partition in a partition suit of this Court: Suit No. 1152 of 1909. Unless it was partitioned so, it could not be made separate and independent and, therefore, viable, just what the recitals in the first mortgage-deed bear:

"And whereas by the Return the Commissioner of Partition directed the mortgagor to do certain things mentioned in the Return in order to make her lot separate and independent That would certainly require money to be expended, the more so, because, to quote a little more from the recitals:—

"..... pending the final confirmation of the said Return the said Mortgagor did by an order dated the 22nd day of June 1944 made in the said suit take possession of the 4/21 part or share in the then 116 Cotton Street. Sure enough, the mortgagor could not lie by in such a situation at the peril of the very allotment made to her, and taken possession of by her. Money she did

need, but apparently she had not. Placed in possession of such facts, Solicitor H. N. Sen earned competence to give proper advice: (1) *Wright v. Carter*, (1903) 1 Ch 27=72 LJ Ch 138=51 WR 196. And what advice would a competent and honest adviser give in the circumstances save the advice of raising money by mortgage of such valuable property in the very hub of trade and commerce in Calcutta—a notorious fact I take judicial notice of? Nandorani's solicitor, Mr H. N. Sen, did no more. And the test is just that, as laid down by Lord Hailsham, L.C., in (2) *Inche Noriah v. Shaikh Allie*, 1929 AC 127=AIR 1929 PC 3; the advice must be such as a competent and honest adviser would give acting solely in the interest of the donor (here the mortgagor).

13. Once the first and main mortgage of November 29, 1946, stands on the basis of honest and competent advice given by Solicitor H. N. Sen, Nandorani's own solicitor, it is futile to make a point of further payments of Rs. 10,000 having been made by the mortgagee company and received by Nandorani on four subsequent dates: June 11, November 22, December 20, 1947, as also February 4, 1948, according to the very terms of the instrument of mortgage (quoted in paragraph 5), in absence of Mr H N Sen, but in presence of Moti Lall Sain, Nandorani's husband, than whom she had no greater well-wisher.

14. The same consideration applies mutatis mutandis to the execution of the deed of further charge, a little more than two years after the execution of the first one. Once the great deed stands, the small deed, some two years later, follows as a matter of course, and that too Nandorani not fending for herself, but befriended by none else than her husband Moti Lall on this occasion as well. Then, there is Nandorani's letter bearing date February 3, 1948, exhibit J, to the address of Mr. N. K. Roy, the mortgagee company's solicitor, requesting a loan of another sum of Rs. 5,000, as Rs. 25,000 taken already had been expended, because "owing to the abnormal rise in charges of labour and materials, the cost of repairs, additions and alterations is much exceeding" the estimated amount. The result of the partition suit having been what it is, repairs, additions and alterations there had to be as of necessity. I find, therefore, a ring of truth in this letter of Nandorani. And the further deed of charge cannot go down on a consideration as this: that she had no independent advice.

15. I have so long proceeded on the footing that independent advice is essential. Even then the two instruments of mortgage stand. But here I see circumstances which establish the fact that both

the instruments are the spontaneous and well understood acts of Nandorani. Such circumstances are—

(i) There was then absolute necessity for money, and not an inconsiderable sum at that, though small enough compared to the value of the valuable property in the heart of the town of Calcutta, following the return of the partition Commissioner, so as to make the allotment to Nandorani viable, in absence of which the allotment so made would go to pieces.

(ii) What bulks large is the simple nature of the transactions: bare mortgages with complications nowhere, which a woman of Nandorani's type, operating a banking account, could and did understand well enough, the Bengali equivalent of a mortgage: "Bandaki" being a common word, understood by almost all, males and females, no matter what their education is, nothing to say of one like Nandorani.

(iii) Nandorani did not impeach, but abode by the two mortgages over the years ever since their execution in 1946 and 1949 until the filing of her written statement on September 1, 1958.

(iv) Such delay, coupled with payment of interest over the years too, brings out in bold relief her true intention that she stood by the mortgages all along, acknowledging thereby that she executed them in full understanding of what they were: (3) *Wright v. Vanderplank*, (1856) 8 De G. M & G 133, (delay of ten years after execution of the gift), (4) *Allcard v. Skinner*, (1888) 36 Ch D 145, (six years' delay in revoking a grant to the sisterhood), and (5) *Dating Sabara Binte Daring Tadaleh v. Chabak Binte Lasaliho*, AIR 1927 PC 148, (only three years' delay after execution of the gift).

(v) Such rule, with regard to mortgages, must necessarily be far less stringent than the rule with regard to gifts, the outlook in one being different from that in the other. In the case of a mortgage, there is *quid pro quo*: property placed by one as security and money lent by another on such security. A gift, however, is a one-way affair only. So, the long delay I see here counts all the more against Nandorani.

(vi) No undue influence by Moti Lall upon Nandorani nor any hostility between the two is either alleged or seen, Nandorani's evidence that she signed blank papers being plainly untrue.

16. And once it is established, as it is established in the case on hand, that the two mortgages are the spontaneous and well-understood acts of Nandorani, inevitable indeed in the circumstances then prevalent, there is no reason for disregarding them, merely because there is no independent advice from a lawyer: just the law laid down in the (2) *Inche Noriah case*, 1929 AC 127=AIR 1929 PC 3 (*supra*).

in the case of a gift—a law which applies a fortiori to the case of a mortgage.

17. Even in the case Mr. Guha cites,—Mr. Sen appearing for the plaintiff LIC cites it too,—(6) Farid-un-nisa v. Mukhtar Ahmad, 52 Ind App 342=AIR 1925 PC 204, Lord Sumner, relying on an earlier authority, says:—

"Independent legal advice is not in itself essential."

But what Mr. Guha relies upon for in this case is that the actual import of the wakfnama executed by Farid-un-nisa was not brought home to her. So it went down. Can that however be said of Nandarani upon the whole of the evidence? Let it be remembered that the wakfnama, presented to Farid-un-nisa for execution was substantially different from that she had set her mind upon. It is impossible to say so, as Mr. Sen rightly contends, of Nandarani. She, the whole of the evidence completely satisfies me, had intended to execute two plain mortgage-deeds. And she executed just that: two mortgage-deeds. No variation between what she had intended and what she executed in fact is seen here. Indeed, the first mortgage was explained to her by her solicitor, Mr. H. N. Sen, and the second by the mortgagee company's solicitor, Mr. N. K. Roy. A mortgage is a mortgage, with no complexity of the disposition, as in the wakfnama, and with little unfamiliarity anywhere. More, her husband—and who could look to her interest more?—was there when the instruments were so explained. Law, no doubt, throws a cloak of protection round a pardanashin woman as Nandarani is. The cloak here is all the greater, as the instruments of mortgage are in the English language which she does not know. She can only sign her name in English. Even then her solicitor explained the first mortgage, and the mortgagee company's solicitor the second one, her husband having been present on each occasion. So, what more is needed to prove free and intelligent execution of the two instruments by her? Let not the doctrine of law throwing a cloak of protection around a pardanashin woman be pushed to the extreme verge so "as to demand the impossible", as Lord Sumner puts it in the (6) Farid-un-nisa case, 52 Ind App 342=AIR 1925 PC 204 (supra).

18. Only another case Mr. Guha relies upon: (7) Amir Alam v. Bibi Salma, a Bench decision of the Patna High Court, reported in AIR 1952 Pat 19. The facts in this case are so extraordinary that free and intelligent execution of the three impugned deeds by Ayesha, about sixty years of age, in favour of her brother's son, an orphan, she had taken charge of, when he was a lad of four only, was regarded as out of the question. That nephew, when come of age, looked after

his aunt Ayesha's affairs. So, there grew a fiduciary relationship between the two. More, the reading and explaining of the impugned documents left everything to be desired. No near relation of Ayesha, blind at the time, present then, except this nephew; non-examination of the scribes who explained the documents to her; mere students explaining the documents on two occasions; one competent person explaining on one occasion, but it being doubtful whether the woman to whom he had so explained was Ayesha or not; conduct of Ayesha so inconsistent with the deeds by which she had parted with all her immoveable property:—such are the features in the (7) Amir Alam case, AIR 1952 Pat 19, nothing like which can be predicated of Nandarani. So, it appears to be an irrelevant citation which cannot reach the case on hand.

19. Mr. Sen, on the other hand, cites four authorities which I review, one by one. (8) Ismail Mussajee Mookerdam v. Hafiz Boo, (1906) 33 Ind App 86 (PC), is a case where the son, with whom, for whose antecedents, his mother was on terms of bitter hostility, failed to set aside the transfers made by the mother in favour of her daughter, to the total exclusion of her suing son, her dementia having not been proved, and undue influence of the daughter over her mother having neither been alleged nor investigated nor proved. Just so is here, about the undue influence of Moti Lal over his wife Nandarani. (9) Sunitibala Debi v. Dhara Sundari Debi, (1919) 46 Ind App 272=24 Cal WN 297, is a case, the ratio of which, in so far as it is material for the case on hand, is that it is not necessary to prove a Hindu pardanashin lady understanding each detail of the compromise giving rise to a mortgage executed by her, and that it is sufficient to prove her understanding the general result of the compromise, with the aid of people, disinterested and competent, to give her advice. Here Solicitor H. N. Sen and Moti Lal fall pre-eminently under that class. (10) Kundan Lal v. Mt. Mushrafi Begam, (1936) 63 Ind App 326 = (AIR 1936 PC 207), reveals that an illiterate pardanashin wife executed a mortgage-deed mainly to discharge her husband's debt. And that having been found upon evidence, it was held that the law should not be so interpreted as to make it impossible for a pardanashin wife to give security for her husband's benefit, for, that would be converting a principle of protection into a disability. In case on hand, the facts appear to be so much the stronger. Nandarani executed the mortgages for making the allotment to her viable for the benefit of all—her husband, children and children's children including herself. It is not difficult to imagine what would have befallen to her allotment if

she had not made it separate and independent in terms of the directive of the commissioner for partition. And she could not have done so, but for the loans raised. So, let not the cloak of protection, which Nandorani can certainly avail of, degenerate, upon all I see here as to free and intelligent execution by her of the two mortgage-deeds, into taboo of disability. And if it be regarded that the mortgages were for the benefit of Moti Lal alone, one who used to run into periodic insolvency, as is Mr. Guha's contention, even then they cannot go down, so long as Nandorani's free and intelligent execution is there—and it is there. In (11) Mt. Kharbuja Kuer v. Jang Bahadur Rai, AIR 1963 SC 1203, is emphasized the burden of proof, resting on the person who seeks to sustain a transaction entered into with a pardanashin lady, no less such burden being discharged by proof of the document being explained to her and also by other evidence, direct and circumstantial, so as to show that she understood it. That is just what I see here upon evidence. The burden of proof on L. I. C. has amply been discharged by the direct evidence of Majumdar and so many circumstances discussed already.

20. I, therefore, find issues 2 and 3 in favour of L. I. C. and against Nandorani.

21. The fourth issue—the general one—on reliefs remains. The only finding it merits is that the plaintiff LIC is entitled to reliefs it prays the Court for, save that payments made by the defendant Nandorani since the institution of this suit be deducted from the total claim made.

22. In the result, there must be judgment for the plaintiff for Rs. 50,247.71 paise minus such amounts paid by the defendant since the institution of this suit, and that too in terms of prayers (a) and (e) of the plaint. No interest from the date of the suit. Decretal dues so calculated to be paid within six months from today.

Suit decreed.

AIR 1970 CALCUTTA 204 (V 57 C 35)

T. K. BASU, J.

Messrs. Gordhandas Jerambhai and others, Petitioners v. The Assistant Collector of Customs and others, Respondents.

Matter No. 633 of 1967, D/- 27-1-1969.

Foreign Exchange Regulation Act (1947), S. 12 (1) — Submission of declaration in terms of S. 12 (1) — Amounts to sufficient compliance with provisions thereof even if particulars in declaration are incorrect — Show cause notice for contravention of section is without jurisdiction.

The submission of a declaration in terms of Section 12 (1) of the Act is sufficient

compliance with the provisions thereof. If there are incorrect particulars with regard to the full export value of the goods or other details as shown in the declaration, the exporter might be liable for action under other provisions of the Act or the Rules made thereunder. But if, in fact, the declaration has been submitted, it cannot be said that there has been any contravention of Section 12 (1). Consequently, show cause notice issued by Customs authorities for contravention of Section 12 (1) in such case, is without jurisdiction and the authorities can be restrained by a writ from continuing the proceeding on the basis of such notice. Union of India v. M/s. Sreeram Durgaprosad (P) Ltd., 1969-1 SCC 91 & AIR 1962 SC 1893, Foll.; Matter No. 455 of 1967, D/- 31-7-1967 (Cal) & AIR 1961 Cal 616, Disting.

(Para 2)

Cases Referred: Chronological Paras

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| (1968) Civil Appeal Nos. 45-49 of 1968, D/- 19-11-1968 = 1969-1 SCC 91, Union of India v. M/s. Sreeram Durgaprosad (P) Ltd. | 2 |
| (1967) Matter No. 455 of 1967, D/- 31-7-1967 (Cal), Orissa Mineral Development Co. Ltd. v. Asst. Collector of Customs | 3 |
| (1962) AIR 1962 SC 1893 (V 49) = (1963) 3 SCR 338, East India Commercial Co. Ltd., Calcutta v. Collector of Customs, Calcutta | 5, 8 |
| (1961) AIR 1961 Cal 616 (V 48) = Matter No. 169 of 1959 = 1961 (2) Cri LJ 635, Lakshminarayan Ramniwas v. Collector of Customs | 6 |
| G. P. Kar, for Respondents. | |

ORDER:—In this case the petitioner challenges three notices dated the 25th October, 1967 issued on petitioners Nos. 1, 2 and 3 respectively by the Assistant Collector of Customs for Export Department, Customs House, Calcutta, asking the petitioner to show cause why certain bales of Hessian and Tarpaulin cloth meant for export to Czechoslovakia should not be confiscated under the provisions of Section 113 (d) of the Customs Act, 1962. The substance of the allegations in the notice to show cause is that the petitioner had in the declaration filed under the provisions of Section 12 (1) of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as the Act) shown as the destination of the goods various countries in Eastern Europe where the goods to be exported were, in fact, meant for different countries in Western Europe. It is alleged that the petitioner has thereby contravened the provisions of Section 12 (1) of the Act read with Sections 23-A and 23-B thereof.

2. Reliance is placed on behalf of the petitioner on an unreported decision of the Supreme Court in the case of Union of India v. M/s. Sreeram Durgaprosad (P)

Ltd. in which the majority judgment was delivered by Hegde, J. on behalf of the Supreme Court on 19-11-1968. It was held in that case that the submission of a declaration in terms of Section 12 (1) of the Act was sufficient compliance with the provisions thereof. If there are incorrect particulars with regard to the full export value of the goods or other details as shown in the declaration, the exporter might be liable for action under other provisions of the Act or the Rules made thereunder. But if, in fact, the declaration has been submitted, it cannot be held that there has been any contravention of S. 12 (1) of the Act. It was held in that case, on an interpretation of the scheme of the Act that, in so far as the Customs authorities are concerned, all they have to see is that no goods are exported without furnishing the declaration prescribed in Section 12 (1) of the Act. Once that stage is passed, the rest of the matter is left in the hands of the Reserve Bank and the Director of Enforcement.

3. Admittedly, a declaration under Section 12 (1) of the Act has been submitted in the present case. In the circumstances, it must be held that the petitioner cannot be charged with any violation of the provisions of Section 12 (1) of the Act.

4. Mr. G. P. Kar appearing on behalf of the respondents contended that the application is premature and that I should not interfere at this stage. In support of this argument, he relied on an unreported decision of B. C. Mitra, J., D/- 31-7-1967 in the case of the Orissa Mineral Development Co. Ltd. v. Assistant Collector of Customs, Matter No. 455 of 1967 (Cal). In that case it was held that if the Customs authorities had, in the facts of a case, jurisdiction to issue the notice to show cause, the High Court should not interfere before the adjudication is completed by the Customs authorities.

5. In my view, this proposition of law cannot be disputed. It has, however, been laid down by the Supreme Court in the case of East India Commercial Co. Ltd. Calcutta v. Collector of Customs, Calcutta, reported in AIR 1962 SC 1893 that where an inferior Tribunal is continuing with a proceeding which is without jurisdiction, a Writ of Prohibition will lie restraining the Tribunal from so continuing to proceed. In paragraph 27 of the Report at page 1903 Subba Rao, J. observed as follows:—

"The respondent proposed to take action under Section 167 (8) of the Sea Customs Act, read with Section 3 (2) of the Act. It cannot be denied that the proceedings under the said section are quasi-judicial in nature. Whether a statute provides for a notice or not, it is incumbent upon the respondent to issue notice to the appellants disclosing the circumstances under which proceedings are

sought to be initiated against them. Any proceedings taken without such notice would be against the principles of natural justice. In the present case, in our view, the respondent rightly issued such a notice wherein specific acts constituting contravention of the provisions of the Act for which action was to be initiated were clearly mentioned. Assuming that a notice could be laconic, in the present case it was a speaking one clearly specifying the alleged act of contravention. If on a reading of the said notice, it is manifest that on the assumption that the facts alleged or allegations made therein were true, none of the conditions laid down in the specified sections was contravened, the respondent would have no jurisdiction to initiate proceedings pursuant to that notice. To state it differently, if on a true construction of the provisions of the said two sections the respondent has no jurisdiction to initiate proceedings or make an inquiry under the said sections in respect of certain acts alleged to have been done by the appellants, the respondent can certainly be prohibited from proceeding with the same".

6. Mr. Kar in this connection also drew my attention to an unreported decision of this Court in the case of Laxminarayan Ramniwas v. Collector of Customs Matter No. 169 of 1959 = (Since Reported in AIR 1961 Cal 616). In that case Sinha, J. (as he then was) observed as follows:—

"Shortly put, Mr. Deb's argument is that his clients had a valid import license for 49.817 tons which had been imported ex ss. 'Eastern Maid' and assuming that the value had been mis-declared, it could not come within the purview of Section 167 (8), although it might come under Section 167 (37) (c) i.e. misstatement in the bill of entry in regard to value. In other words, he says that under no circumstances could the goods be said to have been imported in contravention of law, because there was valid license. In my opinion, although the matter is an arguable one, it is by no means free from doubt. It is true that the import license was for a very much larger quantity than the goods imported in this particular consignment. But the clearance permit that was taken out showed the weight of the goods and its value. If it is now found that the actual goods are not as described but are goods worth much more, there is ground for an investigation, to find out whether the goods that have been imported are in accordance with the license. I am unable to hold that where a permission is given to import a certain quantity of goods of a certain value, it necessarily permits the importation of the goods of the same weight for a value, much in excess. Upon this point, it is not necessary for me to come to a final conclusion. The Customs Authorities, and the Assis-

tant Collector of Customs who has issued this show-cause notice, has jurisdiction to deal with this point and decide it. He has merely issued a show-cause notice, and asked for an explanation. The petitioner may take the objections which he has taken before me, and such objections will be decided according to law. I do not see how it can be said that the Assistant Collector of Customs has no jurisdiction to deal with the matter. It is true that if a judicial tribunal attempts to deal with a matter which it has no jurisdiction to deal with, then the writ Court may intervene. But that signifies an initial lack of jurisdiction, which must be patent on the face of the proceedings. It would be absurd to hold that immediately upon the tribunal issuing a show-cause notice the importer can come to this Court, to have the merits of the case investigated. In that event, this Court will have to go into the merits of each and every show-cause notice issued by the customs authorities. Mr. Deb, however, argues that upon the facts stated in the show-cause notice itself, it appears that the conclusion must inevitably be that no offence has been committed under Section 167 (8). Firstly I do not at present agree with that proposition, for reasons stated above. Secondly, that does not mean that the Assistant Collector of Customs has no jurisdiction to decide the point."

7. It will appear from the above observations that, since it was held in the facts of that case that the Customs authorities had jurisdiction to decide the question involved, the High Court did not choose to interfere at the stage of the issue of a notice to show cause. As I have indicated above, this proposition of law cannot be disputed.

8. In the facts of the present case, however, even if all the allegations in the notice to show cause be assumed to be true and correct, they do not disclose any contravention of Section 12 (1) of the Act in view of the decision of the Supreme Court mentioned above. In that view of the matter, it must be held on the principles enunciated by the Supreme Court in *East India Commercial Co's case*, AIR 1962 SC 1893 that the notice in this case is entirely without jurisdiction and the respondents should be restrained by a Writ of Prohibition from continuing the proceedings on the basis of the said notice. The contentions of Mr. Kar on this point must, therefore, be rejected.

9. In the result, this application must succeed and the Rule must be made absolute. There will be a writ in the nature of Mandamus directing the respondents to recall, cancel and withdraw the three notices dated the 25th October, 1967 and a Writ in the nature of Prohibition restraining the respondents from giving any effect to or taking any steps pursuant to

the said three notices. The respondents would however, be at liberty to proceed according to law.

10. There will be no order as to costs.
Petition allowed.

AIR 1970 CALCUTTA 206 (V 57 C 37)
P. N. MOOKERJEE, ACTG., C. J. AND
AMIYA KUMAR MOOKERJI, J.

M/s. Rai Mohan Das and others, Petitioners v. Union of India, Opposite Parties.

Civil Revn. Case No. 3506 of 1964, D/- 24-7-1969.

(A) Civil P. C. (1908), S. 48 — Execution though started more than 12 years before still continuing — Plea of bar under section is not sustainable as there is no question of fresh execution in the case — (Limitation Act (1963), Art. 136).

(Para 2)

(B) Bengal Public Demands Recovery Act (3 of 1913), S. 53 — Objection that certificate holder has made excess claim — Certificate Court is bound to decide the question.

If the certificate holder has included, within its claim, amounts payable to other parties it is the duty of the Certificate Court to determine the certificate debtor's objection that the certificate-holder was not entitled to the full amount, claimed under the certificate even if this objection was not raised by the certificate officer and, therefore, he had no occasion to determine the same and the point was also not taken in the other proceedings, prior to the matter coming up before the Board of Revenue and there was no occasion for the tribunals concerned to consider this aspect of the matter when the matter is raised before the Board of Revenue and there appeared to be some *prima facie* ground in support of the certificate-debtors' objection there is no reason why this question should not be determined. (Para 3)

Sukumar Mitra and Probodh Kumar Dasgupta, for Petitioners; Manasnath Roy, for Opposite Party No. 1.

P. N. MOOKERJEE, Ag. C. J.:— This Rule was obtained by the petitioners against an order of the Board of Revenue, rejecting their contention that the instant certificate was barred by limitation and, further, that the claim under it, so far as the certificate-holder is concerned, was an excess claim.

2. The question of limitation was raised under Section 48 of the Code of Civil Procedure the allegation being that more than 12 years had passed from the filing of the certificate and no execution is permissible of the same any longer. On this point the decision must go against the petitioners, as it appears that the execu-

IM/JM/E520/69/MKS/P

tion case, which appears to have been started more than 12 years ago, is still continuing. There is no question of fresh execution and, accordingly, the plea of bar under Section 48 of the Code of Civil Procedure, even if it is otherwise available, cannot be accepted. On this ground, we overrule the petitioners' above contention.

3. As to the second contention, however, namely, that in the instant case the dues claimed in the certificate were not dues to the certificate-holder alone but to another party, namely, the Government of Pakistan, as well, that, obviously, requires consideration before disposal of the present proceedings. The view of the Hon'ble Member, Board of Revenue, that this is not a question, which can be raised in a certificate proceeding, does not appear to us to be tenable. If the certificate holder has included, within its claim, amounts payable to other parties, it is the duty of the Certificate Court to determine the certificate debtor's objection that the certificate-holder was not entitled to the full amount, claimed under the certificate. It is true that this objection was not raised by the certificate officer and, therefore, he had no occasion to determine the same. It is also true that, in the other proceedings, prior to the matter coming up before the Board of Revenue, this point was not taken and there was no occasion for the tribunals concerned to consider this aspect of the matter; but when the matter was raised before the Board of Revenue and there appeared to be some *prima facie* ground in support of the certificate-debtors' objection there is no reason why this question should not be determined. We, accordingly, accept the petitioners' contention that the extent of the claim allowable to the certificate-holder, namely, the Union of India, in the present proceedings, should be determined before the instant proceedings are disposed of. For that purpose, the matter should go back to the Certificate Officer for further consideration, the point of limitation, raised by the certificate-debtors-petitioners being rejected.

4. In the above view, we make this Rule absolute, set aside the impugned order of the Board of Revenue and direct that the case be remitted to the Certificate Officer for determination of the question as to how much, if any, out of the certificate in question, is realisable by the Union of India. That will be the only point to be decided by the Certificate Officer on this remand and, upon such determination, he will finally dispose of the matter in accordance with law.

5. There will be no order as to costs in this Rule.

6. Let the security, already furnished by the certificate-debtors, continue until the disposal of the instant proceeding.

7. Let the records go down as quickly as possible.

8. AMIYA KUMAR MOOKERJI, J.:— I agree.

Rule made absolute.

AIR 1970 CALCUTTA 207 (V 57 C 38)

A. K. SINHA, J.

Nitish Ranjan Das and another, Petitioners v. University of Calcutta and others, Respondents.

C. R. Nos. 320 and 405 (w) of 1964, D/-27-8-1968.

(A) Constitution of India, Art. 226 — Natural justice — Enquiry by University — Examinees alleged to have copied answers at examination — Particular rule or names of students from whose answer books answers were copied not disclosed — Examinees appearing before sub-committee as asked but not demanding further or better particulars — Held, though Civil Procedure Code was not applicable to such proceeding, principle was same and in absence of specific rule as to framing of charge examinees were entitled to ask for further or better particulars — Failure to disclose particular rule or names of students would not constitute violation of principles of natural justice in the sense that by such vagueness examinees were denied of reasonable opportunity either to make representation against charges or of any hearing in matter — (Education — Enquiries by University authorities) — (Civil P. C. (1908), O. 6, R. 5). (Para 6)

(B) Constitution of India, Art. 226 — Enquiry by sub-committee of Examination Board — Copying at examination — Held, High Court could not look into answer and examine adequacy or sufficiency of evidence which led sub-committee to come to one conclusion or other. (Para 10)

(C) Constitution of India, Art. 226 — Enquiry by sub-committee of Examination Board of University — Charge of copying at examination — Enquiry committee must proceed quasi judicially and submit report with its findings to university authorities — Punishing examinee without such findings would offend principles of natural justice (Education — University examination — Charge of copying at examination — Procedure to be adopted by Enquiry Committee).

It cannot be denied that the practice of adopting unfair means in the examination by the students is a serious problem facing the University Authorities. While on the one hand, such charges if established show a mental degeneration of the boys to get through the examination by means fair or foul, on the other hand,

these charges, if not properly reported against or established on findings with reasons of the concerned Authorities impose a serious check on the future career of these boys. So, in order to cope effectively with such a dual situation, the Enquiry Committee must have a quasi-judicial approach to the entire matter in controversy before it which demands that not only reasonable opportunity should be given to the students concerned to defend themselves but a report with its findings on facts must be submitted before the University Authorities, so that they may pass appropriate orders on conclusions based on such findings made by such Committee. Punishing a person without such findings is, clearly, opposed to fundamental concept of justice and runs counter to all principles of judicial procedure.

(Para 11)

Where the sub-committee appointed by Examination Board did not submit a report with its findings on facts to Examination Board but merely recommended for cancellation of the examination of the different groups of students from different sections it was held that it was impossible to conclude that there was any evidence either direct or substantial to justify the conclusion that might be reached by the Examination Board in cancelling the examination. In absence of proper report with the findings of the sub-committee the order cancelling the examination of the petitioners could not be sustained as valid. Even assuming that in the instant case, whether or not the principle of natural justice was complied with, it however, involved at best a disputed question of fact. The absence of report with the findings of the sub-committee would render order cancelling examination invalid. (1952) 56 Cal WN 730 (SB), Ref.

(Paras 14, 15)

(D) Constitution of India, Art. 226 — Questions of fact — High Court cannot enquire into — University rules requiring that enquiry committee must submit report with its findings — In absence of such findings report cannot be supplemented by stating certain facts on affidavit.

(Para 16)

- Cases Referred: Chronological Paras
- (1966) AIR 1966 SC 875 (V 53) — 1963-3 SCR 767, Board of High School and Intermediate Education U. P., Allahabad v. Bagleswar Prasad 10
- (1963) AIR 1963 Punj 480 (V 50) — 65 Pun LR 632, Ram Chander Singh v. Punjab University 7
- (1962) AIR 1962 SC 1110 (V 49) — 1963-2 SCJ 509, Intermediate Board of Examination, U. P., Allahabad v. Ghanshyam Das Gupta 7
- (1958) AIR 1958 All 792 (V 45), Son Pal Gupta v. University of Agra 8

(1952) 56 Cal WN 730 (SB), University of Calcutta v. Dipapal 13

In C. R. No. 320 (w) of 1964

Kashi Kanta Moitra, for Petitioners; Sailendranath Roy, for Respondents Nos. 4 and 6; A. K. Banerjee and N. R. Mukherjee, for Respondents Nos. 1 and 3.

In C. R. No. 405 (w) of 1964:

Kashi Kanta Moitra, for Petitioners; Sailendranath Roy, for Respondents Nos. 4 and 6; N. Roy, for Respondent No. 4; N. R. Mukherjee and Mrs. Usha Dutt, for Respondents Nos. 1 and 3.

ORDER:— Both these Rules which were issued at the instance of the two students of Shantipur College for quashing orders cancelling their B. Sc. Examination of the year 1963 of the Calcutta University, are taken up together as they involve common question of fact and law. The facts set out by the petitioners in both the petitions are substantially as follows:

2. The petitioners were students of Shantipur College affiliated to the University of Calcutta. They appeared at the B. Sc. Examination of the year 1963 held by the University of Calcutta on and from 3-4-63 at Shantipur College Centre, having had Mathematics, Physics & Chemistry as their combination subjects and their roll numbers were 41 and 40 respectively. The examination passed off smoothly and peacefully and there was no disturbance either in the examination hall or outside. The petitioners, it is alleged, fared very well in the said examination and were expecting with reasonable certainty to come out successful. The petitioners in spite of these facts found to their utter surprise from the University Gazette publishing the results of the B. Sc. Examination that their names appeared with the remarks 'reported against'.

3. Therefore, the petitioners made written representations to the respondents Nos. 1 to 3 and wanted to know as to why their results were withheld and also demanded publication of their results.

4. Then by letter dated 4-12-63 issued by the Assistant Controller of Examinations the petitioners were charged with breach of discipline at the said B. Sc. Examination as follows:

"That in contravention of the rules of the examination you copied answers from the answer-scripts of your fellow examinees while appearing in the Mathematics Paper II."

The petitioners were also directed to appear before the Sub-Committee on 10-12-63 at 3 P. M. in the Darbhanga Hall and furnish explanation of their conduct with a caution that in case of default of appearance they will be deemed to have no explanation in the matter. The petitioners, however, appeared at the appoint-

ed date before the said Sub-Committee and denied categorically the charges levelled against them and also denied that there was any disturbance in the examination on the date of the examination of Mathematics Paper II in answer to the only question put to them by the Sub-Committee. It is alleged that neither answer papers were shown nor similarities or dissimilarities examined. Facts were not disclosed, charge was not substantiated, no evidence was led in support of the said charge of breach of discipline in the examination hall. The petitioners were never told who were the fellow examinees from whose answer scripts Mathematics Paper II they had copied and thereby committed breach of discipline. Then by a subsequent letter dated 21st December, 1963, issued through the respondent No. 4, the petitioners were informed that the Vice-Chancellor and the Syndicate of the University of Calcutta had cancelled the B. Sc. Examination in respect of all 18 students of the Shantipur College whose results were 'reported against'. The petitioners, thus, felt aggrieved and came up to this Court and obtained the above Rules.

5. Upon these facts quite a large number of grounds were taken but Mr. Moitra appearing on behalf of the petitioners in both these cases contended in the first place that the charges as framed against the petitioners were utterly vague, unaccompanied by statement of allegation and therefore, could not be sustained. In the second place, he contended that even though the Sub-Committee was appointed for the purpose of enquiry, the enquiry proceeding was held in violation of rules and principles of natural justice.

6. In support of the first contention Mr. Moitra drew my attention to the actual charge levelled against the petitioners (annexure A to the petition) and submitted that essential particulars were withheld from the charge. The particular rules which were alleged to be contravened were not given and the names of the fellow examinees from whose answer scripts the petitioners were alleged to have copied were not disclosed or as to which of the answers in the examination papers were copied were also not given. So, according to him, in absence of these very essential and necessary particulars, it was impossible for the petitioners to submit proper explanation although it may be that they were directed to submit such explanation before the Sub-Committee. Since these very material particulars were not given, the petitioners must be deemed to have not been afforded reasonable opportunity to defend themselves against the imputation or allegation made in the charge. I do not think there is much of substance in this argument. The petitioners were asked to

be present before the Sub-Committee and if they were aggrieved by the uncertainties or vagueness of the charges it was open to them to ask for further or better particulars. There was nothing to show that even though petitioners appeared before the Sub-Committee they made any such representation demanding particulars. It is true that particular rule or the names of the students were not disclosed in the charge but these facts by themselves do not constitute the violation of the principles of natural justice in the sense that the petitioners by such vagueness were denied reasonable opportunity either to make representation against the charges or of any hearing in the matter. It is well known that under the Code of Civil Procedure if necessary particulars are wanting in the plaint, the defendants are entitled to ask for better, or for further particulars. Because certain particulars are wanting in the plaint barring those few exceptions provided in the Code of Civil Procedure, the plaint is not liable to be thrown out at sight. It is true that the rules and principles laid down in the Civil P. C. are not applicable to such enquiry proceeding, even then the principle is the same and in absence of specific Rule as to framing of charge the aggrieved parties are entitled to ask for further or better particulars before the Sub-Committee. Not having done so, I do not think the petitioners are entitled to challenge the validity of the charge levelled against them only on the ground of vagueness or uncertainty. So I cannot accept the first contention raised by Mr. Moitra.

7. Regarding the second contention the grievances of the petitioners are that no answer paper was shown and similarities or dissimilarities examined and no evidence was led in support of the charges against the petitioners. It is submitted that the only question that was put to the petitioners was whether there was any disturbance in the examination hall and this was categorically denied. In fact, everything was done on the pretext of holding an enquiry with a closed mind. Even if there was any conclusion that charge against the petitioners was established, it was according to Mr. Moitra reached by the Sub-Committee purely on a subjective process and not on any objective basis. So this enquiry proceeding was held in flagrant violation of rules and principles of natural justice. Reliance was placed by the learned Advocate on a case reported in AIR 1963 Punj 480 Ram Chander Singh v. Punjab University. I fail to see how this case is of any assistance to the petitioners. In this case the Registrar, Punjab University, on receipt of the report of the Superintendent that the petitioner kept notes concealed in a handkerchief submitted the case to the

'Unfair Means Committee' constituted by the Syndicate for examining such cases. The Committee without giving an opportunity to the petitioner disqualified him as contemplated under the Rules framed by the said University. In these circumstances, relying on the decision of the Supreme Court reported in AIR 1962 SC 1110 *Intermediate Board of Examination, U. P., Allahabad v. Ghanshyam Das Gupta*, it was held that the entire action taken against the petitioner was invalid as the petitioner could not be disqualified without being given an opportunity to show cause by the Unfair Means Committee against the proposed punishment. I, therefore, do not think that this case has any application to the facts of the present case.

8. Mr. Moitra next relied on a decision of the Allahabad High Court reported in AIR 1958 All 792. The facts of this case are more or less similar to the facts of the above case of Punjab High Court. Here the examinee was caught by the invigilator copying from a chit and then he took possession of the chit and asked the petitioner to give explanation which he declined to do. The invigilator then sent the report to the University which in its turn called for a report from the Examiner of the answer paper. His report was that the petitioner appeared to have copied certain answers from the chit. The papers were laid before the Vice-Chancellor who without giving the petitioner an opportunity passed order withholding the result of the petitioner and debarring him from appearing at the examination for a period of one year. It was held that though the order passed by the Vice-Chancellor was administrative in its nature, considering the fact that it had grave consequence inasmuch as it affected the future career of the student, natural justice demanded that the Vice-Chancellor should have heard the petitioner before passing the order. So this case also has no application to the facts of the present case.

9. Mr. Moitra then argued that only question put by the Committee was whether there was any disturbance which was denied by the petitioner. As against this denial there was no other material or evidence relying on which the Sub-Committee could have come to any conclusion that the charge against the petitioner was established. If there is any similarity of the answers given by several examinees, that by no means could establish that the petitioners copied answers from the answer script of their fellow examinees. So according to Mr. Moitra even if there was any conclusion by the Sub-Committee that charge was established against the petitioner, although there is no indication in the report, it was based on no evidence and, therefore, the order passed on

such conclusion cancelling the petitioners' examination could not be sustained.

10. Mr. Mukerjee, learned Counsel for the respondents sought to repeal the contention on an argument that there need not be any direct evidence to establish the charge against the petitioners. It was open to the Enquiry Committee to take into consideration relevant and proper materials and rely on circumstantial evidence to see whether the charge levelled against the petitioners was established or not. In the instant case, the answers given by the petitioners were so similar to those of several other answer papers submitted by other students that the conclusion would be irresistible that the petitioners must have copied their answers from the papers of other examinees. All that is necessary in such an enquiry is according to Mr. Mukherjee that it must be honest and fair and the students concerned must be given an opportunity to defend themselves in accordance with rules and principles of natural justice. Reliance was placed in support of this contention by the learned Advocate on a decision of the Supreme Court reported in AIR 1966 SC 875, *Board of High School and Intermediate Education U. P., Allahabad v. Bagleswar Prasad* in which it was inter alia held that the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. It was held that the enquiries by domestic Tribunal in such cases must no doubt be fair and the students against whom the charges are framed must be given adequate opportunities to defend themselves and in holding such enquiries the Tribunal must scrupulously follow the rules of natural justice. But it would not be reasonable to import into these enquiries rules which govern all criminal trials held in the ordinary Courts of law. Mr. Moitra, however, sought to distinguish this decision on the ground that in the instant case, there was no circumstantial evidence either. The disputed answer papers were produced before me but it is neither possible nor feasible for this Court to go into the adequacy or sufficiency of such evidence which led the Sub-Committee to come to one conclusion or the other. It seems to me that it is not possible to decide this point as it will be presently seen that there is no report with findings against the petitioners submitted by the Sub-Committee.

11. In the instant case it appears that the Sub-Committee merely made a recommendation for cancellation of the petitioners' examination along with quite a large number of other students without any finding on facts and no reasons were even assigned for making such recom-

mentation excepting a bare statement that the facts were considered. So unless there was a finding of the disputed question embodied in the report of the Sub-Committee, no punishment could be inflicted upon the students concerned on a mere recommendation of the Sub-Committee. It cannot be denied that the practice of adopting unfair means in the examination by the students is a serious problem facing the University Authorities. While on the one hand, such charges if established show a mental degeneration of the boys to get through the examination by means of fair or foul, on the other hand, these charges, if not properly reported against or established on findings with reasons of the concerned Authorities impose a serious check on the future career of these boys. So, in order to cope effectively with such a dual situation, the Enquiry Committee must have a quasi-judicial approach to the entire matter in controversy before it which demands that not only reasonable opportunity should be given to the students concerned to defend themselves but a report with its findings on facts must be submitted before the University Authorities, so that they may pass appropriate orders on conclusions based on such findings made by such Committee. Punishing a person without such findings is, clearly, opposed to fundamental concept of justice and runs counter to all principles of judicial procedure.

12. Mr. Mukerjee, however, submitted that the Sub-Committee did submit a report which would show that it fully considered the facts and then recommended punishment to those students whose roll numbers were mentioned under different groups in the report. It was also submitted that what was required in such a case was that the opportunity would be given to the students concerned and admittedly such opportunity was given and an enquiry was made in their presence. Thereafter, on conclusion of such enquiry, the Sub-Committee submitted a report with recommendation for punishment to the concerned students. So there was full compliance with the rules and principles of natural justice. It is not necessary that these findings or conclusion on facts must also appear in the report. I cannot agree.

13. The relevant rules relating to the duties of the Examination Board and the Syndicate were fully discussed and explained in a Special Bench decision reported in (1952) 56 Cal WN 730 (SB), *University of Calcutta v. Dipa Pal*, also relied on by the learned Counsel for the respondents, from which it seems to me fairly clear that it is the Examination Board which must come to the conclusion that unfair practices have been established and report that such a student should be held not to have passed the examina-

tion. If it comes to such a conclusion, then it must report its reasons to the Syndicate which has no power to vary the findings of the Examination Board. The Syndicate may confirm such findings or if it disagrees with them, it may refer them back to the Board for reconsideration. The Examination Board, in its turn may appoint a Sub-Committee whose duty it is to consider matters referred to them and to submit their decision and report to the Committee. In the Special Bench case, however, there was no compliance with these rules in the sense that the Sub-Committee reported not to the Examination Board but to the Syndicate and the Syndicate undoubtedly acted on that report considering the report as a report of the Sub-Committee. In giving his reasons for so holding the learned Chief Justice (Harris, C. J.) observed at page 736 of the Report *inter alia* as follows:

"..... but the difficulty arises because the Sub-Committee admittedly never reported its findings to the Examination Committee and the latter body never considering the report of its Sub-Committee could have arrived at any findings whatsoever."

14. From the above observations it also follows that in absence of a proper report with its findings by the Sub-Committee of the Examination Board it is not possible for the Examination Board either to consider the report of its Sub-Committee or to arrive at any findings whatsoever. So applying the principles indicated above to the facts of the present case it seems to me fairly clear that the Sub-Committee failed to give a report from which a conclusion could have been reached by the Examination Board one way or the other. In fact, as already noticed, there was no report by the Sub-Committee with its findings on fact but there was a mere recommendation for cancellation of the examination of the different groups of students from different sections. From this report it is impossible to conclude that there was any evidence either direct or circumstantial to justify the conclusion that might be reached by the Examination Board in cancelling the examination of the students. So, in absence of proper report with the findings of the Sub-Committee the order cancelling the examination of the petitioners cannot be sustained as valid.

15. Mr. Roy, the learned Counsel for the respondents in C. R. No. 405 (w) of 1964 submitted that in the instant case, whether or not the principle of natural justice was complied with, however, involved at best a disputed question of fact. Even assuming that it is so, it could not be denied that there was no report with the findings of the Sub-Committee and this rendered the impugned order invalid.

16. Mr. Roy also drew my attention to an additional affidavit in opposition affirmed on 21-5-1968 by one of the members of the Committee stating that the matter was enquired into in all details and after considering all the materials the Sub-Committee concluded that the charge against the petitioners was established and recommended for cancellation of their examination results. It is not for this Court to go into these questions of fact but for the Examination Committee which could only be done in accordance with the rules of the University. So if that rule dictates that there must be a finding with the report, that cannot be supplemented by stating certain facts before this Court on an affidavit.

17. So, for the reasons given, the order cancelling the examination results of the petitioners, in my view, suffers from serious infirmity and must be struck down as invalid. That being so, the only consequence is that this sub-committee which was constituted temporarily for an enquiry into the impugned charges not having been in existence now the entire enquiry proceeding held by such a Committee also fails.

18. The result, both the petitions succeed. The entire enquiry proceeding with the report dated 14th December, 1963 of the Sub-Committee (annexure 'C' to the affidavit-in-opposition in C. R. No. 320 (W) of 1964) culminating in the impugned order of cancellation of the results of the examination of the petitioners are all quashed. I make it clear, however, that all proceedings, report or recommendations of the Sub-Committee and orders made in respect of all other students mentioned in the said report remain unaffected. The order I make, will only apply to the petitioners.

19. The Rules are made absolute to the extent indicated above. Nothing, however, in this judgment will prevent the University to reconsider the case of the petitioners in accordance with the relevant rules or regulations and in accordance with the law and then take such steps as it is entitled to take. I make no order as to costs.

20. Let a writ both in the nature of Certiorari and Mandamus issue accordingly.

Petition allowed.

AIR 1970 CALCUTTA 212

(V 57 C 39)

D. BASU AND A. K. BASU, JJ.

The New Central Jute Mills Co. Ltd., Appellant v. The Assistant Collector of Customs and others, Respondents.

A. F. O. O. No. 45 of 1969. D/- 12-6-1969 from judgment of B. C. Mitra, J., D/- 6-3-1969.

LM/AN/G79/69/LGC/P

(A) Letters Patent (Cal.), Cl. 15 — 'Judgment' meaning of — Writ petition challenging authorisation under S. 105, Customs Act as well as seizure made thereunder—Interim injunction order restraining Customs authorities not to examine or look into documents seized — Modification allowing custom authorities to inspect document held, was appealable — Further order allowing inspection to strangers to proceeding, held was nothing but a second modification of original interim order and was a 'judgment' within Cl. 15 and hence appealable.

A decision in order to be a judgment must finally determine the rights of the parties in the proceeding. But all proceedings are not of the same nature.

(Para 3)

Where in a writ proceeding challenging the validity of order of authorisation, under Section 105 of Customs Act as well as the seizure made thereunder an interim injunction was granted restraining the custom authorities not to examine or look into the books seized and later on they were allowed to examine them in presence of petitioner but the single judge on application of the custom authorities allowed the Enforcement Directorate to inspect the documents.

Held, that the first modification allowing the custom authorities to inspect the document was appealable. But the omission to prefer an appeal could not debar the petitioner from challenging further modification of the original order of injunction. The order allowing inspection to Enforcement Directorate was nothing but a second modification of the original interim order issued by the Court, by way of giving inspection not only to the respondents in the Rule but to strangers through the medium of the respondent and hence the order was a 'judgment' within the meaning of Cl. 15 of the Letters Patent and was, therefore, appealable.

(Para 4)

(B) Constitution of India, Art. 226 — Petition challenging authorisation under S. 105, Customs Act as well as seizure thereunder — Interim injunction restraining customs authorities to inspect documents seized — Court, held, had no jurisdiction to allow the strangers to proceedings to inspect the documents — Such order is ultra vires and no question of improper or arbitrary exercise of discretion would arise — (Customs Act (1962), S. 105).

In a writ proceeding challenging the authorisation under Section 105, Customs Act as well as the seizure made thereunder an interim injunction was granted restraining the respondent to inspect the documents seized, the Court on an application by the Customs authorities allowed the Enforcement Directorate who

were not a party to the proceedings, to inspect those documents;

Held, that the mere fact that the Enforcement Directorate, who were not parties in the case before the Court below, had independent powers under a different statute namely Foreign Exchange Regulation Act, 1947, which could be exercised by them was itself a ground for not allowing the application. (Para 5)

By allowing the Customs authorities to extend their opportunity of inspection in favour of the Foreign Exchange Directorate, the Court, was depriving the appellants of their substantive right to question any seizure or order of production issued by the Enforcement Directorate in case they had directly exercised their power under the Foreign Exchange Regulation Act. In the pending Rule, the trial Court had no jurisdiction to do anything in that behalf, or to indirectly enforce the rights of a party which was not a party before it. When the decision of the Court was *ultra vires*, no question of an improper or arbitrary exercise of discretion arises because it is no order at law at all. (Para 6)

A person's document constitutes his property which might sometimes be more valuable than immovable property itself and that, accordingly, it could be taken away or invaded by another person only under authority of law. Where that right was governed by statute, the right could be exercised only in compliance with the procedure or the conditions and limitations imposed by that statute. When the Customs authorities seized the documents in the exercise of their powers under Section 105, they could use those documents only for their own purpose under the Customs Act and not for lending them to somebody else. (Para 6)

Cases Referred: Chronological Paras

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| (1960) AIR 1960 SC 1156 (V 47) = | |
| (1960) 3 SCR 713, Printers | |
| (Mysore) Private Ltd. v. Pothan | 5 |
| Joseph | |
| (1959) AIR 1959 Cal 62 (V 46) = | |
| ILR (1959) 1 Cal 602, Narendra | |
| Nath v. Jitendra Nath | 3 |
| (1959) AIR 1959 Cal 420 (V 46) = | |
| ILR (1960) 1 Cal 415, Gopiram | |
| Agarwalla v. First Addl. I.-T. Of- | 3 |
| ficer | |
| (1953) AIR 1953 Mad 841 (V 40) = | |
| (1953) 1 Mad LJ 810, Royal Calcutta | |
| Turf Club v. Raman Menon | 3 |

R. C. Deb with R. N. Bajoria, for Appellant; G. P. Kar with Asoke Kumar Banerjee, for Respondents.

D. BASU, J.:— This appeal is against the order of B. C. Mitra, J. passed on March 6, 1969 in Matter No. 344 of 1968, on an application made by the Assistant Collector of Customs, the respondent in the parties under Art. 226 of the Constitu-

tion. That petition had been brought by the appellant against the respondents Customs authorities and the Union of India, challenging the validity of the order of authorisation dated May 11, 1968 (vide page 79 of the paper book), under which the Preventive Officer of the Customs Department, respondent No. 2, was authorised under Section 105 of the Customs Act to enter into the premises of the appellant and to search for and seize and take possession of their goods and documents and things, pursuing the belief of the Customs authorities that goods liable to confiscation under the said Act were secreted in the premises of the appellant. Certain documents, inter alia, were seized from the custody of the appellant in pursuance of this order and the petitioner challenged the order of authorisation as well as the seizure made thereunder on various grounds. While issuing the Rule on this petition an interim order of injunction was issued by the Court on 16-5-1968 directing the seized documents to be kept in the sealed box, and restraining respondents, that is, the Customs authorities, "not to examine or look into the books seized until further orders of this Court". Thereafter there was an application for vacation of the said order by respondents and simultaneously an application for the extension of the period of interim injunction which was originally limited to six weeks, was made by the appellant.

2. These applications were disposed of by the order of the Court on 8-8-1968 (page 8 of the paper book) by which the original interim order was modified to the extent that the respondents, that is, the Customs authorities, would be at liberty to break open the seals for purposes of examining the documents in the presence of the petitioner but that the respondents "shall not take any further steps in pursuance thereof." In short, though by the interim order, as originally issued, the respondents had no right of inspection of the documents, they were given that right for their own inspection by the first order of variation of the interim injunction dated 8-8-1968. The matter, however, did not end there since another party, namely, the Directorate of Enforcement, was anxious to have inspection of the seized documents for purposes of their own under the Foreign Exchange Regulation Act, 1947. They, therefore, mentioned the matter to this Court before B. C. Mitra, J. asking for inspection on 13th December, 1968 and the Court upon hearing the Counsel concerned ordered that instead of mentioning the matter orally, an application should be filed by the proper party (vide paragraph 10, p. 9 of the paper book). In pursuance of that direction of the Court, a formal application to this effect was filed by the Customs authorities, together

with the Union of India (respondents 1 and 2), which is at pages 5 to 9 of the Paper Book. In this application the prayer of the Customs authorities was that while they themselves had already the right to inspect the seized documents, they should now be permitted to allow the Enforcement Directorate to inspect the documents and for this, the permission of the Court was sought. It is that application which has been disposed of by the Court by the impugned order at page 51 of the paper book. In this order the Court said that the Enforcement Directorate had statutory powers under Ss. 19-E and 19-F of the Foreign Exchange Regulation Act, 1947 to compel the appellant or even the Customs Department to produce the disputed documents but that the Court could not allow them to exercise that power while the documents were in the custody of the Court in the pending proceedings, at the end of which the appellant had a right to get back the documents. The substance of this observation seems to be that it was in exercise of the powers of the Customs authorities under the Customs Act that the disputed documents had been seized and that after the disposal of the petition under Art. 226 arising out of that seizure, if that terminated in favour of the petitioner, he was entitled to get a return of the seized documents. Nevertheless, the Court held that unless the Enforcement Directorate was allowed an inspection of the documents the object of the statutory powers of the Enforcement Directorate would be defeated simply because the documents were in the custody of the Court in a proceeding initiated by the Rule Nisi on the petition under Art. 226 of the Constitution. In other words, it was because of the pending proceedings before the Court that the Enforcement Directorate was not in a position to exercise their statutory powers and that was a reason why the Court should allow them to inspect the documents which had been seized by the Customs authorities. To reproduce the relevant observations of the Court below on this point:—

"But at the same time if the Enforcement Directorate has a right to call for production of documents under Section 19-E of the said Act and also a power to summon any person to give evidence and produce documents under Sec. 19-F of the said Act, the ends of justice demand that they should not be denied the right to look into the documents because a Rule Nisi has been issued by this Court and interim orders have been made with regard to the documents."

3. We are to determine the validity of this reasoning in the present appeal but before we go into the merits, a preliminary objection raised by Mr. Kar on behalf of the respondents has to be cross-

ed, namely, as to the maintainability of this appeal from the impugned order. It was argued by Mr. Kar that the impugned order was nothing but an order of inspection of documents which was not a "judgment" within the meaning of clause 15 of the Letters Patent under which the appeal comes from the decision of a single Judge to this Division Bench. Mr. Kar relied upon certain decisions showing that interlocutory orders like an order of amendment, AIR 1959 Cal 62 or service of a notice, AIR 1959 Cal 420 or an order for inspection of documents in a suit, AIR 1953 Mad 841, did not constitute a judgment within the meaning of the Letters Patent. The word 'judgment' has, however, been interpreted by the Supreme Court in another context in a number of decisions because that word occurs in Arts. 132, 133 and the like. It has been explained in those cases that a decision in order to be a judgment must finally determine the rights of the parties in the proceeding. But all proceedings are not of the same nature.

In a suit, inspection of documents is only an interlocutory step like similar other steps, such as interrogatories, discovery and the like, which are preliminary steps for deciding the cause in the suit which may not be identical with the right of inspection. A suit may be one for declaration of title or other reliefs such as partition, accounts and the like. Those reliefs are independent of the inspection of documents and that is why there cannot be a 'judgment' from which appeal would lie when the Court either grants or refuses inspection of documents in a suit.

4. But the case is otherwise in an application under Art. 226. Here the case which the Court has got to decide on the instant petition, for instance, was whether the seizure made by the respondents was lawful and whether the respondents had a right to open, examine or inspect those documents on the basis of the order of seizure, the validity of which was challenged in the petition. The interim relief that the Court granted at the time of issuing Rule Nisi was co-extensive in nature with the rights sought to be established at the hearing of the petition, the only difference being that it was limited to a temporary period, namely, the pendency of Rule or until further orders were made by the Court. In other words, what was decided on the application for interim injunction initially was whether the respondents should or should not have a right to examine the documents until their right to examine the documents was investigated into and decided by the Court on the hearing of the petition under Art. 226, on the merits. There is little dispute that the original order of interim injunction was itself

appealable. It was even conceded that the first modification which the Court made on 8-8-1968 allowing the Customs authorities to inspect the documents was appealable. But as matters stand, the appellant did not prefer any appeal against that order. That omission, however, cannot debar the appellant from challenging any further modification of the original order of injunction which the Court might make affecting the appellant, by giving inspection to persons other than the Customs authorities. In fact, the Enforcement Directorate is not a party to the Rule which was pending before the Court. They could not, therefore, make an independent application in the instant proceeding, as the Court rightly held, asking for inspection of the documents. That is why the Customs authorities made the application in question for permission of the Court to allow the Enforcement Directorate to inspect the documents which were lying in the hands of the Customs authorities. Mr. Kar resisted the suggestion that the impugned order was a variation of the original interim order issued by the Court with the Rule. We have, however, little doubt that, properly understood, the impugned order is nothing but a second modification of the original interim order issued by the Court, by way of giving inspection not only to the respondents in the Rule but to strangers through the medium of the respondents. Looked at from this standpoint we have little doubt that the impugned order is a 'judgment' within the meaning of Clause 15 of the Letters Patent and is, therefore, appealable.

5. Coming now to the merits of the reasons which were given by the Court below for allowing the respondents Customs authorities to entertain the Enforcement Directorate to have an inspection of the documents. In our opinion, the mere fact that the Enforcement Directorate, who are not parties in the case before the Court below, had independent powers under a different statute which could be exercised by them was itself a ground for not allowing the application. Mr. Kar urged that the impugned order of the Court below was a discretionary order and this Court should not interfere with such a discretionary order so long as the Court had not acted arbitrarily or unjudicially, as has been referred to by the Supreme Court in AIR 1960 SC 1156. The Printers (Mysore) Private Ltd. v. Pothan Joseph.

6. It is, however, to be noted that a person's document constitutes his property which might sometimes be more valuable than immovable property itself and that, accordingly, it can be taken away or invaded by another person only under authority of law. Where that right

is governed by statute, the right can be exercised only in compliance with the procedure or the conditions and limitations imposed by that statute. When the Customs authorities seized the documents in the exercise of their powers under Section 105, they could use those documents only for their own purpose under the Customs Act and not for lending them to somebody else. It was argued that the Enforcement Directorate had accompanied the Customs authorities at the time of the search made by the Customs Department inasmuch as they themselves had some suspicion that provisions of the Foreign Exchange Regulation Act, 1947 or the connected laws had been violated by the appellant. It is, however, to be remembered that the officers of the Foreign Exchange Department did not exercise those powers which they themselves had to make a search or to call for a party to produce or deliver documents under Section 19-E etc., of the Foreign Exchange Regulation Act, 1947. Sec. 19-E is as follows:—

"The Director of Enforcement may, during the course of any inquiry in connection with any offence under this act—

(a) require any person to produce or deliver any document relevant to the inquiry;"

It was argued on behalf of appellant by Mr. Deb that this power could be exercised only during the course of any enquiry in connection with any offence under this Act and that it was not evident in this case that any such enquiry in connection with an offence under the Foreign Exchange Regulation Act, 1947, had been formally initiated. In fact, we have not got before us any order made by the Directorate of Enforcement under the Foreign Exchange Regulation Act. Whatever might be the circumstances, from the legal standpoint, it cannot be overlooked that the legality of the action of the respondents, namely, the Customs authorities, was in challenge in the pending proceedings, or in other words, the right of the Customs authorities themselves to inspect the documents was in question, upon which no decision of the Court has yet been arrived at. If the Enforcement Directorate had independently pursued their powers under the Foreign Exchange Regulation Act and had either called for those documents or seized them the appellant would have got an independent right to challenge that action of the Enforcement Directorate in appropriate proceedings. By allowing the Customs authorities to extend their opportunity of inspection in favour of the Foreign Exchange Directorate, the Court was depriving the appellants of their substantive right to question any seizure or order of production issued by the Enforcement Directorate in case they

had directly exercised their power under the Foreign Exchange Regulation Act. In the pending Rule, the trial Court had no jurisdiction to do anything in that behalf, or to indirectly enforce the rights of a party which was not a party before it. When the decision of the Court is ultra vires, no question of an improper or arbitrary exercise of discretion arises because it is no order at law at all.

7. In this view, we are of the opinion that the impugned order of the Court must be set aside. The appeal is accordingly allowed and the impugned order dated March 6, 1969 is set aside.

8. In the circumstances of the case, there would be no order as to costs.

9. We must add, however, that there may be some inconvenience caused to the Enforcement Directorate if the hearing of the Rule is prolonged to any unusual length and the documents in question are detained until the disposal of the Rule. We desire, therefore, that this Rule should be heard and disposed of as early as possible.

10. AJAY K. BASU, J.: I agree.
Appeal allowed.

AIR 1970 CALCUTTA 216 (V 57 C 40)
N. C. TALUKDAR, J.

Dhirendra Nath Sen and another, Petitioners v. Rajat Kanti Bhadra, Opp. Party.

Criminal Revn. No. 1244 of 1967, D/- 29-8-1969.

(A) Criminal P. C. (1898), S. 198 — "Person aggrieved" — Defamation of a spiritual head of certain community — Individual person of that community is not a person aggrieved — Cognizance of offence taken on a complaint by such individual is illegal.

If a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation is against him personally and he is the person aimed at, before he can maintain a prosecution for defamation. In short, the grievance of the complainant should not merely be the one shared by every member of an organised society. Where, therefore, the editor of a paper writes an editorial which is highly defamatory of the spiritual head of a certain community, an individual of that community is not an aggrieved person within the meaning of Section 198, Criminal P. C. The mere fact that the feelings of the complainant have been injured in consequence of a defamatory statement made against his religious head, affords him no ground under the law to prosecute the accused for defamation. (1858) 1 F & F 347 &

(1944) AC 116 & (1948) 1 KB 580 & AIR 1925 Cal 1121 & (1935) 36 Cr LJ 408 (Sind) & AIR 1937 All 677 & (1935) 38 Cr LJ 116 (Oudh) & AIR 1965 SC 1451, Rel. on. (Para 4)

(B) Penal Code (1860), S. 500 — Complaint for alleged defamation in respect of an Ashram, an incorporated body — Complainant an individual claiming to be a member bringing complaint — Allegations not disclosing any defamation of the Ashram thereby touching complainant as a member thereof — No action under S. 500 lies. AIR 1955 SC 196, Rel. on. (Para 5)

(C) Penal Code (1860), Ss. 499 and 500 — Defamation — Essentials.

The concept of defamation is very old and the Penal Code makes no distinction between the written and spoken defamation. The term defamation includes both libel and slander. The classical definition of the term however is as has been given in the case of (1882) 8 QBD 491 as a "False statement about a man to his discredit". This definition has been approved of in a series of decisions. The concept of defamation is indeed a mixed concept partly subjective and partly objective and the institutions of the proceedings must be against the background of Section 198 of the Criminal P. C. Upon ultimate analysis however, whether the impugned publication is defamatory or not is a question of fact and the same must abide a full-fledged trial. (1936) 52 TLR 669 & (1882) 8 QBD 491, Rel. on. (Para 6)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1451 (V 52)=	
1965 (2) Cri LJ 434, Sahib Singh Mehra v. State of U.P.	4
(1955) AIR 1955 SC 196 (V 42)=	
1955 SCA 258=1955 Cri LJ 526, H. N. Vishnu v. State of Delhi	5
(1948) 1948-1 KB 580=1948-1 All ER 450, Braddock v. Bevins	4
(1944) 1944 AC 116=170 LT 362, Knuipfer v. London Express Newspaper Ltd.	4
(1937) AIR 1937 All 677 (V 24)=	
38 Cri LJ 1086, Ankaraju Subharaaya v. Batuk Prasad	4
(1936) 52 TLR 669=80 SJ 703, Sim v. Stretch	6
(1935) 36 Cri LJ 116=152 Ind Cas 478 (Oudh), Jagadish Narain v. Nawab Sham Ara Begum	4
(1935) 36 Cri LJ 408=153 Ind Cas 443 (2) (Sind), Hosseinbhoy Ismailji v. Emperor	4
(1935) 38 Cri LJ 975=156 Ind Cas 567 (Sind), Hosseinbhoy Ismailji v. Emperor	4
(1925) AIR 1925 Cal 1121 (V 12)=	
26 Cri LJ 1539, Pratap Chandra Guha v. King Emperor	4
(1882) 8 QBD 491=51 LJ QB 380, Scott v. Sampson	6

(1858) 1 F & F 347=75 ER 758, East-wood v. Holmes 4

Ajit Kumar Dutt, Prasun Chandra Ghosh and Birendranath Banerjee, for Petitioners; Arun Kumar Jana, for Opp. Party.

ORDER:— This Rule is for quashing the proceedings under Section 500 of the Indian Penal Code, pending before Sri K. K. Roy, Magistrate, 1st Class, Cooch Behar, in Case No. C.R. 28 of 1966 under Section 500 I.P.C. as not maintainable in law and on merits.

2. The facts leading on to the Rule are chequered but can be put in a short compass. The complainant, Rajat Kanti Bhadra, who described himself as a member of the Shoulmari Ashram, filed a complaint under Section 500 I.P.C. in the Court of the learned Sub-Divisional Magistrate, Cooch Behar against two accused persons viz., Sookomal Kanti Ghosh, Editor of a Bengali Daily called the "Jugantar" and Dhirendranath Sen, the printer and publisher of the same. The impugned publication is an item of news purported to have been served by the P.T.I. and U.N.I. and appeared in the issue of the Jugantar dated the 7th December, 1965, under the sub-heading "Shoulmari Sadhu", the English translation whereof is as follows: "The Foreign Minister stated that the Sadhu of Shoulmari who calls himself Subhas Chandra Bose, is not Netaji and the Government has not the least doubt about this fact that he is not". It was averred that the said newspaper which was published in Calcutta, was widely distributed in West Bengal, including Cooch Behar, within the jurisdiction of the abovementioned court. The learned Magistrate examined the complainant on solemn affirmation and sent the case for judicial enquiry and report to Sri I. Sundas, Magistrate, 1st Class, Cooch Behar. The latter after examining the complainant and four other witnesses observed on 16-3-1966 that no cognizance can be taken of the offence under Section 500 I.P.C. as there was a non-conformance to the provisions of Section 198 of the Code of Criminal Procedure, inasmuch as the complainant is not the person aggrieved within the meaning of that section, and dismissed the complaint under Section 203 of the Code of Criminal Procedure, sending back the record to Sri S. K. Banerjee, Magistrate, 1st Class, Cooch Behar. On a perusal of the said report, Sri S. K. Banerjee, Magistrate, 1st Class, Cooch Behar by his order dated the 18th March, 1966, dismissed the complaint under Section 203 of the Code of Criminal Procedure. The complainant thereupon preferred a revisional application under Section 436 of the Code of Criminal Procedure before the learned Sessions Judge, Cooch Behar for setting aside the order of the trying Magistrate

dismissing the complaint and for holding a further enquiry into the complaint filed. Sri H. N. Sen, Sessions Judge, Cooch Behar, by his order dated the 30th September, 1968, allowed the said application and directed a further enquiry into the complaint referred to above. The learned trying Magistrate, on receiving back the records sent the case to Sri G. C. Chatterjee, Magistrate, 2nd Class, Cooch Behar, for judicial enquiry and report by his order dated the 6th January, 1967. Four witnesses were examined by the learned enquiring Magistrate who ultimately submitted a report on 26-6-1967 holding that there was a prima facie case against the accused persons under Section 500 I.P.C. On the 12th July, 1967, Sri N. N. Pal, Magistrate, 1st Class, Cooch Behar, perused the report of the judicial enquiry and summoned both the accused under Section 500 I.P.C. This order as also the proceedings based thereupon have been impugned by the two accused-petitioners and the present Rule was obtained.

3. Mr. Ajit Kumar Dutt, Advocate (with Messrs. Prasun Chandra Ghosh and Birendranath Banerjee, Advocates) appearing on behalf of the accused-petitioners in support of the Rule, has made a three-fold submission. The first contention of Mr. Dutt which is one of law and goes to the very root of the case, inter alia is that the cognizance of the case as taken by the learned Magistrate has been bad in law and without jurisdiction vitiating the resultant proceedings because of a non-conformance to the mandatory provisions of Section 198 of the Code of Criminal Procedure inasmuch as the present complainant is not "some persons aggrieved" within the meaning of Section 198 of the Code. In support of his contention, Mr. Dutt referred to the averments made in the petition of complaint which relate to the Sadhu of Shoulmari only and also to several authorities as well as some reported decisions on the point. The second contention of Mr. Dutt raises an interesting point of law viz., that even if it be assumed that the petition of complaint discloses a defamation of the Ashram, thereby touching the complainant as a member thereof, no action would lie under Section 500 I.P.C., as the Ashram is an indeterminate body. To establish his point on this behalf, Mr. Dutt referred to the allegations made in the petition of complaint and to the contents of the impugned publication itself. The third and the last contention of Mr. Dutt is however one of fact and relates to merits viz., that the impugned publication is not in any way defamatory and in any event the proceedings are not maintainable in the absence of the two news agencies which served the news item. When the case was called on for

hearing, nobody appeared on behalf of the complainant-opposite party and after the matter was heard in part, it was adjourned in the interests of justice to give an opportunity to the complainant-opposite party to appear through some other learned Advocate, as it appeared from the records that the learned Advocate, who had originally been engaged and filed the power, was elevated to the Bench. Ultimately an administrative notice had to be issued and Mr. Arun Kumar Jana, Advocate, appearing on behalf of the complainant-opposite party made his submissions. Mr. Jana submitted in the first instance that the objections raised on behalf of the accused-petitioners as to whether there has been a proper cognizance under Section 198 of the Code of Criminal Procedure or whether the present complaint merely discloses the defamation of an indeterminate body or whether the impugned publication is not at all defamatory and not maintainable in the absence of the two news agencies, are ultimately questions of fact to be determined in a full-fledged trial and therefore the prayer for quashing at this stage is premature. With regard to the first submission of Mr. Dutt, Mr. Jana contended that there has been no non-conformance to Section 198 of the Code of Criminal Procedure because the defamation alleged relates to the head of the institution, His Holiness Srmat Saradanandjee, touching thereby all the members of the Ashram who are his disciples. In this context, he submitted that the impugned publication having lowered the Head of the Ashram in public estimation, has also so lowered the complainant, who is but a member of the said Ashram, and is as such a "person aggrieved" within the meaning of Section 198 of the Code of Criminal Procedure. Mr. Jana next submitted that the second contention of Mr. Dutt is also not maintainable inasmuch as the defamation alleged relates not to an indeterminate body but to an Ashram, the religious head whereof viz., His Holiness Srmat Saradanandjee, was defamed, touching thereby the present complainant also as his disciple. As to the third and last contention of Mr. Dutt, Mr. Jana joined issue and submitted that the point whether the impugned publication is defamatory or not, is based ultimately on fact and is but premature at this stage, without a full-fledged trial.

4. Having heard the learned Advocates appearing on behalf of the respective parties and on going through the legal materials on the record, I will now proceed to determine the various points raised. As to the first contention raised by Mr. Dutt that the cognizance taken by the learned Magistrate has been bad in law because of a non-conformance to the

mandatory provisions of Section 198 of the Code of Criminal Procedure, the steps of Mr. Dutt's reasoning are that the impugned publication has not in any manner, directly or indirectly, defamed the Ashram or the complainant as its member or even any other member of the said Ashram; that the complainant in the facts and circumstances of the case could not in law bring an action for libel merely on the ground that his feelings have been injured; that the complaint has been filed by a person who does not come within the ambit of the expression "some persons aggrieved" within the meaning of Section 198 of the Code of Criminal Procedure; and that there having been a clear non-conformance to the mandatory provisions of the statute, the resultant proceedings stand vitiated and should be quashed at the earliest stage. In this connection Mr. Dutt made an ancillary submission that in any event, the Shoulmar Ashram being an unincorporated body or association of individuals, the complainant as its member has no cause of action and could not in law bring an action for libel, as the "person aggrieved". Mr. Jana's reply to the first point raised by Mr. Dutt, in a short compass, is that the defamation complained of in this case is not of an indeterminate body but it relates to the Head of the Institution, His Holiness Srmat Saradanandjee, thereby touching all the members of the Ashram as being his followers and that when the religious head is lowered in public estimation, the disciples, amongst whom the present complainant is one, are also so lowered. The complainant therefore is a "person aggrieved" within the meaning of Section 198 of the Code of Criminal Procedure and there is consequently no defect in cognizance. In support of the respective contentions on the first point as referred to above, various authorities have been cited and a reference has also been made to several reported decisions. In Halsbury's Laws of England (3rd Edn.: Edited by Viscount Simonds) Vol. 24, page 5, paragraph 6, it has been observed under the heading "Group Defamation" that "A class of persons cannot be defamed as a class, nor can an individual be defamed by general reference to the class to which he belongs". A similar view was taken by Gatlley in "Libel and Slander" (4th Edn.) at page 115 wherein there is a discussion relating to the "defamation of a class" and it has been stated that "where the words complained of reflect on a body or class of persons generally, such as lawyers, clergymen, publicans or the like, no particular member of the body or class can maintain an action". The observations of Mr. Justice Willes in the case of *Eastwood v. Holmes*, (1858) 1 F & F 347 at p. 349 have been approved of and a reference was further made to the case

of *O. Brien v. Eason* reported in (1913) 47 Ir LT wherein Lord Justice. Holmes and Lord Justice Cherry observed that the dictum of Willes J. in the case of (1858) 1 F & F 347 "was sound law and strictly applicable". A reference in this connection may also be made to *Odgers "on Libel and Slander"* (6th Edn.) at page 123 wherein it has been stated that "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff". It was further observed at page 124 that "so if the words reflect impartially on either A or B, or on someone of a certain member of class, and there is nothing to show which one was meant, no one can sue." It would therefore appear that there is an imprimature of authorities on the point that there will be no action of libel, if the body defamed is indeterminate, unless and until an individual is referred to. As to the case law on the point, I will refer in the first instance to the case of *Kunpfier v. London Express Newspaper, Ltd.*, (1944) AC p. 116 wherein Lord Porter observed at pp. 123 and 124 that "this case raises once again the question which is commonly expressed in the form; 'can an individual sue in respect of words which are defamatory of a body or class of persons generally?'" The answer as a rule must be 'No,' but the inquiry is really a wider one and is governed by no rule of thumb. The true question always is; "was the individual, 'or were the individuals, bringing the action personally pointed' to by the words complained of?". The next case on the point is the case of *Braddock v. Bevins* (1948) 1 K. B. 580 wherein the Master of the Rolls, Lord Greene delivering the judgment of the court, observed at page 588 that "No one of these is named in the alleged libels and before any one of them can succeed he must show that the alleged libels were or one of them was published of himself. In establishing this there are two stages. First, he must satisfy the judge as a matter of law that the words are capable of referring to himself as a particular identifiable individual and secondly, if he succeeds in this he must satisfy the jury that the words do so refer to himself". It was further observed at page 599 that "the words appear to us to be a mere generalisation and on applying the principles laid down by the House of Lords in 1944 AC 116 the appeal of these three appellants fails". I may refer in this context to the *Nil Darpan* case tried by the Supreme Court of Calcutta, cited in Mayne's Criminal Law of India wherein the words impugned as stated are "I present the indigo planters' mirrors to the indigo planters' hands". Chief Justice Sir Barnes Peacock observed thereupon that "this certainly appears to me to represent to the indigo planters that if they

look into this paper they would see a true representation each of himself". Mr. Justice B. B. Ghose in his dissentient judgment in the case of *Pratap Chandra Guha Roy v. King-Emperor*, AIR 1925 Cal 1121 referred to the same and observed at page 1127 that "the true rule appears to be that if a person complains that he has been defamed as a member of a class he must satisfy the court that the imputation is against him personally and he is the person aimed at, before he can maintain a prosecution for defamation". Mr. Dutt relied upon the observations made in the abovementioned case by Mr. Justice Buckland to whom the case was referred to as the third Judge, on a difference of opinion between Mr. Justice Newbould and Mr. Justice B. B. Ghose, viz., that exception 2 to Sec. 499 I.P.C. is intended to include a company or an association or collection of persons as such within the word "person" as used in the definition, so that the latter should not be limited to individuals. It is doubtful if the police force at a particular place is an association or collection of persons as is contemplated in Exception 2, Section 499 I.P.C. and that the police force as such cannot complain of any imputation as regards its personal reputation. Mr. Justice Buckland agreed with the observation of Mr. Justice B. B. Ghosh that the true rule in such cases is that when a person complains of defamation as a member of a class he must satisfy the Court that the imputation is against him personally before he can maintain a prosecution for defamation. The next case referred by Mr. Dutt is the case of *Hosseinhoy Ismailji v. Emperor*, (1935) 36 Cri LJ 408 (Sind), wherein it was observed by the Additional Judicial Commissioner Mr. Mehta that only such person as has directly or indirectly suffered in his own reputation by the defamation complained of can set the machinery of the law Courts into motion. In short, the aggrievement of the complainant should not merely be the one shared by every member of an organised society. Where, therefore, the editor of a paper writes an editorial which is highly defamatory of the spiritual head of a certain community, an individual of that community is not an aggrieved person within the meaning of S. 198, Criminal Procedure Code. Mr. Dutt further referred to another case (1935) 36 Cri LJ 975 (Sind) viz., the case of *Hosseinhoy Ismailji v. Emperor*, wherein the Judicial Commissioner Ferrers and the Additional Judicial Commissioner Rupchand held that where the person defamed, namely the High Priest of a community, is a male adult and does not come within the proviso to Section 198 Criminal Procedure Code, it is for him to complain, and for nobody else whether on the strength of his written authority or otherwise. The mere fact that the feel-

ings of the complainant have been injured in consequence of a defamatory statement made against his religious head, affords him no ground under the law to prosecute the accused for defamation. In the case of Ankaraju Subbaraya v. Batuk Prasad, AIR 1937 All 677, Mr. Justice Ganga Nath referred with approval to Odgers "on Libel and Slander" (6th Edn.) at pages 123 and 124 and the case of AIR 1925 Cal 1121, mentioned above and observed at page 678 that "if a well-defined class is defamed, each and every member of that class can file a complaint. In other cases the defamatory words must refer to some ascertained and ascertainable person and that person must be the complainant. Where the words reflect on each and every member of a certain number or class, each or all can sue. If the words reflect impartially on either A or B, or on someone of a certain number or class, and there is nothing to show which one was meant, no one can sue If a person complains that he has been defamed as a member of a class, he must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation". It will be pertinent in this context to refer also to the decision of the Supreme Court in the case of Sahib Singh Mehra v. State of Uttar Pradesh, AIR 1965 SC 1451 wherein Mr. Justice Raghubar Dayal delivering the judgment of the court observed at page 1453 that "explanation 2 provides that it may amount to defamation to make an imputation concerning a company or an association or collection of persons as such The language of Explanation 2 is general and any collection of persons would be covered by it. Of course, that collection of persons must be identifiable in the sense that one could, with certainty, say that this group of particular people has been, defamed, as distinguished from the rest of the community". Mr. Jana appearing for the opposite party referred to the case of Jagdish Narain v. Nawab Shams Ara Begum, (1935) 36 Cr LJ 116 (Oudh) and the observations made therein by Mr. Justice Zia-ul-Hasan relating to the provisions of Section 198 of the Code of Criminal Procedure as to cognizance. The facts, however, are clearly distinguishable and the principles ultimately laid down there viz., that the provisions of the said section are mandatory, are not disputed in the present case. It accordingly does not help the contention of Mr. Jana advanced in this behalf. I respectfully agree with the principles laid down by the authorities referred to above as also with the observations made in the cases cited before and I hold that the interpretation sought to be given by Mr. Jana to the provisions of Section 198 of the Code of Criminal Procedure is untenable as it

seeks to cloak the same with too wide a meaning, much beyond the intention of the legislature. There has been in fact no proper cognizance in this case as enjoined under Section 198 of the Code of Criminal Procedure and the first contention of Mr. Dutt succeeds.

5. The second contention of Mr. Dutt also stands on a strong footing. The impugned publication as submitted by him, relates to the Head of the Shoulmari Ashram, His Holiness Srimat Saradanandjee, described as "the Sadhu of Shoulmari" and not to the present complainant personally and that in the petition of complaint also there is no allegation that the complainant has been, in any way, defamed personally. The facts and circumstances again, Mr. Dutt urged, do not disclose any defamation of the Ashram either directly or indirectly and in any event the Shoulmari Ashram being an unincorporated body or association of individuals, the complainant as one of its members could not in law bring an action for libel. I have gone through the petition of complaint in this connection and have given my anxious consideration to the averments made therein but I find that there is neither any imputation against the complainant personally nor any defamation against the Ashram as such. Even if it be assumed that the petition of complaint discloses a defamation of the Ashram thereby touching the complainant as a member thereof, no action would lie under Section 500 I.P.C. as the Ashram is an indeterminate body. I agree, therefore, with the submission of Mr. Dutt that the present proceedings are an abuse of the process of the court and the objection thereto having been taken at the earliest stage, the same should be quashed in the interests of justice. In this context a reference may be made to the observations of the Supreme Court in the case of H. N. Rishbud v. State of Delhi, 1955 SCA 258—(AIR 1955 SC 196) wherein Mr. Justice Jaganmohandas delivering the judgment of the court observed at page 269 that "when the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under S. 537 Cr. P. C., of making out that such an

error has in fact occasioned a failure of justice". It was ultimately held that "To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused". I uphold therefore the second contention also of Mr. Dutt.

6. The third and last contention of Mr. Dutt relates to merits viz., that the impugned publication is not in any way defamatory and that the proceedings are not maintainable in the absence of the two news agencies which served the news item. So far as the second part of the contention is concerned, it is not maintainable inasmuch as there is no bar in law to the institution of a proceeding for defamation against the present accused without the two news agencies being made co-accused therein. The first part of the contention again is based ultimately on facts and the same is indeed premature at this stage. It may be pertinent in this context, to ascertain what defamation is and the ingredients thereof. Many definitions have been attempted but none has been found exhaustive. The concept of defamation is as old as the hills and the Indian Penal Code makes no distinction between the written and spoken defamation and the term defamation includes both libel and slander. The classical definition of the term however has been given by Mr. Justice Cave in the case of *Scott v. Sampson*, (1882) 8 QBD 491 as a "false statement about a man to his discredit". This definition has been approved of in a series of decisions including that of *Sim v. Stretch*, (1936) 52 TLR 669 at p. 671 where Lord Atkin observed that "would the words tend to lower the complainant in the estimation of the right thinking members of the society generally". The concept of defamation is indeed a mixed concept partly subjective and partly objective and the institution of the proceedings must be against the background of Section 198 of the Code of Criminal Procedure. Upon ultimate analysis however, whether the impugned publication is defamatory or not is a question of fact and the same must abide a full-fledged trial. I hold accordingly that the third contention of Mr. Dutt is premature at this stage.

7. In the result, I make the Rule absolute; and I quash the criminal proceedings under Section 500 I.P.C., pending before Sri K. K. Roy, Magistrate, 1st Class, Cooch Behar, in C. R. Case No. 28 of 1966.

Rule made absolute.

AIR 1970 CALCUTTA 221 (V 57 C 41)

S. K. CHAKRAVARTI, J.

The New Great Insurance Company of India Ltd., Petitioner v. United Equipments and Stores (Pvt.) Ltd., Opp. Party.

Civil Rule No. 3958 of 1966, D/- 27-8-1969.

Contract Act (1872), S. 28 — Agreement containing provision for reference to arbitration — Suit still lies and remedy of other party is to apply under S. 34, Arbitration Act for stay of suit — If making of award is made condition precedent to any right of action suit does not lie.

An agreement between the parties by which recourse to a court of law is absolutely prohibited would be against S. 28 and would be void, but it is still open to the parties to stipulate by a valid agreement between themselves that any dispute between them will be referred to arbitration and that the making of an award shall be the condition precedent to any right of action. Such a clause does not close the final door to a court of law. The approach to the court may be not by the straight path, but by the byelanes or in other words, the approach may be a staggered one and that would not be a contravention of Section 28. If there is only a clause to the effect that the parties are to refer the matter to arbitration, then a suit would still lie, and the remedy of the other party would be to apply under Section 34 of the Arbitration Act for a stay of the suit. If, however, the making of an award is made a condition precedent to a right of action, the suit would not lie and if such a suit is brought, it would be dismissed as a premature one and the party cannot be referred to a prayer for a stay in the suit under S. 34 as S. 34 would not apply, the right of the party to file a suit being staggered. (1876) ILR 1 Cal 466 & (1936) 40 Cal WN 865, Rel. on; AIR 1937 Lah 851, Explained; (1843-60) All ER 1 = (1856) 10 ER 1121, Referred to. (Para 9)

Cases Referred: Chronological Paras (1937) AIR 1937 Lah 851 (V 24), Firm

Jowahir Singh v. Fleming Shaw and Co. 5, 11

(1936) 40 Cal WN 865, M. D. Cruz v. Secy. for State for Indian Council 8

(1891) 65 LT 825=8 TLR 37, Trainor v. Phoenix Fire Assurance Co. 8

(1885) ILR 11 Cal 232, Aghore Nath Banerjee v. Calcutta Tramways Co., Ltd. 8

(1876) ILR 1 Cal 466, Coringa Oil Co., Ltd. v. Koeglekar 7

(1862) 1 H & C 72=7 LT 127, Tredwen v. Holmon 7

(1843-60) All ER 1 = (1856) 10 ER 1121=5 HLC 811, Scott v. Avery 6, 7, 8, 10

Subrata Roy Chowdhury, Biswarup Gupta, Jatin Ghosh, for Petitioner; Amarendra Mohan Mitra, Haripada Mitra, Arunendranath Basu, for Opp. Party.

ORDER:— This case raises a very important and interesting point as to the right of the party to a contract of insurance to file a suit where under the contract it is provided for that all differences arising out of the policy are to be referred to arbitration and that the making of an award shall be a condition precedent to any right of action against the company.

2. The broad facts of this case are admitted. The opposite party's motor car was insured with the petitioner company and it was involved in an accident on the 8th of March, 1963. The opposite party sent the claim form duly filled in and signed, together with detailed estimate of repairs done by Barman and Company in respect of the damage to whom it had paid a sum of Rs. 1113.35 on this account. The petitioner company by its letter dated the 24th August, 1964 (Exhibit 2) contended that the opposite party had taken away the motor car from the garage and did not give any opportunity to the surveyor appointed by the petitioner company to inspect the car, and as such, the petitioner company repudiated the claim. Thereafter the opposite party filed the instant suit in the court of the Small Causes, at Calcutta for recovery of the sum of Rs. 1113.35 paise. Before the learned trial Judge the petitioner raised only one point and it was to the effect that in view of clause 7 of the Contract of Insurance the dispute in question was to be referred to arbitration, and the making of an award was a condition precedent to the institution of the suit, and as arbitration had not been resorted to, the suit was a premature one and should be dismissed. The learned trial Judge did not accept this contention and decreed the suit. The petitioner filed an application under Section 38 of the Presidency Small Cause Courts Act before the Full Bench of the small causes Court at Calcutta and that Full Bench also upheld the decision of the trial Court. Hence this application.

3. Mr. Gupta, learned counsel appearing on behalf of the petitioner submits that the Courts below have taken an erroneous view of the law. He submits that where, in the contract, there is only a provision for reference to arbitration, then a suit may still lie, and the remedy of the other party would be to apply for stay under Section 34 of the Arbitration Act. He further urges that if, however, in addition there is a clause to the effect that the making of an award shall be a condition precedent to any right of action, that clause is a legal and valid one, and will have to be given effect to, and as in the present case there is such a clause, the

suit should have been dismissed, as admittedly there had been no reference to arbitration. It would be convenient at this stage to quote CL 7 of the contract of insurance.

Clause 7:—

"All differences arising out of this party policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and the making of an Award shall be a condition precedent to any right of action against the company. If the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

4. Mr. Gupta has referred to a number of decisions and also to different parts of Halsbury's Laws of England. I will refer to the same as and when it would be convenient.

5. To have recourse to a Court of law for redress of one's grievances or injury is a fundamental right so to say. It is a facet of the rule of law, and is inherent in every suitor as has been pointed out in the case of Firm Jowahir Singh v. Fleming Shaw and Co. Ltd., AIR 1937 Lah 851. This right has been considered to be so very important that some countries have gone so far as to lay down, either by specific legislation, or through judicial decisions, that its citizens cannot contract themselves out of this right, or, in other words, cannot shut out the jurisdiction of the Courts absolutely by any agreement between themselves. Our country is no exception to this salutary rule, and has provided in Section 28 of the Contract Act, that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights, is void to that extent. But this proposition is not an absolute one. Law provides also that if the parties so desire they may settle their disputes by arbitration. Exception 1 to Section 28 of the Indian Contract Act is to that effect, and runs as follows:

Exception 1:—

"This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

6. The leading case in England in this respect is that of *Scott v. Avery*, (1843-60) All ER 1 = (1856) 10 ER 1121. In this case Lord Campbell has observed as follows:

"But what pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject, if he were not allowed to enter into such a contract."

"An agreement to refer a dispute to arbitration couched in such language as entirely to oust the jurisdiction of the Courts is invalid; but there is no legal objection to an agreement which makes it a condition precedent to the enforcement of a claim that the liability and the amount shall first be determined by arbitration."

(Halsbury's Laws of England, Third edition, volume 1, pages 17 and 18).

"As a general rule, however, the arbitration clause provides that the award of an arbitrator is to be a condition precedent to any action on the policy, and that no action is to be brought except for the amount of the award. In this case the cause of action is not complete until an arbitration has taken place in accordance with the clause and an award has been made by an arbitrator." (Halsbury's Laws of England, third edition, volume 22, page 257).

"So long as the arbitration agreement only requires certain condition precedent or subsequent in order to constitute the right of action, it does not oust the jurisdiction of the Court and a provision in an arbitration agreement, known as a *Scott v. Avery*, (1843-60) All ER 1 = (1856) 10 ER 1121 clause whereby the making of the award is to be considered a condition precedent to any right of action in respect of any of the matters agreed to be referred, is valid." (Halsbury's Laws of England, 3rd Edition, volume 2, page 19).

7. Even in our country the principles laid down in *Scott v. Avery* have been followed. The first case of this kind is the *Coringa Oil Co., Ltd. v. Koegler*, (1876) ILR 1 Cal 466. In this case the contract was to the effect that in case of any dis-

pute the same is to be decided by two competent London brokers—one to be appointed by the buyers and the other by the seller's agents; such broker's decision is to be final. The contract did not provide that no action should be brought till such decision was pronounced. The Court on a consideration of Section 28 of the Contract Act came to the conclusion that such clause is legal and valid. This Court observed as follows:

"That section does not apply to contracts which merely contain a provision for referring disputes to arbitration but to those which wholly or partially prohibit the parties from having recourse to a Court of law. If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, under the first part of Section 21, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunal, and so, if a contract were to contain a double stipulation, that any dispute between the parties should be settled by arbitration and that neither party should enforce their rights under it in a Court of law, that would be a valid stipulation, so far as regards its first branch, viz. that all disputes between the parties should be referred to arbitration, because that by itself would not have the effect of ousting the jurisdiction of the Courts; but the latter branch of the stipulation would be void; because by that, the jurisdiction of the Court would be necessarily excluded. Then the first exception in the 28th section applies only to a class of contracts where (as in the cases of *Scott v. Avery*, (1843-60) All ER 1 = (1856) 10 ER 1121 and *Tredwen v. Holmon*, ((1862) 7 LT 127 cited by *Phear, J.*) the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference, as for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts; it only stays the plaintiff's hand till some particular amount of money has been first ascertained by reference."

8. The other important case in this respect is the case of *M. D'cruz v. Secretary of State for India in Council* (1936) 40 Cal WN 865. In that case Rule 26 of the Provident Fund Rules came up for consideration and it was provided therein that in cases of dispute the matter in dispute was to be referred in writing to the Advocate General or Standing Counsel in Calcutta and an award, order or decision of the said referee shall be a condition precedent to any right of action of any party in difference in respect of any of the matters by the rules provided or in any way arising thereout or connected there-

with and whatever award, order or decision shall be made by the said referee shall be binding and conclusive on all parties and shall be final to all intents and purposes without any appeal. No reference contemplated by the rule was made in that case. The Court observed as follows:

"The legality of a clause in a contract to the effect that no cause of action can accrue until a third person has decided on any difference that may arise between the contracting parties was recognised long ago in *Scott v. Avery*, (1843-60) All ER 1 = (1856) 10 ER 1121. In *Aghore Nath Banerjee v. Calcutta Tramways Co. Ltd.*, (1885) ILR 11 Cal 232 this Court held that there is nothing in the Contract Act which prevents the principle from being applicable from *Trainor v. Phoenix Fire Assurance Co.*, (1891-65 LT 825) that the principle holds good when the referee has power to determine liability and his decision is not limited to quantum. It follows, therefore, that the plaintiffs have no cause of action in respect of the *Provident Fund*."

9. From the above discussions the following principles may be laid down. An agreement between the parties by which recourse to a Court of law is absolutely prohibited would be against Section 28 of the Contract Act and would be void, but it is still open to the parties to stipulate by a valid agreement between themselves that any dispute between them will be referred to arbitration and that the making of an award shall be the condition precedent to any right of action. Even our Courts in India have held such a clause to be valid. Such a clause does not close the final door to a Court of law. If it so does, it would be void but it does not do so. The approach to the Court may be not by the straight path, but by the byelanes or in other words, the approach may be a staggered one and that would not be a contravention of S. 28. If there is only a clause to the effect that the parties are to refer the matter to arbitration, then a suit would still lie, and the remedy of the other party would be to apply under Section 34 of the Arbitration Act for a stay of the suit. If, however, the making of an award is made a condition precedent to a right of action, the suit would not lie and if such a suit is brought, it would be dismissed as a premature one and the party cannot be referred to a prayer for a stay in the suit under Section 34 as S. 34 would not apply, the right of the party to file a suit being staggered.

10. Mr. Amarendra Mohan Mitra, learned advocate appearing on behalf of the opposite party, submits that the principles of *Scott v. Avery*, (1843-60) All ER 1 = (1856) 10 ER 1121 do not apply to cases in India and that if there is any clause in any contract under which the

making of an award is made a condition precedent to a right of action, that would be offending Section 28 and would be void. I am not in a position to accept the proposition of Mr. Mitra in view of the fact of independent decisions referred to above.

11. Mr. Mitra has relied on the case of AIR 1937 Lah 851 which has been referred to above, but that case does not lay down such a proposition of law. In that case there was no clause to the effect that the making of an award shall be a condition precedent to any right of action, and that decision does not refer to any such clause. Moreover the cases I have referred to above will show that this contention is not correct.

12. Mr. Mitra submits further that the last sentence in clause 7 of the contract of Insurance is to be read independently and separately, and that this clause is void, inasmuch as, it limits the right of the party to have recourse to any Court of law, and as such, contravenes Section 28 of the Contract Act. Let us examine this proposition of Mr. Mitra carefully. In the first place, I do not think that this last sentence in clause 7 can be read divorced from the previous portion of the same clause. The use of the term "If" at the beginning of this last sentence would also show that it is to be construed with reference to the foregoing provision in the same clause. In my view, the only reasonable construction of this portion would be that under the earlier portion of Cl. 7 all differences are to be referred to the decision of the Arbitrator within one calendar month after having been received in writing so to do, but if the differences relate to the disclaimer of liability to the insured, then this time is extended in favour of the insured to a period of 12 calendar months from the date of such disclaimer. Or in other words, such an arbitration is to be resorted to within twelve months from the date of disclaimer instead of one month as in the earlier portion of the same clause.

13. Even assuming Mr. Mitra's contention in this respect to be correct and this portion to be read separately and independently, still I do not think that it ousts the jurisdiction of the Court at all. It is perfectly open to the parties to a contract to stipulate that the other party would lose his right to enforce it on the lapse of a particular time, or in other words, to have a time limit for the purpose of the contract, and to provide that if it is not performed within the time stipulated by parties concerned, the other party would lose his right. That is not a case of ouster of jurisdiction of Courts. In this view of the matter this clause cannot be held to have contravened the provision of Section 28 of the Contract Act.

He ordered tea and took a seat opposite to the accused. He told the accused that he had brought the promised amount of Rs. 50/- but the accused replied that he would not take the money there. The complainant however made over the currency notes along with his bills to the accused and the latter accepted them. On receiving a signal from the witnesses, the D.S.P. entered the restaurant along with two other policemen and disclosed his identity to the accused. He caught hold of the accused by the arm because the accused resisted the search of his person. The D.S.P. then asked the Inspector to search the accused. The notes Exhibits P-1 to P-5 which had been put by the accused in the right pocket of his coat were then recovered from his pocket. The numbers of the currency notes were compared with those recorded previously and were found to tally. One of the notes (Exhibit P5) got torn during the course of struggle between the accused and the police at the time of search. The prosecution case is fully supported by the evidence of the complainant and the two independent witnesses Kewal Ram (P.W. 1) and Ram Rikh (P.W. 5).

3. It is true that both Kewal Ram and Ram Rikh who had been directed by the D.S.P. to hear the talk between the complainant and the accused, stated that they could not distinctly hear the conversation between the two as the radio in the restaurant was being played at a very high pitch but they both deposed that they saw with their own eyes the currency notes being given by the complainant to the accused and the same being recovered by the Inspector from the same right pocket of the accused's coat in which he had put them after accepting the same.

4. The defence of the accused was that on 7-1-1966 he and one Hira Singh were at the post office to collect the licence for the radio installed at the Kendra when Madan Singh met him and asked him to take his bills. He asked Madan Singh to hand over the bills to the diarist at the office. After that he and Hira Singh went to Kiran Restaurant for taking lunch. Madan Singh also came there and requested him to accept the bills and hand them over to the diarist. On his insistence he took hold of the bills and put them in the right pocket of his coat. The bills were folded at that time. After four or five minutes a gentleman came and caught hold of his arm. He was accompanied by a Sikh gentleman. On inquiring from him as to who he was he was told that he was a D.S.P. He then told him that he had accepted only bills from Madan Singh but when the bills were unfolded on search 5 currency notes of Rs. 10/- each came out. He pleaded that

he told the D.S.P. that Madan Singh had quarrelled with him in the past and had falsely implicated him on account of enmity. In support of his defence, the accused examined Hira Singh (D. W. 2) but on a close examination of his statement the learned Special Judge came to the conclusion that the witness, being a colleague of the accused had come to his rescue and that there were serious discrepancies in his statement which clearly established the falsity of his evidence.

5. The failure of the witnesses to hear the conversation however does not seem to me to be of much consequence as it has not been denied by the accused that the currency notes of the value of Rs. 50/- were recovered by the police from his pocket. It is not the case of the accused that the amount was paid to him by the complainant on some other account. The amount can also not be regarded as forming part of the legal remuneration of the accused. The case is therefore fully covered by the presumption arising under Section 4(1) of the Prevention of Corruption Act which reads:—

"Where in any trial of an offence punishable under Sec. 161 or Sec. 165 or Sec. 165-A of the Indian Penal Code it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said Sec. 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

While it is thus true that the presumption under Section 4(1) of the Prevention of Corruption Act is attracted to the case and it stands completely un rebutted there is one other aspect of the case which has necessarily to be considered in view of the defence set up by the accused.

6. It cannot be denied that the presumption under Section 4(1) applies only if it is established that the accused had actually accepted the currency notes. On the other hand, if the prosecution evidence falls short of what is required to prove that fact or if it is found that money had either been planted or foisted on him by means of a deception or a trick then the presumption under Section 4(1) can obviously not be pressed into service for the purpose of establishing his guilt.

7. The contention urged on behalf of the accused is that he was duped into pocketing the relevant currency notes under the cover of bills and that there

was as a matter of fact no acceptance of money at all. Support for this argument is sought to be found in the statement of the complainant who admitted that the accused refused to have the notes in the restaurant in the first instance, but he accepted the same when they were handed over to him along with the bills. I think this statement cannot be of any help to the accused at all. Firstly, the two independent witnesses Kewal Ram (P. W. 1) and Ram Rikh (P. W. 5) did not refer to any such refusal on the part of the accused and it was not even put to them in cross-examination that any bills had been passed on to the accused along with the currency notes. Both these witnesses stated in unequivocal terms that what was passed on by the complainant to the accused was currency notes and the same were clearly visible to them.

Assuming for the sake of argument that what the complainant stated was true that too would not take away from the effect of his further statement that he had passed on the currency notes to the accused and that the latter had accepted them with full knowledge of that fact although they were passed on along with the bills. The money was evidently being paid by the complainant to the accused in a public restaurant where several other persons were also present. If the accused therefore told the complainant that he would not accept the notes in the restaurant there was nothing unnatural in his conduct. His initial hesitation must have however been overcome when the complainant put those notes inside the folds of the bills. In doing so however the money must have been taken by the complainant from his pocket and put inside the bills and then passed on by him to the accused within the sight of the witnesses.

8. This circumstance therefore does not in any way militate against the evidence of Kewal Ram and Ram Rikh nor does it detract from the evidence of Madan Singh complainant who did say that the accused accepted the currency notes when they were handed over to him along with the bills.

9. There is thus no escape from the conclusion that the passing of the money by the complainant to the accused was not the result of any deception or trick practised on him and that the currency notes were accepted by the accused with full knowledge of the fact that what was being passed on to him was money that was not legally due to him. The presumption under Section 4(1) therefore applies to the case in full force. The guilt of the accused must therefore be held to have been established beyond reasonable doubt.

10. The appeal is accordingly dismissed and the conviction of the accused is

upheld but the sentence passed on him is reduced to one year R. I. and a fine of Rs. 200/- under Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act. His conviction under Section 161 Indian Penal Code is also upheld but the sentence of imprisonment is reduced to one year R. I. In default of payment of fine the accused shall undergo further imprisonment for a period of three months. The two substantive sentences of imprisonment, as ordered by the trial Court, shall however run concurrently.

Appeal dismissed.

AIR 1970 DELHI 98 (V 57 C 22)

I. D. DUA, C. J.

Ashish, Petitioner v. D. C. Tewari, Respondent.

Criminal Revn. No. 571 of 1968, D/- 15-1-1969.

(A) Criminal P. C. (1898), S. 488 — Scheme and object — Section serves a social purpose and enables deserted wives and helpless deserted children to secure urgent relief of maintenance through Magistrate's Court — Proceedings are relatively summary and cannot be equated to civil suit for maintenance — Orders passed being tentative are subject to final determination of rights of parties by Civil Court and are also liable to be varied with change of circumstances. (Para 6)

(B) Criminal P. C. (1898), S. 488 — Right of minor child to maintenance — Neglect or refusal to maintain — Can be inferred from conduct — Fact that child is in mother's custody and that mother cannot live with her husband are not material so far as right of child is concerned.

The fact that the minor child is living with his mother, is not a sufficiently cogent ground by itself for refusing him relief by way of maintenance and this would be all the more so in the case of a child of 5 years. At this age, normally speaking, the mother is entitled to have his custody. The child's right and his father's corresponding liability in regard to the maintenance is not, broadly speaking, dependent on the former living with the latter. Neither statute nor any recognised principle provides that a child of such age living with his real mother would, merely for that reason, lose right of maintenance from his father. The fact that the father and the mother cannot pull on together is hardly material so far as the minor child's rights are concerned. Absence of formal refusal to maintain is no answer under the law and it can be implied or inferred even from

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conduct because even neglect to maintain is sufficient to justify an order under this section. (Para 6)

(C) Criminal P. C. (1898), S. 488(1) — Amount of maintenance — Has to be fixed after taking into consideration all circumstances of case.

The trial Magistrate had awarded a sum of Rs. 20/- per month by way of maintenance of his minor son of 5 years of age in the custody of real mother who was living apart and was being paid a monthly sum of Rs. 90/- by way of interim maintenance under S. 24 Hindu Marriage Act, 1955. The father whose monthly income came to Rs. 540/- per month had also to maintain his own old mother and younger brother who was studying. On a recommendation of the Sessions Judge for enhancement of the amount to Rs. 50/- per month:

Held: that taking into consideration all the circumstances of the case including the status and standard of the father, the amount of Rs. 50/- for maintenance of the minor child, could on no account be considered unreasonable or excessive. It is wrong to presume that unless the father can spare some money after maintaining himself, his old mother and his brother, he has no legal obligation to maintain his own minor son, of course in accordance with his status and standard.

Even assuming but without deciding that the amount of interim maintenance allowed under S. 24 Hindu Marriage Act was intended to include the needs of the minor child, Rs. 90/- P.M. awarded under S. 24 could by no means be considered to be adequate for both the mother and the child to such an extent as to dis-entitle the minor son to get an order for reasonable amount under S. 488 Cr. P. C. (Paras 7, 8)

Smt. Mohini Tewari, for Petitioner;
Respondent in person.

ORDER:— Shri D. R. Khanna, Additional Sessions Judge, Delhi, has forwarded this revision to this Court with a recommendation to increase the maintenance allowance to Ashish minor fixed at Rs. 20/- p.m. by Shri V. N. Chaturvedi, Sub-Divisional Magistrate, Hauz Qazi, Delhi, payable by his father Shri D. C. Tewari. The learned Additional Sessions Judge has recommended that the amount be increased to Rs. 50/- p.m.

2. Shri Tewari was married to Smt. Mohini Tewari, mother of Ashish minor and the minor child was born on 26-11-1964, in Delhi. Shri D. C. Tewari is stated to be working as a Librarian in the Malviya Regional Engineering College at Jaipur. According to the averments in the application for maintenance, his monthly income is about Rs. 700/- and he has not cared to maintain his minor child. The prayer in the applica-

tion which is based on total neglect and failure of his father to maintain the minor is for payment of Rs. 300/- p.m.

3. The father after stating the story of his marriage with the minor's mother, pleaded in the written statement that his wife and her mother had after the marriage started persuading and coercing him to live with them at their house because the minor's grandmother had no other child except his wife. They also wanted Shri Tewari to break off with his widowed mother and younger brother. To this, he obviously did not agree. When his wife saw no hope of persuading him to agree to her point of view, she left the house in August, 1964 on the pretext of Raksha Bandhan. At that time, she was in the seventh month of her pregnancy and thereafter she did not return to her matrimonial home in spite of repeated efforts to persuade her to come back. Having failed in his efforts, he filed an application for restitution of conjugal rights in October, 1965 which was decided by a Subordinate Judge, Delhi, on 29-4-1967, when his wife made a statement that she was ready to accompany her husband to his house at Jaipur. However, when Shri Tewari went to take his wife, she plainly refused to accompany him. This resulted in another application for restitution of conjugal rights in July, 1967. In those proceedings, Shri Tewari pleads to have been paying Rs. 90/- p.m. to his wife and child as maintenance allowance in compliance with the order of the Court. According to his case, he is earning about Rs. 540/- p.m. It appears from the order of the learned Magistrate that Shri Tewari also objected to the jurisdiction of the Delhi Courts on the ground that he had neither resided within the jurisdiction of the Delhi Courts nor did he last reside within such jurisdiction with his minor child or with his wife. After considering the evidence led in the case, the learned Sub-Divisional Magistrate upheld the jurisdiction of the Delhi Courts. On the merits, after considering the arguments addressed on both sides, the learned Sub-Divisional Magistrate observed that Shri Tewari was already paying Rs. 90/- p.m. to his wife, who is the mother of the minor-petitioner. So observing the learned Magistrate proceeded:

"There are rulings to this effect that the maintenance does not cover high education and the better standard of living. In awarding the maintenance allowance, we have also to see the other circumstances of the respondent also. It is from the record clear that the respondent is maintaining his mother and brother and running a second house in Delhi. He is already also paying Rs. 90/- per month to the petitioner's mother. So looking to these circumstances and agreeing with the arguments of the learned counsel for

the petitioner I order the respondent to pay Rs. 20/- (Twenty) per month to the petitioner as maintenance allowance from the date of order."

This order, it may be pointed out, was made on 30-8-1968.

4. On revision, the learned Additional Sessions Judge observed that Shri Tewari is employed at Jaipur and his total emoluments come to Rs. 540/-. Shri Tewari's reply, according to the order of the learned Additional Sessions Judge, shows that he was, to quote from the order, "brought up in rich traditions of a decent family life with a special emphasis on education and living in an enlightened educational atmosphere among the top educationists of the country". Because of this reply by Shri Tewari, the learned Additional Sessions Judge felt that it would not be unreasonable that a child of such a person should be educated in a good school. At that time the minor was studying in Frank Anthony Junior School where the monthly fee payable is Rs. 24/-. The sum of Rs. 20/- p.m. as maintenance was accordingly considered to be clearly inadequate and it was held proper to increase the amount to Rs. 50/- p.m. at least. Adverting to the expenses of Shri Tewari, the learned Additional Sessions Judge observed in his order that according to the order of the Matrimonial Court, out of Shri Tewari's salary of Rs. 540/- p.m., Rs. 83/- are deducted towards Provident Fund, Income-tax and Insurance premium, out of the balance of Rs. 457/- he had to pay Rs. 80/- to his wife and with the rest to maintain himself, his old mother and younger brother, who is studying. Payment of Rs. 50/- p.m. by Shri Tewari towards his child was, in the circumstances, held not to be too much.

5. Before me, both the minor's mother as his guardian and his father have appeared in person. Shri Tewari has urged that the learned Additional Sessions Judge has failed to consider all the relevant circumstances of the case. According to him, he has not refused to maintain his minor child and has emphasised his assertion that whenever he met his wife and child, he paid some amount towards the child's maintenance. He has also argued that his wife is not willing to live with him and to redress this grievance, he has instituted another suit against her. He has also prayed that I should go into the entire record to see which way justice lies.

6. It is proper at this stage to reproduce Section 488, Cr. P. C.

"488. Order for maintenance of wives and children.— (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain it-

self, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment is sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him:

Provided, further that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases.

Provided that if the Magistrate is satisfied that he is wilfully avoiding service,

or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Any order so made may be set aside for good cause shown, on application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."

This section has been enacted with the object of enabling discarded wives and helpless deserted children to secure the much-needed and urgent relief. It is thus intended to serve a social purpose, the desirability and effectiveness of which cannot be over-emphasised. The fact that the minor child is living with his mother, is not a sufficiently cogent ground by itself for refusing him relief by way of maintenance and this would be all the more so in the case of a child of the age of Ashish. At this age, normally speaking, the mother is entitled to have his custody. The child's right and his father's corresponding liability in regard to the maintenance is not, broadly speaking, dependent on the former living with the latter. Neither statute nor any recognised principle that I know of provides that a child of the age of Ashish living with his real mother would, merely for that reason, lose right of maintenance from his father. The fact that the father and the mother cannot pull on together is hardly material so far as the minor child's rights are concerned. Shri Tewari's submission that he has never refused to maintain his child, ignores that formal refusal to maintain is no answer under the law and that it can be implied or inferred even from conduct. It also ignores the legal position that even neglect to maintain is sufficient to justify an order under this section. And then, neglect or refusal to maintain seems to me to mean neglect or refusal to maintain properly and assuming, without holding, that Shri Tewari has, once in a while, given some money or present for the child, as he argues in this Court, that cannot be successfully pleaded as a complete defence to the child's claim to be adequately and regularly maintained according to the means and status of the father. I must not be understood to equate proceedings under Section 488, Cr. P. C., with a regular civil suit for maintenance because it is obvious from the statutory scheme of Chapter XXXVI of the Code that these provisions are relatively summary, designed to afford urgent relief to the needy,

neglected wife and child to a limited extent through the Courts of Magistrate. The somewhat summary method of enforcement of orders under this section also highlights the sense of urgency which inspired the enactment of this statutory provision. Such orders are, it is unnecessary to point out, subject to the final determination of the rights of the parties by Civil Court, and are also tentative liable to be varied with change of circumstances.

7. Shri Tewari's opposition to the recommendation of the learned Additional Sessions Judge on the ground that all the circumstances have not been considered is unacceptable on a proper perusal of the order and the record. The fact that after paying additional sum of Rs. 30 p.m. to the minor child (which brings the total monthly maintenance to him under Section 488, Cr. P. C., to Rs. 50 p.m.) Shri Tewari would be left with only about Rs. 315 to support himself, his old mother and his younger brother, who is still studying, is certainly a relevant consideration, but the argument based on this circumstance ignores the vital consideration that Shri Tewari's responsibility towards his own minor son is of no less importance, and this responsibility is expressly enforceable under Section 488 of the Code. It is wrong to presume that unless the father can spare some money after maintaining himself, his old mother and his brother, he has no legal obligation to maintain his own minor son, of course in accordance with his status and standard.

8. The further contention that Shri Tewari is already paying Rs. 90 p.m. to his wife, pursuant to an order under Section 24 of the Hindu Marriage Act and that this amount is meant for his child as well, assuming, without holding, the last assertion to be correct, does not render the recommendation of the learned Additional Sessions Judge to be unacceptable because, in view of Shri Tewari's status as represented by him and keeping in view the present high cost of living, Rs. 50 p.m. can scarcely be considered to be sufficient and certainly not excessive for the maintenance of the minor child. Section 24 of the Hindu Marriage Act is enacted for the purpose of providing, *inter alia*, maintenance pendente lite and Rs. 90 p.m. can by no means be considered to be adequate for both the mother and the child to such an extent as to disentitle Ashish in the present proceedings to get an order for reasonable amount and Rs. 50 p.m. can on no account be held to be unreasonable or excessive. I am not expressing any opinion on the question whether or not the amount allowed under Section 24 was meant for the maintenance of child, and indeed I am doubtful if the amount allowed was intended by the learned Sub-

ordinate Judge to include the needs of the minor child.

9. The recommendation of the learned Additional Sessions Judge, on an overall view of all the circumstances deserves to be accepted and I hereby accept it and vary the order of the learned Magistrate as suggested. The amount would of course be payable from the date of the order of the learned Magistrate because no recommendation has been made that it should be made payable from the date of the application.

10. Before concluding, I cannot help observing that this is a typical case of absence of proper adjustment on collective deliberation by the husband and the wife genuinely attempting to solve the difficult problem confronting them and arising out of their affection for their respective parents and other near relations. Mrs. Tewari and her mother must realise that after marriage, the wife's home is where the husband lives and the husband's family has to be considered by her to be her family. Her mother must properly grasp this vital fact, taking it for granted that after marriage the girl has to go and live with her husband. She must, therefore, adjust herself to the changed situation after her daughter's marriage. Similarly, Shri Tewari and his mother and brother have to face the new situation created by the marriage. The introduction of his wife in his family means that all the family members must welcome her with affection and they must help her in all respects to strengthen her roots in the family life of her husband. Mrs. Tewari has to look upon her mother-in-law as her own mother, who in turn must look upon her daughter-in-law as if she is her daughter. The younger brother is also entitled to be looked upon as the child of the family. This of course does not mean that if Mrs. Tewari's mother is unprovided for and is otherwise needy, then Mr. Tewari must ignore her requirements. Within reasonable limits, Shri Tewari must allow his wife to look after her own mother. All this requires joint co-operative effort with good will on all sides and I have no doubt that educated, sensible and practical as all the persons concerned in this controversy are, and belonging as they do to respectable families with high Indian traditions, they will all realise the futility of avoidable litigation which is calculated to bring disharmony and financial difficulties in the family. The litigation in which the parties seem to be involved at the present point of time can neither solve their problem nor bring peace of mind to them, leave alone the financial and other difficulties and most of all the unhealthy environments for their own child, to whom they owe both legal and moral obligation to bring up as a good human being. In the civil litigation for

restitution of conjugal rights, that Court has a judicial duty to try to bring about reconciliation between the two spouses, and I hope serious and genuine effort would be made to this end. That Court would no doubt use its good offices in accordance with law to remove misunderstandings, if any, between the parties and see that the two spouses forget their past differences and begin to live together, if for no other reasons, at least for the good of their child and their own aged parents. I trust that their aged parents also are anxious to see their children living happily together in the normal way.

Reference accepted and maintenance enhanced.

'AIR 1970 DELHI 102 (V 57 C 23)

HARDAYAL HARDY, J.

Gurbachan Singh, Appellant v. State, Respondent.

Criminal Appeal 33 of 1967, D/- 20-3-1968, from Order of Spl. J., Delhi, D/- 3-2-1967.

(A) Prevention of Corruption Act (1947), Section 6 — Purpose of sanction.

The intention of the legislature in providing for a sanction in respect of the offences covered by Section 6 of the Prevention of Corruption Act is merely to afford a reasonable protection to the public servants in the discharge of their official functions. It is not the object of the section that a public servant who is guilty of the particular offence mentioned in that section should escape the consequences of his criminal act by raising the technical plea of invalidity of sanction. The section is a safeguard for the innocent and is not a shield for the guilty.

(Para 18)

(B) Prevention of Corruption Act (1947), S. 6 — Sanctioning authority — Public servant employed by Provincial Government loaned to Central Government — Sanctioning authority would be the loaning government and not borrowing government. AIR 1962 SC 1573, Rel. on.

(Para 19)

(C) Criminal P. C. (1893) S. 196A — Accused charged under Ss. 120-B, 161, 162, 163 of Penal Code, 1860 — Sanction obtained in respect of offences under Section 120B and S. 161 I. P. C. but not in respect of offences under S. 120-B and Ss. 162 and 163 — Conviction for offences under Ss. 120B and 161 I. P. C. can still be maintained. AIR 1967 SC 1590, Rel. on.

(Paras 21, 25, 27)

(D) Prevention of Corruption Act (1947) S. 6 — Penal Code (1860) Ss. 120-B and 163 — Accused who was not entitled to

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protection of S. 197, Criminal P. C. charged under Ss. 120-B, 161, 162 and 163 I. P. C. — Sanction obtained under S. 6(1)(c) — Held if offences under S. 120-B and S. 163 I. P. C. were outside scope of S. 6 of the Act, there could be no bar to prosecution of accused under those sections.

(Para 20)

(E) Prevention of Corruption Act (1947), S. 5-A — Prosecution for offences under Ss. 120-B and 161 I. P. C. — Investigation by officer below rank of officers mentioned in S. 5-A — Held it could not be said that because sanction was not necessary under S. 197, Cr. P. C. it was also not necessary under S. 196-A, Cr. P. C. because position in so far as offence under S. 161, I. P. C. was concerned was same notwithstanding amendment of Act in 1952 by introduction of S. 5-A as offence under that section when so investigated, would still remain non-cognizable.

(Para 23)

(F) Prevention of Corruption Act (1947), S. 6 — Officer according sanction not examined as witness — His signature proved but there was no evidence to establish that sanctioning officer had applied his mind to the case — Held presumption was that sanction was duly accorded in absence of evidence to contrary—(Evidence Act (1872) S. 114).

(Para 29)

Cases Referred: Chronological Paras

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| (1967) AIR 1967 SC 1590 (V 54) =
1967 Cri LJ 1401, Madan Lal v.
State of Punjab | 26 |
| (1962) AIR 1962 SC 1573 (V 49) =
1962 (2) Cri LJ 510, R. R. Chari
v. State of U. P. | 119 |
| (1954) AIR 1954 SC 455 (V 41) =
1954 Cri LJ 1161, Ronald Wood
Mathams v. State of W. B. | 22 |
| (1949) AIR 1949 PC 117 (V 36) =
50 Cri LJ 395, Phanindra Chan-
dra Neogy v. King | 22 |
| (1948) AIR 1948 PC 128 (V 35) =
49 Cri LJ 503, H. H. B. Gill v.
King | 22 |

D. D. Sharma with Tarlochan Singh Sodhi, for Petitioner; R. L. Mehta, for Respondent.

JUDGMENT:— The appellant in this case was charged with offences under Sections 161, 162 and 163, I. P. C. for attempting to obtain for himself and other persons illegal gratification from two postal employees from Jullundur and Kapurthala, namely Kewal Krishan and P. L. Sachdeva, for getting their names included in the merit list which was to be prepared as a result of the postal examination held in September 1962 by exercising his influence with some other public servants dealing with the matter. He was also charged with conspiracy with some other unknown person or persons and also for attempting to cheat the afore-mentioned Kewal Krishan and P. L. Sachdeva by trying to obtain Rs. 500

from each of them by falsely holding out that he would get their names included in the merit list as aforesaid.

2. Learned Special Judge who tried the case found the appellant guilty of an offence under Section 120-B, I. P. C. and Section 161, I. P. C. only by his order dated 3rd February, 1967 and sentenced him to two years R. L. and a fine of Rs. 500 under each of the two counts. In the event of default in the payment of fine, the appellant was also ordered to undergo further rigorous imprisonment for a period of three months for each default. The substantive sentences of imprisonment were however ordered to run concurrently. The appellant being aggrieved by the order of conviction and sentence has come up in appeal to this Court.

3. The main and if I may say so, the only real contention urged on behalf of the appellant is that his trial was vitiated for want of a valid sanction.

4. In order to appreciate the argument of the learned counsel, it is necessary to refer to the sanction-order (Ex. P. 1) and the evidence produced by the prosecution in that behalf. It is common ground that at the time when the appellant is alleged to have committed the offence of which he has been found guilty, he was working as a receptionist in the office of the Directorate General Post and Telegraphs, under the Ministry of Home Affairs at New Delhi. Ordinarily therefore, cognizance of an offence under Section 161 I. P. C. could be taken against him on a sanction accorded by a competent authority in the Ministry of Home Affairs. In the present case however, the sanction (Ex. P. 1) has been granted by the Controller of Printing and Stationery Punjab (hereafter to be referred to as the Controller) by his order dated 13-8-1964.

5. The argument of Mr. Sharma, learned counsel for the appellant, is that there is no evidence on record to establish any connection between the appellant and the office of the Controller.

6. The question for consideration therefore is as to who is the authority competent to remove the appellant from his office as envisaged in Section 6 (1) (c) of the Prevention of Corruption Act 2 of 1947 (hereafter to be referred to as the Act). The prosecution examined Lekh Raj (PW 1) Head Assistant from the office of the Controller to prove the sanction (Ex. P. 1). The witness deposed that the sanction-order bears the signature of Shri K. C. Kurian, Controller of Printing and Stationery Punjab. He also stated that the appellant was employed in the office of the Controller and was on deputation from that office to the Government of India, Ministry of Home Affairs. He further stated that the Controller of Printing and Stationery Punjab, Chandigarh, was the appointing and dismissing autho-

rity for the staff working under him. In support of his statement the witness produced four letters (Exs. P3 to P6) written by the appellant. Exs. P4, P5 and P6 are letters dated 30-1-58, 27-2-58 and 14-3-58 respectively addressed by the appellant to the Accounts Officer, Printing and Stationery Department Punjab, Chandigarh, while Ex. P3 is a letter dated 22-1-69 addressed by him to the Controller. All these letters are admitted by the appellant to have been addressed by him to the officers concerned. In Ex. P. 6 the appellant stated that he had joined the Rationing Department Delhi with the permission of the Accounts Officer, Printing and Stationery Department, Punjab while his claim in Ex. P5 was that he had done so after a no-objection certificate to that effect was issued to him by the Accounts Officer under his office memo No. 3660-G dated 12-11-1953. In Ex. P4 the appellant stated that he was entitled to payment of arrears on account of difference of leave salary and that he has been informed that his service book along with his bill for arrears had been submitted by the Accounts Officer to the Accountant General Simla for pre-audit. He complained in his letter that the payment of arrears was being unduly delayed and requested that early steps be taken to finalise the case. Ex. P. 3 clarifies the position regarding the appellant's claim for difference of leave salary admissible in his case as he states therein that he had taken leave from 29-6-1954 to 19-11-1954 which had been duly sanctioned by the office of the Controller and necessary payment for the said period was also made to him by a cheque for Rs. 321/15As. According to him the payment of that amount was made to him on the basis of the last pay certificate submitted by the Rationing Department Delhi; but since the decision on fixation of pay of Sub-Inspectors in the Department was then under consideration his case for payment of difference of pay was lingering in the office of the Controller for the last two years.

7. The argument of the learned Counsel for the appellant however, is that the appellant was merely attempting to put forth a claim for establishing continuity of his service for the entire period, but there was no evidence to show that his claim was actually accepted by the Controller. I do not think so. If the appellant had no connection with the office of the Controller there would have been no occasion for payment of leave salary to him for the period 29-6-54 to 19-11-54 by means of a cheque for Rs. 321/15 As. as stated by the appellant himself in Ex. P. 3. Likewise there would have been no occasion for him to claim payment on account of difference of pay.

8. The appellant proved through DW 12, Shri B. M. Sharma, retired Under

Secretary, Ministry of Home Affairs, two documents Exs. D. 12 and D. 13 in support of his contention that his appointment under the Ministry of Home Affairs was a direct appointment and had nothing to do with his previous appointment in the office of the Controller. Ex. D. 12 is dated 20-11-54 while Ex. D. 13 is dated 30-11-54. Both these documents show that the appellant was appointed as a temporary clerk in the Ministry of Home Affairs with effect from the forenoon of 20-11-54. These documents read with Ex. P. 3 go to establish continuity of service between the last date of leave viz., 19-11-54 mentioned in Exhibit P. 3 and the date on which he was appointed in the Ministry of Home Affairs. If the appellant was not an employee in the office of the Controller there was no question of his reverting to that office after the abolition of the rationing system in Delhi and proceeding on leave from 29-6-54 to 19-11-54. Likewise if his appointment under the Ministry of Home Affairs was not in continuation of his previous service there would have been no question of his having been appointed in the said Ministry with effect from the forenoon of 20-11-54 i.e., the day immediately following the expiry of his sanctioned leave in the office of the Controller. Similarly if the appellant had no connection with the office of the Controller there would have been no occasion for his service book being retained in that office as mentioned in Ex. P. 4.

9. Shri Roshan Lal Khanna (P. W. 20) is the next witness examined by the prosecution in connection with the appellant's appointment in the office of the Controller. He deposed that before partition of the country he had joined the office of the Controller of Printing and Stationery Punjab at Lahore as a copy-holder on 14-3-1933. Gurbachan Singh appellant who had joined that office in 1936 was then working as a copy-holder with him. He further stated that Gurbachan Singh worked in that office for six or seven years. His statement finds corroboration from Ex. D. 15 which purports to be an extract from the service book of the appellant during the course of his employment in Rationing Department at Delhi. According to that document the appellant worked as a copy-holder in the Government Printing Press Punjab, Lahore from 3-2-1936 to 7-9-1943. On 8-9-1943, he was promoted as Assistant Joint Store-keeper and then reverted as copy-holder from 12-11-43 to 14-11-43. From 15-11-43 to 29-1-44 he was transferred on deputation to the Ordnance Parachute Factory Lahore where he continued to work till 10-10-46. On 11-10-46 he was declared as a substantive temporary Sub-Inspector in the office of

Controller of Rationing Delhi. The office of Controller of Printing and Stationery Punjab at Chandigarh being the corresponding office of the Government Printing and Stationery Punjab Lahore, his continuity of service in the Department of Printing and Stationery appears to have been upheld and that is why immediately after rationing was abolished in Delhi the appellant hastened to claim his lien over his post in the office of the Controller. His claim appears to have been recognised because of leave having been sanctioned to him for the period 29-6-54 to 19-11-54 till he proceeded on deputation to a post under the Ministry of Home Affairs with effect from the forenoon of 20-11-54.

10. That the appellant held a permanent post in the office of the Controller is also apparent from the letter dated 6-8-1966 (Ex. P. 52) addressed by Shri G. D. Gupta, Under Secretary to the Government of India, Ministry of Home Affairs to the Superintendent of Police, Special Police Establishment annexing a copy of the letter dated 17-6-1966 (Ex. P. 53) addressed by the Accounts Officer in the office of the Controller to the Under Secretary, Ministry of Home Affairs. According to Exhibit P. 52 the appellant was transferred as a Lower Division Clerk from the office of the Controller where he held a permanent post. The letter also negatives the appellant's claim that he is a permanent hand of the Home Ministry and states that with effect from 1-6-1966 his services had been replaced at the disposal of the Controller. Ex. P. 53 recognises that the Controller's office is the parent office of the appellant and goes on to add that before he is reverted to that Department his case of suspension must be finally decided because action to retire him from service would be taken after the period of suspension is regularised and entries in the service book are completed right upto the date of his reversion to his parent office.

11. This evidence leaves no manner of doubt about the appellant being a permanent employee in the office of the Controller.

12. Mr. Sharma questioned the correctness of the statements made in Exs. P. 52 and P. 53 and strongly urged that both these documents were fabricated during the course of the trial at the instance of the police after the prosecution had failed to prove the appellant's connection with the office of the Controller. Learned counsel argued that both these documents were not available when Shri G. D. Gupta (P. W. 24) was examined on 24-2-1965. It was only re-called on 25-10-1966. Meanwhile he had been persuaded by the police to address the letter Ex. P. 52 along with annexure P. 53

which had been procured during this interval.

13. It is no doubt true that Exhibits P. 52 and P. 53 came into existence after the close of the prosecution case and the examination of the last defence-witness Inder Singh (DW 11). But that is hardly any reason to suspect that an officer of the status of Shri G. D. Gupta would stoop so low as to fabricate false evidence with a view to oblige the police.

14. After Shri G. D. Gupta was re-called and examined, the prosecution was also allowed to examine Shri Rattan Singh (PW 32) who was working as an Assistant in the office of the Controller and had brought with him the appellant's file as maintained in that office. He deposed that before 20-11-1954 the appellant was working in a "confirmed post" as a Reviser in the office of the Controller and that the file brought by him contained an application dated 22-10-53 made by the appellant seeking permission to get his name registered with the Employment Exchange Delhi in search of a better job. The witness further deposed that necessary permission was accorded to him by the Controller on 12-11-1953.

15. To rebut the additional evidence adduced by the prosecution, the appellant was allowed to examine Shri B. M. Sharma (DW 12) retired Under Secretary, Ministry of Home Affairs. But there is nothing in the evidence of that witness which in any way disproves the prosecution case. The two last exhibits D. 12 and D. 13 which relate to the appellant's appointment as a clerk in the Ministry of Home Affairs which were proved through him have already been referred to by me earlier. If anything, those letters establish the continuity of the appellant's service from one department to another without any break.

17. I therefore agree with the learned Special Judge that the sanction required in this case was that of the Controller.

18. It may be mentioned here that Mr. R. L. Mehta, learned counsel for the State, showed me during the course of his arguments another sanction which had been obtained from the Ministry of Home Affairs before the cognizance of the offence was taken against the appellant. Mr. Mehta however submitted that the sanction order was not placed on file as the prosecution was satisfied that the authority competent to remove the appellant from service was the Controller. Nevertheless Mr. Mehta prayed that if I came to the conclusion that the appellant was an employee under the Ministry of Home Affairs, permission be granted to the prosecution to lead evidence at this stage for proving the sanction accorded by the Ministry of Home Affairs. As I am satisfied that the sanction required in the present case was

that of the Controller, I have not felt the necessity of considering Mr. Mehta's prayer for additional evidence. But I must say that if I had even the least doubt in my mind about the validity of the sanction I would not have hesitated to grant Mr. Mehta's prayer for additional evidence as in my opinion the intention of the legislature in providing for a sanction in respect of the offences covered by Section 6 of the Prevention of Corruption Act is merely to afford a reasonable protection to the public servants in the discharge of their official functions. It is not the object of the section that a public servant who is guilty of the particular offence mentioned in that section should escape the consequences of his criminal act by raising the technical plea of invalidity of sanction. The section is a safeguard for the innocent and is not a shield for the guilty.

19. The next contention of the learned counsel for the appellant was that even if the appellant were held to be a permanent employee in the office of the Controller in view of the fact that he was employed at the time of commission of the offence under the Ministry of Home Affairs the sanction required was that of the Central Government. The answer to the argument is furnished by a decision of the Supreme Court in *R. R. Chari v. State of Uttar Pradesh*, AIR 1962 SC 1573 where it was held that if the services of a public servant permanently employed by a Provincial Government or loaned to the Central Government the authority to remove such public servant from office would not be the borrowing government but the loaning government.

20. Mr. Sharma learned counsel for the appellant, then argued that sanction in this case had been accorded under Section 6(1)(c) of the Prevention of Corruption Act, whereas the appellant had been prosecuted not only for offences under Sections 161, 162 and 163 I. P. C. but also for an offence under Section 120-B for which the authority envisaged under Section 6(1)(c) of the Act would not be the proper authority. The argument appears to me to be wholly misconceived for the simple reason that if offences under Section 120-B and Section 163 I. P. C. are outside the scope of S. 6 of the Act there could be no bar to the prosecution of the appellant under those sections. The appellant is admittedly not a public servant who is removable from his office by or with the sanction of the State Government or the Central Government and as such he is not entitled to the protection of Section 197 of the Code of Criminal Procedure. That being so, I am not aware of any other provision of law to which one might turn for the purpose of discovering the necessity for sanction.

21. Mr. Sharma next argued that offences under sections 161, 162 and 163 with which the appellant was charged were non-cognizable offences. Since Section 120-B derives its colour from the offences which are said to be the object of criminal conspiracy no cognizance of offences under Section 120-B, I. P. C. could therefore, be taken in the absence of sanction under Section 196-A, Criminal P. C.

22. Mr. Mehta learned counsel for the State countered the argument by submitting that under Sec. 5-A of the Prevention of Corruption Act, 1947 an offence under Section 161, I. P. C. is cognizable so far as investigation by officers of the rank of Deputy Superintendent of Police and an officer not below the rank of Inspector of Police who is specially authorised by the Inspector-General of Police, Special Police Establishment are concerned. There was therefore, no necessity for sanction under Section 196-A, Criminal P. C. Mr. Mehta also submitted that even otherwise it was not necessary to obtain sanction under Section 196-A, Criminal P. C. in the case of an offence under Section 120-B read with Section 161, I. P. C. In this connection the learned counsel invited my attention to two decisions of the Privy Council: *H. H. B. Gill v. King*, AIR 1948 PC 128 and *Phanindra Chandra Neogy v. The King*, AIR 1949 PC 117 where it was held that no sanction under Section 197, Criminal P. C. was necessary in the case of an offence under Section 120-B read with Section 161, I. P. C. for the simple reason that a public servant in conspiring or accepting or attempting to accept illegal gratification could not be held to have committed the offence while acting or purporting to act in the discharge of his official duty. Both these cases were approved by the Supreme Court in *Ronald Wood Mathams v. State of W. Bengal*, AIR 1954 SC 455 where it was held that sanction under Section 197 was not necessary for instituting proceedings against a public servant on charges of conspiracy and bribery.

23. I am afraid, I cannot agree with Mr. Mehta when he says that because sanction is not required under Section 197, Criminal P. C. there is also no necessity for sanction under Section 196-A, Criminal P. C. in respect of offences under Sections 120-B and 161, I. P. C. even when the investigation of the case is by an officer below the rank of officers mentioned in Section 5-A referred to above as in my opinion the position is so far as an offence under Section 161, I. P. C. is concerned is still the same notwithstanding the amendment of the Prevention of Corruption Act, 1947 in 1952 by the introduction of Section 5-A as an offence under that section when so investi-

gated, would still remain non-cognizable.

24. In all the three cases cited by Mr. Mehta the ratio decidendi is that a public servant while committing an offence of accepting bribe neither acts nor purports to act in the discharge of his official duty and as such the provisions of Sec. 197 are not attracted. In the case of an offence of criminal conspiracy with the object of committing a non-cognizable offence to which Section 196-A, Criminal P. C. is attracted, there is no such limitation and the section applies to public servants as well as to others alike. There is therefore, substance in the argument of Mr. Sharma that cognizance of an offence under Section 120-B and Sections 162 and 163, I. P. C. could not have been taken against the appellant for want of sanction under Section 196-A, Criminal Procedure Code.

25. The question however, is whether that would vitiate the trial as a whole. I have already stated that the appellant has been convicted of offences under Sections 120-B and 161, I. P. C. He has not been convicted of offences under Sections 162 and 163, I. P. C. If therefore, for want of sanction under Section 196-A, Criminal P. C. the appellant could not be tried for offences under Section 120-B and Sections 162 and 163, I. P. C. that would not affect his conviction under Sections 120-B and 161, I. P. C.

26. I am fortified in this view by a decision of the Supreme Court in *Madan Lal v. State of Punjab*, AIR 1967 SC 1590. The accused in that case was charged with offences under Sections 120-B, 409 and 477-A, I. P. C. No sanction had however been obtained for the prosecution of the accused for offences under Section 120-B read with Section 477-A, I. P. C. It was held that the conspiracy to commit an offence is by itself distinct from the offence to do which the conspiracy is entered into. Such an offence, if actually committed, would be the subject-matter of separate charge. If that offence does not require sanction though the offence of conspiracy does, and sanction is not obtained, the Court can still proceed with the trial as to the substantive offence as if there was no charge of conspiracy.

27. In the present case, there is a valid sanction for the prosecution of the appellant for offences under Section 120-B and Section 161 I. P. C. If therefore there is no sanction in respect of offences under Section 120-B and Sections 162 & 163 I. P. C. his conviction for offences under Sections 120-B & 161, I. P. C. can still be maintained.

28. Mr. Sharma lastly argued that the officer who accorded the sanction had not

been examined as a witness and all that had been done was that a Head Assistant (Lekh Raj PW1) from the office of the Controller had been examined. He had only proved the signature of that Officer but there was no evidence to establish that the officer according the sanction, had applied his mind to the facts of the case.

29. There is no merit in this argument. The sanction order (Ex. P1) fully sets out the material facts and the offences disclosed by those facts. There is a presumption about official acts having been regularly performed. In the absence of any evidence to the contrary, it cannot be held that the officer granting the sanction acted mechanically without applying his mind to the material placed before him.

30. The next contention urged by Mr. Sharma was that this was a case of mistaken identity. From the very outset, the contention appeared to be so utterly devoid of merit that the learned counsel found it almost impossible to introduce any element of acceptability into his argument. He argued that the person actually responsible for the commission of the offence was another person who bore the same name as the appellant and who was employed in the Examination Branch of the Postal Department but the appellant had been falsely implicated in his place because of his enmity with Mr. R. K. Nayar (PW 11). To appreciate this contention it is necessary to set out the broad features of the prosecution story. (After examining evidence his Lordship came to the conclusion that defence set up by appellant was palpably false and was rightly rejected by the learned trial Judge—Ed).

31-40. The result of the above discussion is that the appellant's conviction for offences under Section 120-B and Section 161 I. P. C. is maintained. The sentence on each count however is reduced to one year R. I. The sentence of fine is set aside while the sentence of imprisonment is ordered to run concurrently. The appellant who is on bail should surrender forthwith.

Order accordingly.

AIR 1970 DELHI 107 (V 57 C 24)

**S. N. ANDLEY AND PRAKASH
NARAIN, JJ.**

Hans Raj, Petitioner v. Commissioner of Excise, Vikas Bhawan, New Delhi and others, Respondents.

Civil Writ No. 191 of 1968, D/- 27-2-1969.

(A) Punjab Excise Act (1 of 1914), S. 43 — Delhi Liquor License Rules (1935), R. 5.10 — Excise Commissioner deleting name of partner from license issued in name of firm — Writ challeng-

IM/LM/E343/69/BNP/M

ing order — Preliminary objection that writ has become infructuous because of expiry of annual term of licence — Provision for grant of licence from April to March does not contemplate issue of fresh licence every year — Right of holders of licence cannot be said to be extinguished on expiry of term, particularly when provision for renewal exists — Objection not sustainable. (Para 11)

(B) Punjab Excise Act (1 of 1914), S. 43 — Delhi Liquor Licence Rules (1935), R. 5A — Grant of licence in name of firm — Partners do not hold licence in their individual name — Rule provides for grant of licence to partnership firm. (Para 12)

(C) Punjab Excise Act (1 of 1914), S. 15 (5)—Issue of licence in name of firm—Inclusion of name of newly entered partner in licence on application by existing partners — Existing partners subsequently alleging withdrawal of that application — Commissioner issuing show cause notice to newly entered partner — Appearance of parties — Commissioner directing existing partners to furnish copy of withdrawal application and affidavit regarding its presentation — Commissioner ordering delivery of documents to newly entered partner and fixing date of filing of written statements by all partners — Case not heard on that date — Order for deletion of name of newly entered partner passed subsequently on ground that original application for inclusion of name was not made by all partners — Order held was illegal as it adversely affected rights of newly entered partner without giving him opportunity of being heard — Order also held was violative of principles of natural justice — Constitution of India, Art. 226. (Para 13)

S. N. Chopra Sr. with S. L. Bhatia, for Petitioner; D. Narasraju, Sr. with Brijbans Kishore and J. N. Aggarwal, Ravinder Narain, C. L. Iitorora, for Respondents.

S. N. ANDLEY, J.:— We are confining our decision in this writ petition to the question whether the impugned order dated 7/17th February, 1968 was passed in violation of the provisions of sub-section (5) of Section 15 of the Punjab Excise Act, 1914 or the principles of natural justice. This order came to be passed in the circumstances hereinafter stated.

2. The petitioner, respondent No. 3 and respondent No. 4 are sons of late Ishar Dass. The deceased was the holder of an L-4 licence issued to him under the Act for the retail sale of liquor in a restaurant. The deceased was the sole proprietor of the Esplanade Bar and Restaurant, Chandni Chowk, Delhi. He died on or about June 2, 1946. Thereafter, on March 14, 1947, a deed of partnership was executed between the petitioner and respondents 3 and 4, being the

successors and heirs of the deceased, in respect of the business carried on under the style of Esplanade Bar and Restaurant. In 1948, these three persons also purchased the United Coffee House, New Delhi. In 1951, the petitioner ceased to be a partner of the business carried on in the name of Esplanade Bar and Restaurant and respondents Nos. 3 and 4 ceased to be partners in the United Coffee House, New Delhi.

3. The L-4 licence was discontinued on or about August 13, 1956 in accordance with the prohibition policy and in its place an L-2 licence was, it is alleged granted to Kishan Lal & Co. The L-2 licence was for wholesale and retail sale of liquor. At this time, respondents Nos. 3 and 4 were the partners of Kishan Lal & Co. aforesaid.

4. Another partnership deed was entered into on July 1, 1964, whereby respondent No. 5 son of respondent No. 3, was taken in as a partner of Kishan Lal & Co. and, on July 27, 1964, an application was made for the inclusion of respondent No. 5 as a partner in respect of the L-2 licence.

5. Another partnership deed was entered into on July 1, 1966 whereby the petitioner also came in as a partner of Kishan Lal & Co. Therefore, at this time, the partners of Kishan Lal & Co. were the petitioner and respondents Nos. 3 to 5. Since the petitioner had become a partner of Kishan Lal & Co., an application was made on December 10, 1966, for including his name also on the aforesaid L-2 licence. It is the contention of the petitioner that written statements were made by respondent No. 3 on his own behalf and as attorney for respondent No. 5 and by respondent No. 4 supporting the application which had been filed on December 10, 1966.

6. On April 19, 1967 another deed of Partnership was executed between the petitioner and respondents Nos. 3 to 5 in which, inter alia, the respective shares of the partners were redetermined. It is alleged that prior to this partnership deed, respondent No. 3 had, on April 5, 1967 made an application to the Excise authorities for withdrawal of his earlier application for including the name of the petitioner in L-2 licence.

7. The District Excise Officer passed an order on June 9, 1967 which was communicated to Kishan Lal & Co. by his letter dated June 14, 1967. By this letter the aforesaid firm was informed that the request for the inclusion of the names of respondent No. 5 and the petitioner had been allowed subject to the responsibilities for all obligations under the Excise law. In fact a further communication dated June 20, 1967 was addressed by the District Excise Officer to Kishan Lal & Co. stating that the names of the peti-

tioner and respondent No. 5 had been included in the L-2 licence as partners and the L-2 licence was itself returned to the firm.

8. Then on November 7, 1967, respondent No. 3 sent a representation to the Lt. Governor, Delhi, in which, broadly speaking, it was contended that respondent No. 3 was always the sole proprietor of the aforesaid L-2 licence and continued to be so. He prayed that the two names added to the L-2 licence should be deleted. Upon this representation, a notice dated November 28, 1967 was issued to the petitioner and respondent Nos. 3 to 5 to show cause "why the addition of either or both the names of Shri Jagmohan and Shri Hans Raj in the said licence as per order dated 9-6-1967 of the Collector of Excise, Delhi be not omitted." Upon receiving this notice, the petitioner, by his letter dated December 4, 1967 requested the Excise Commissioner to furnish copies of the records detailed therein. Some further correspondence followed between the petitioner and the Excise authorities, the result of which was that copies of only some of the documents asked for by the petitioner were supplied to him while the copies of other documents were not supplied, on the ground that they were confidential notes on the file. By another letter dated December 19, 1967, the petitioner asked for inspection of certain records as also of the two licences which had been granted from time to time. He further requested that he may be given one week's time, after such examination, for a personal hearing. It is stated by the petitioner in this letter that it was necessary for him to have this inspection in order to prove that the licence had never been transferred as alleged by respondent No. 3. This request was not acceded to by the District Excise Officer as is apparent from his letter dated December 20, 1967.

9. The matter ultimately came up before the Excise Commissioner on December 27, 1967. The order passed by the Excise Commissioner is annexure 'III' to the counter filed by respondent No. 3. It appears from this order that the petitioner and respondents Nos. 3 and 4 appeared before him and the Excise Commissioner accepted the representation by respondent No. 3 of respondent No. 5. Respondent No. 3 appears to have asserted before the Excise Commissioner about the filing of his application dated April 5, 1967 for withdrawal of his representation dated December 10, 1966 and, as to this, the Excise Commissioner has stated that this application for withdrawal is not on the file. It further appears from the order that respondent No. 3 was asked to file an attested copy of the said application along with the copy of the endorsement in acknowledgment of its receipt

and also an affidavit regarding its presentation. This order further states that the petitioner requested for copies of the statements which had been made by respondent No. 3 for himself and on behalf of respondent No. 5 and by respondent No. 4 and it was pointed out to him that the statements were undated and had not been recorded either by the Collector of Excise or Excise Commissioner or the District Excise Officer.

However, the Excise Commissioner made an order that there would be no objection to copies of the aforesaid statements being furnished to the petitioner. This order then records the filing of a representation by the parties concerned to appoint their brother-in-law, Shri Hans Raj, to settle their affairs and for that purpose the grant of one week's time. Then in the penultimate paragraph the Excise Commissioner directed the parties to file their final written statements by January 8, 1968 failing which the case was to be decided ex parte.

10. It is not disputed by the respondents that no proceedings took place on January 8, 1968, as, in the meantime, the file had been called for by an Executive Councillor. It need only be stated that the parties did not appear before the Excise Commissioner on any subsequent date and, on 7/17th February, 1968, the Excise Commissioner passed the impugned order whereby he held that inasmuch as the application for including the name of the petitioner had not been signed by all the partners, it was not an application as contemplated by Rule 5.7 of the Delhi Liquor License Rules. Accordingly, he ordered the deletion of the names of the petitioner and respondent No. 5 from the L-2 licence.

11. Mr. Narasaraaju, who appears for the Commissioner of Excise and the Delhi Administration, respondents Nos. 1 and 2 respectively, has raised two preliminary objections. The first preliminary objection that he has raised is that the grant of a liquor licence is a grant from year to year and the licence having expired on March 31, 1968, the writ has become infructuous. It is true that a licence under the Delhi Excise Act is a licence which is granted for the period 1st April in any year to 31st March in the subsequent year but it is not correct, in our opinion, to say that there is always a fresh grant of a licence. Rule 5.10 of the Delhi Liquor License Rules talks of the renewal of a licence and so does Section 43 of the Act. In fact also, it appears that the L-2 licence which was granted by the authorities in the beginning has been renewed from year to year. It cannot, therefore, be said that the rights of the holder of a licence are terminated completely upon the expiry of the annual term. The Act

and the Rules contemplate renewal of the very same licence and that being so, we do not find any substance in this preliminary objection.

12. The second preliminary objection which has been raised is that a firm cannot be the holder of a licence and it is only the partners of the firm who hold the licence in their individual names. This objection also has no substance because Rule 5.4 of the Delhi Liquor Licence Rules talks of the grant of a licence, inter alia, specifically to a partnership of firm.

13. The petitioner has complained that a hearing as contemplated by sub-section (5) of Section 15 of the Act or by the principles of natural justice was not afforded to him by the Excise Commissioner who decided the matter in his absence. Mr. Narasaraju on the other hand argues that a hearing contemplated by sub-section (5) of Section 15 and by the principles of natural justice was given to the parties when the Excise Commissioner passed his order dated December 27, 1967 and thereafter it was merely a question of the parties filing their written statements on the date fixed by that order. We have summarised the order dated December 27, 1967 which had been passed by the Excise Commissioner and we find it difficult to accept the contention of Mr. Narasaraju that any of the matters in controversy between the parties were decided on this date after hearing the parties.

All that this order did was to state that the application for withdrawal alleged to have been filed by respondent No. 3 on April 5, 1967 was not on the file; that copies of the statements made by or on behalf of respondents Nos. 3 to 5 be given to the petitioner and that the parties file their written statements by January 8, 1969. None of the points which were in controversy between the parties can be said to have been decided by this order. If that is so, it cannot be contended that the order dated 7/17th February, 1968 which was ultimately passed by the Excise Commissioner and which is impugned by this writ was passed after giving a reasonable opportunity to the petitioner or to any of the parties concerned. Sub-section (5) of Section 15 provides that no order shall be made under this section which adversely affects the rights of any person upon whom an obligation is imposed by or under this Act, without giving such person a reasonable opportunity of being heard. That the order dated 7/17th February, 1968 affects the rights of the petitioner cannot be doubted, because his claim that his name should remain as a partner of Kishan Lal & Co. on the L-2 licence has been decided adversely to him. That being so, this order has to be quashed.

14. We, therefore, issue a writ of certiorari quashing the order passed by the Excise Commissioner, respondent No. 1, on 7/17th February, 1968 and we also issue a writ of mandamus directing him to hear the matter afresh and to decide it according to law.

15. The petitioner will have his costs of the petition. Counsel's fee is fixed at Rs. 200/-. The costs are recoverable from respondents Nos. 1 and 2.

Petition allowed.

AIR 1970 DELHI 110 (V 57 C 25)

S. N. SHANKAR, J.

Baldev Mittar and Tirath Parkash, Petitioners v. Basant Ram and another, Respondents.

Civil Revn. 349-D of 1965, D/- 19-9-1969, against order of Addl. Dist. J., Delhi, D/- 10-5-1965.

(A) Arbitration Act (1940), Ss. 17, 16, 30 and 33 — Setting aside of award — Premises under tenancy of partnership — Award allotting separate portions to partners and determining their liabilities in respect of rent of such separate portions — Such division is not illegal — Rights of landlord who is not a party to arbitration proceedings not affected — Award cannot be set aside: AIR 1954 Bom 243, Dist.; AIR 1968 Punj 28 & AIR 1951 SC 186, Rel. on. (Para 5)

(B) Arbitration Act (1940), Ss. 17, 16 and 30 — Setting aside of award — Inherent powers, exercise of — Award cannot be set aside on grounds mentioned in a time barred application under S. 30 — Court ought to proceed under S. 17. AIR 1967 SC 1233 & AIR 1948 Mad 512, Rel. on. (Paras 6 & 7)

Cases Referred: Chronological Paras
(1968) AIR 1968 Punj 28 (V 55) =
ILR (1967) 1 Punj 882, Shyam
Sunder v. Brij Lal Chaman Lal
Purani 5
(1967) AIR 1967 SC 1233 (V 54) =
1967-3 SCR 147, Madan Lal v.
Sunderlal 7
(1960) AIR 1960 Pat 201 (V 47) =
1959 BLJR 723, Deep Narain Singh
v. Mt. Dhaneshwari 8
(1959) AIR 1959 All 711 (V 46),
Smt. Dulari Devi v. Rajinder
Prakash 3
(1954) AIR 1954 Bom 243 (V 41) =
ILR (1954) Bom 311, Hastimal Dali
Chand Bohra v. Hira Lal Moti-
chand Mutha 3, 5
(1951) AIR 1951 SC 186 (V 38) = ILR
30 Pat 664, Bedri Narain Jha v.
Rameshwar Dayal Singh 6
(1948) AIR 1948 Mad 512 (V 35) =
1948-1 Mad LJ 376, Y. L. Paul v.
G. C. Joseph 5

M. K. Chawla, for Petitioners; Pt. Maharaj Kishan, for Respondent No. 1; Sh. K. K. Raizada, for Respondent No. 2.

ORDER:— This revision is directed against the order of the Additional District Judge, Delhi, dated 10th May, 1965, dismissing the appeal of the present petitioner and affirming the order of the trial Court refusing an award, filed before it in a dispute between the parties, to be made a rule of the Court.

2. Before dealing with the contentions raised, it will be appropriate to briefly state the facts which have led to the present litigation. Baldev Mittar and Tirath Parkash petitioners herein and Basant Ram and Bhagwan Das respondents in this revision carried on business in partnership under the name of Jhol Brothers. On disputes arising between them, they appointed one Shri Ram Labhaya Kapoor as Arbitrator to decide the same. The Arbitrator gave his award dated 4th May, 1962, dividing the partnership assets and held that the back portion of the shop premises No. 2706, which was being used by the firm as godown with three doors on the back side, was allotted to Basant Ram and he was to pay Rs. 35/- per month on account of rent for this portion to the landlord and the front portion of the same premises was allotted to the other three partners, Bhagwan Das, Tirath Parkash and Baldev Mittar, who were held to be liable to pay the balance of the rent payable to landlord for the entire premises.

He further held that Basant Ram was to be provided with goods and raw materials worth Rs. 1,000/- by the other partners in order to enable him to continue his business separately in the portion allotted to him and the remaining partners thereafter were to be entitled to the remaining assets of the firm Jhol Brothers including its goodwill and were also liable for its debts and liabilities, and that they were to keep Basant Ram saved and indemnified against any claims, demands, costs, losses and damages in respect of the firm Messrs Jhol Brothers. This award, it is not denied, was implemented between the parties, and they entered into separate possessions of the respective shares of the premises allotted to them in terms of the award and the goods and raw materials worth Rs. 1,000 were also given over by the other partners to Basant Ram as directed in the award.

On 13th of June, 1962, the Arbitrator filed this award in Court and prayed that it may be made a rule of the Court. Notice of the filing of the award was issued to the parties, and was served on Basant Ram on 30th of July, 1962. On 7th of September, 1962, he filed objections to the award and prayed that it

may be set aside. No objections were filed by the other partners. During the pendency of his objections, on 10th of October, 1962, Basant Ram also filed an application under Section 33 of the Arbitration Act, which was later not pressed by him and was consequently dismissed. On the objections filed by Basant Ram, the learned trial Court framed the following issues:—

(1) Whether the objections of Basant Ram are within time? (He having been served on 30-7-1962?)

(2) Whether the award is illegal, void, and without jurisdiction as given in preliminary objection No. 1 dated 28-8-1962?

(3) Whether the landlord consented to the severance of the tenancy of the parties? If not, with what effect?

(4) Whether Basant Ram is estopped from taking the objections?

(5) Whether the objectors received goods and cash worth Rs. 1,000/- and as such the award has been acted upon? If so, with what effect?

(6) Whether the objections under S. 33 Arbitration Act, filed on 10-10-1962 are competent and maintainable?

(7) Whether the agreement dated 1-5-1962 is invalid, illegal and unenforceable as alleged?

(8) Whether the award is liable to be set aside on objections taken in para 7 of the objections under S. 33 of the Arbitration Act (dated 9-10-1962)?

(9) Relief.

3. Issues 1, 6, 7 and 8 were decided against Basant Ram and it was held that objections filed by him were barred by time. Under issues 4 and 5, it was held that Basant Ram had already received goods and cash worth Rs. 1,000/- but he was not estopped from challenging the award. Under issues 2 and 3 the finding was that the landlord had not consented to the severance of the tenancy as directed by the award and the same was, therefore, illegal. By order dated 25th of May, 1963, with these findings, the learned trial Judge in exercise of his inherent powers refused to make the award a rule of the Court. He also directed Basant Ram to deposit in Court the amount of Rs. 1,000/- for payment to the other partners. Aggrieved from this, the other partners went up in appeal and the learned Additional District Judge relying on *Hastimal Dali Chand Bohra v. Hira Lal Moti Chand*, AIR 1954 Bom 243, held that the trial Court was justified in the circumstances of this case to invoke its inherent powers and to refuse to make the award a rule of the Court.

Following *Smt. Dulari Devi v. Rajinder Prakash*, AIR 1959 All 711, the learned Judge further held that as this award touched the rights of the landlord, who was a non-party to the arbitration agreement, the Arbitrator was guilty of judi-

cial misconduct, and the award deserved to be set aside. In support of his conclusion he also referred to several practical difficulties in the matter of actual payment of rent of the entire premises to the landlord by one of the partners, when the landlord was not willing to break up the tenancy, and observed that this would result in multiplicity of judicial proceedings, and, for this reason also the award was illegal.

4. I have heard the learned counsel for the parties. Pt. Maharaj Kishan, appearing for the respondents, has taken a preliminary objection that this revision is not maintainable. I do not, however, see any substance in this contention, as I am of the view that in this case the Court below has failed to observe the mandatory provisions of Section 17 of the Arbitration Act and has acted illegally and with material irregularity in the exercise of its jurisdiction in setting aside the award on extraneous grounds.

5. Section 17 of the Arbitration Act reads as under:—

"17. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

A bare reading of the section would show that if the Court sees no cause to remit the award for reconsideration a contingency provided in Section 16 of the Act, or to set it aside, on grounds mentioned in Section 30 of the Act, it shall proceed to pronounce judgment according to the award. This position in law is well established. Reference in this connection may also be made to *Y. L. Paul v. G. C. Joseph*, AIR 1948 Mad 512, where when time for making an application for setting aside an award had expired, the applicant was held to be not entitled to show grounds upon which the award could be set aside and was also held not to be entitled to resist the prayer for filing of the award.

The learned counsel for the respondents, however, contends that normally it would be so but in a case where the Court finds that third-party interests were involved in the award, it has a discretion to refuse to make it a rule of the Court. In support of this proposition, he places reliance on AIR 1954 Bom 243 (supra), which has also been referred to by the learned Court below. In that case

the Arbitrator held that the agreement between the parties was one of mortgage and not of sale and on that footing directed defendants 1 to 3 in those proceedings to pay to the plaintiff Rs. 8,500/- as interest at the rate mentioned in the award. The principal contention raised before the Court for resisting this award being made a rule of the Court and noticed on page 244, column 1 of the Report, with reference to which the decision was given, was that the Arbitrator had no jurisdiction to pass a virtual decree on the mortgage as he had purported to do in that case, because, according to the defendants, it was beyond the jurisdiction of the Arbitrator, as the dispute referred for his decision was simply whether the transfer of the defendants' properties should take the form of a sale or a mortgage and nothing more.

In the award, the Arbitrator directed not only that the mortgage deed should be executed by the defendants in favour of the plaintiff but also that in certain contingencies the plaintiff would execute the award itself and recover the amount by sale of the mortgaged properties. It was in this context that while affirming the legal proposition on page 245, column 1 of the Report, that if a party to an award wants to challenge its validity on any ground and desires the award to be remitted or set aside, he has to make an application in that behalf, the Court observed that it would not follow that the Court cannot suo motu set aside the award in a proper case. If the award directed a party to do an act, which was prohibited by law or if it was otherwise patently illegal or void, the Court held that it was open to it to consider this patent defect suo motu.

This authority will not help the respondents in this case, as there is no illegality or patent defect in the present award. It is not disputed that the partnership Messrs. Jhol Brothers consisted of four persons, who were all parties to the present reference on the basis of which this award has been made. As partners, they were joint tenants in respect of the premises and the tenancy stood in the name of the partnership. All that the Arbitrator has done by this award is to allot separate portions of the same premises to the partners to be enjoyed by them separately and has also determined their liabilities for rent in respect of the portions so separated. As far as the landlord is concerned, they continue to be liable to him for the full rent severally as well as jointly, as before. There is nothing illegal in such a division. It is not infrequent that in suitable cases of dissolution of partnership separate portions of the partnership premises are allotted by mutual arrangement to individual partners to entitle them to conti-

be contrary to considerations of fairplay and justice, vide *Daryao v. State of U.P.* 1962-1 SCR 574=(AIR 1961 SC 1457)

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..... This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred."

Applying this rule to the case of the petitioner he could have raised the plea in the Supreme Court that he did not satisfy the definition of "proprietor" because he did not hold the whole village and, therefore, the Regulation is inapplicable. This plea was very material, and the petitioner could have obtained the decision of the Supreme Court in his favour in case it had substance. He failed to do so and, apart from the doctrine of approbation and reprobation, even the doctrine of constructive res judicata would seem to operate against the petitioner. Why should the respondents be faced with the same kind of dispute twice over? The petitioner should not be permitted to "blow hot and cold". He cannot ignore the rule of pleadings at his convenience. The argument of Mr. Joshi that these doctrines do not apply because the respondents are not prejudiced seems to be devoid of substance. The advantage secured need not necessarily be pecuniary. Am I to understand that the petitioner is at liberty to both approbate and reprobate in Courts? There is no virtue in this legal somersault.

4. Mr. Bhabha next submits that assuming these doctrines do not apply, even then the scheme of the Regulation would take in a part of the village. According to Mr. Joshi, this contention is not correct. In this connection he invites my attention to the preamble, Section 2(h), Sections 3 and 12 of the Regulation. The preamble, argues Mr. Joshi, refers to "the abolition of proprietorship of villages". Section 2(h) contemplates a person who holds any village or villages granted to him. Section 3 refers to extinguishment of all rights etc. of a proprietor in or in respect of all lands in his village or villages, and their vesting in the Central Government. Section 12 contemplates delivery of records relating to the lands or village or villages held by

a proprietor. These provisions, emphasizes Mr. Joshi, show that a village, as a whole, is a unit and not part of a village. Mr. Bhabha, on the other hand, states that reading Section 2(h) and the proviso to Section 10(2) of the Regulation along with other provisions cited by Mr. Joshi, a proprietor of a part of a village is also covered by the Regulation. The preamble, according to him, places emphasis on abolition of proprietorship in lands in a village and not on a village. It is well settled that the preamble of a statute is "a key to the understanding of it": *Kochuni v. States of Madras and Kerala*, AIR 1960 SC 1080. The definition of "proprietor" under Section 2(h) expressly includes his co-sharers. There may be a proprietor and his co-sharers in a village or part of a village. The proviso to Section 10(2) envisages a situation where there are more persons than one entitled to compensation under Section 9 of the Regulation. In other words there can be more than one proprietor in a village. The word 'whole' could have been used in Section 3 if the intention were to apply the Regulation to the village as a whole and not a part thereof. The words "in or in respect of all lands in his village" in this section are not without some significance. The stress is on lands and not on a village. I am inclined to agree with Mr. Bhabha, although this branch of the argument now seems to be of an academic importance in view of the enactment of The Daman (Abolition of Proprietorship of Villages) Regulation (Amendment) Act, 1968, to which I shall presently refer while considering question No. 2. It may be added that the well-known maxim that the greater includes the less, a rule of logic, may also apply in this case and, in this connection, the decision in *Gluchowska v. Tottenham Borough Council* (1954) 1 All ER 408 may not be out of place. The facts of this case are interesting: a rent tribunal fixed the rent of three furnished rooms and a kitchen with the use of a bathroom at £1.7s. per week, and that rent was registered pursuant to S. 3(2) of the Furnished Houses (Rent Control) Act, 1946. Afterwards the landlord let one of the rooms and the kitchen at a weekly rent of £2, later reduced to £1.15s., and occupied the remainder of the premises herself. She was convicted under S. 4(1)(a) of the Act of receiving rent for the premises in excess of the registered rent. It was held "the words 'those premises' in S. 4(1)(a) of the Act referred to the subject-matter of the original letting referred to the tribunal in respect of which the rent was fixed and registered; the payments received by the landlord were made with regard to different premises, albeit part of the premises originally let; and, therefore, no offence was committed. The short point

for the decision of the Queens Bench Court in an appeal by way of a case stated by Middlesex justices before whom the appellant was charged under twenty informations with receiving on twenty occasions excessive rents contrary to Section 4(1)(a) of the Act, was whether or not the receipt by the appellant of the rents complained of constituted offences, and this depended on the meaning to be given to the words "receive on account of rent for those premises" in S. 4(1)(a) of the Act. Parker, J., speaking for himself and for Byrne J., said:—

"Those premises" clearly refer back to the premises the subject of the contract referred to the tribunal, and to the specification of those premises which has under S. 3(2)(b) to be entered in the register. The specification entered in the register in the present case is of the original letting, namely, three rooms and kitchen in the basement together with use of a bathroom. That is the unit in respect of which the rent is fixed and registered

..... It is urged, however, for the respondents that we should construe the words "those premises" in S. 4(1)(a) to mean "those premises or any part thereof" in that, it is said, it would be contrary to the spirit of the Act, and to commonsense, if a landlord were to be permitted to re-let part of the premises at a rent in excess of that registered for the whole premises. It is true that in penal as well as other statutes words should be read in their widest sense if to do otherwise would result in a failure to suppress the mischief aimed at by the legislation. At the same time, to use the words of Wright, J., in *London County Council v. Aylesbury Dairy Co. Ltd.*, (1898) 1 Q. B. 106, 109, the court ".....ought not to do violence to language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."

Lord Goddard, C. J., in his dissenting opinion, said:—

"Unless I am satisfied that there is a *casus omissus* in the Act, it would appear to me unfortunate to be obliged to hold that, while it would be an offence to let three rooms and a kitchen at a rent in excess of that which is registered, no offence is committed if only one of the three rooms and the kitchen is let at a rent which exceeds that registered in respect of the four. I entirely agree that the Court ought not to read into an Act, and more especially into one which carries penal consequences, words which are not there because it would seem convenient to do so or to effect what the Court may think Parliament intended but

has failed to say. But it is possible when construing a statute to expand the literal meaning of words if it appears that an extended meaning must have been intended

..... There is another well-known maxim that the greater includes the less, a rule of logic which has become a rule or maxim of law. These considerations, in my opinion, entitle the court to expand the word "premises" so as to include any part of the premises without reading additional words into the sub-section."

Coming back to the present case, it is possible to take the view that when the Regulation speaks of a village as a unit, it also includes a part thereof. The principle that the greater includes the less can be applied to the Regulation, particularly when it does not say in express terms that a village will not include a part thereof. This question was not canvassed before the Supreme Court on behalf of the petitioner. Considering the matter in the context of the two doctrines mentioned above and also in the context of the scheme of the Regulation, as a whole, I am inclined to hold that the petitioner satisfies the definition of "proprietor" under Section 2(h) of the Regulation. The Regulation is a piece of beneficent legislation and is to be liberally construed so as to advance its objects and suppress the mischief aimed at by the law-making authority. A literal construction has only a *prima facie* preference.

5. The second question assumes that the petitioner is not the proprietor as defined in Section 2 (h) of the Regulation. It is on that assumption that the rival contentions are to be considered, but before I do so, it is necessary to have a *bird's eye-view* of the provisions of the Act. To start with, Section 1 of the Act is the short title and commencement clause on usual lines. Section 2 amends certain clauses of Section 2 of the Regulation. After clause (a) of the Regulation, the definition of "agricultural labourer" has been inserted by S. 2 (a). Under that definition "agricultural labourer" means a person whose principal means of livelihood is manual labour on land. By section 2(b) the definition of "land" in clause 2(g) of the Regulation is substituted with retrospective effect by another definition. "Land" under that definition, means

"land held or let either for the purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans and includes — (i) benefits to arise out of such land, and (ii)

things attached to such land or permanently fixed to anything attached to such land."

This definition conforms to the inclusive part of the definition of an "estate" in Article 31-A (2) (a) (iii) of the Constitution. Hidayatullah, J., (as he then was) speaking for the Supreme Court observed at p. 1117 in the decision cited earlier to which the petitioner was a party:—

"The result, therefore, is that the definition of 'land' in the Regulation being at variance with the definition of 'estate' cannot stand with it. But as it is severable it does not affect the operation of the Regulation which will operate but the protection of Art. 31-A will not be available in respect of land not strictly within the definition of Art. 31-A. In other words, 'land' would include not every class or category of land but only lands held or left for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pastures or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans. Land which does not answer this description is not protected from an attack under Arts. 14, 19 and 31 and it is from this point of view that the cases of the petitioners before us must be examined where categories of land other than those States in Arts. 31-A (2) (a) (iii) are mentioned."

By Section 2(c), after clause (g) of the Regulation, Clause (gg) was inserted, whereby "landless person" is defined to mean "a person who does not hold any land for purposes of agriculture and earns his livelihood, principally by manual labour on agricultural land, and intends to take to the profession of agriculture." By Section 2(d), the definition of "village" was inserted after clause (i) of the Regulation, with retrospective effect. The words "shall be deemed always to have been inserted" in this section are significant, as in the case of the definition of "land". "Village", as defined, includes a hamlet, a Pada or part of a block of the village by whatever name called, whether separated from it or not. The words "a part of the village" are important. In the Statement of Objects and Reasons, it is said that some additional provisions to the Regulation are considered necessary to "further the object of the Regulation and remove possible loopholes therein." This definition was inserted so as to apply the Regulation also to "persons who held only a part of a village from the former Portuguese Government by way of gift, sale or otherwise". The said Statement makes it clear that this was the intention which is "however not clearly brought out by the definition of "property" contained in Section 2(h). To make this definition clear

it is necessary to define 'village' for the purpose of the Regulation". It is true that the said Statement cannot properly be looked into for the purpose of interpretation but it can be referred for the limited purpose of ascertaining the circumstances prevailing at the time of the enactment of the Act. This much liberty is permissible. Section 3 amends Section 6 of the Regulation in so far as the quantum of land revenue is concerned, Section 4 amends Section 8 of the Regulation so as to exclude pasture or grass lands from the occupancy rights of cultivating tenants. Section 5 inserts new Sections 8-A, 8-B, and 8-C in the Regulation. They provide for eviction of occupants of land in certain cases, restriction on sale etc., of land held by the occupants and forfeiture of land transferred in contravention of restrictions on sale etc. Section 6 inserts new Sections 12-A to 12-F. Section 12-A enumerates the duties and functions of the Mamlatdar for the purposes of the Regulation. One of the duties and functions enumerated under clause (f) thereof is to decide the homesteads, buildings and structures together with land appurtenant thereto and the lands under personal cultivation which the proprietor is entitled to retain under Section 4. Section 12-B relates to application for conducting inquiries etc. to be made before the Mamlatdar. Section 12-C provides for powers of the Mamlatdar and procedure to be followed by him in these inquiries. It also provides for an appeal to the Collector from the decision of the Mamlatdar. Section 12-D deals with revisional powers of the Collector. Section 12-E relates to fees payable for application or appeal made under the Regulation, and to end with, Section 12-F bars jurisdiction of civil courts in the matters specified.

6. The Act came into force during the pendency of the petition in this Court. The parties were therefore permitted to amend the pleadings so as to consider the larger question whether the Act has the protection of Article 31-A (a) of the Constitution. The protection under Art. 31-A is of general nature not limited to the statutes specified in the Ninth Schedule appended to the Constitution. Article 31-B specifies these statutes. Article 31-A applies to the laws contemplated therein and also to the amendments thereof unlike Article 31-B the protection of which is restricted to the statutes specified in the Ninth Schedule and not to the amendments thereof: *Ramanlal v. State of Gujarat*, AIR 1969 SC 168.

7. I shall now proceed to consider the rival contentions canvassed at the Bar. According to Mr. Joshi, Section 2(d) of the Act defining "village" as including a part of a village is ultra vires and void

for the following two reasons set out in the petition duly amended:— (a) It is beyond the legislative competency of the State Legislature of this territory, and (b) it violates the fundamental rights of the petitioner guaranteed by Articles 14, 19 (1) (f) and 31 of the Constitution of India and is not protected by Article 31-A of the Constitution. The object of Art. 31-A is to carry out agrarian reforms by doing away with the intermediaries and it is difficult to imagine how agrarian reforms can be furthered by the Amendment Act which would deprive the holders of lands in villages in the district of Daman whether as owner or tenant and which are in their personal cultivation. Moreover, there is nothing to indicate that the Amendment Act has been passed for the purpose of any agrarian reforms. This section is a colourable piece of legislation and is a fraud on the Constitution. By this section, whereby a part of the village is included in the definition retrospectively, a device or cloak is adopted with a view to depriving a person holding lands in a village to which the Regulation as originally enacted does not apply. The petitioner accordingly submits that it is invalid and ineffective and therefore the Regulation does not apply to the petitioner at all and accordingly the respondents are not entitled to implement or enforce the provisions of the Regulation against the lands of the petitioner in the village Regunvada. As regards the reason at (a), Mr. Joshi does not press it in view of the legislative competency of the State Legislature. In terms of Entry 18 of the State List, Seventh Schedule, read with Section 16 of the Government of Union Territories Act 1963. As for the reason at (b) the controversy centres round the question whether the Act including this section has the protection of Article 31-A of the Constitution. If they have, then this ground of attack must necessarily fail. In the petition filed by the petitioner in the Supreme Court, the Supreme Court said at p. 1112 "justification for abolition of estates has been held by this Court to involve agrarian reforms in the public interest." This decision reviews the following decisions:— (1) 'Sri Ram Ram Narain Medhi v. State of Bombay', AIR 1959 SC 459; (2) 'Mahadeo Paikaji Kolhe v. State of Bombay', AIR 1961 SC 1517; (3) 'Atma Ram v. State of Punjab', AIR 1959 SC 519; (4) AIR 1960 SC 1080; (5) 'P. Vajravelu Mudaliar v. Spl. Dy. Collector, Madras', AIR 1965 SC 1017; and (6) 'Ranjit Singh v. State of Punjab', AIR 1965 SC 632. The expression "estate" in Article 31-A (2) (a) of the Constitution was considered in all these cases dealing with the land laws of different States. It was stressed by the Supreme Court that this Article refers to land which pays land revenue as held

in accordance with land relating to land tenures. In the recent decision of the Supreme Court 'Dy. Commissioner, Kamrup v. Durganath', AIR 1968 SC 394, the Supreme Court reiterated the constitutional position that Article 31-A (1) (a) envisages only laws concerning agrarian reforms. This case dealt with the scheme of The Assam Acquisition of Land For Flood Control and Prevention of Erosion Act, 1955. The Supreme Court held that it is a purely expropriatory measure. It provides for acquisition of lands, both urban and agricultural, for executing works in connection with flood control or prevention of erosion. A piece of land acquired under the Act need not be an estate or a part of an estate. It has no relation to agrarian reforms, land tenures or the elimination of intermediaries. Mr. Joshi relies on this decision in support of his contention that the Act is not concerned with agrarian reforms. A case is an authority for what it decides. The facts of this case are distinguishable. I am afraid this decision is not helpful for the present purpose.

The case of AIR 1965 SC 632 (supra) explains at some length what can be taken in by agrarian reforms. This decision is relied upon both by Mr. Joshi and Mr. Bhabha and there the consensus ends. The proper planning of rural areas; limiting the area of land for self-cultivation; giving the tenants the right to purchase lands with landlords; releasing excess land for redistribution; consolidation of holdings; equitable distribution of land between landlords and tenants; the prevention of concentration of lands in hands of few landlords; abolishing intermediaries or modification of the land tenures; rural economy; and assignment of lands to village panchayat for the use of the general community are some of the principal features of agrarian reforms in a socialistic pattern of society, as would be clear from the decisions of the Supreme Court from time to time. That the Regulation is protected by Article 31-A is not in dispute. The Regulation and the Act are to be read together. The Act cannot be considered in isolation. The attack of Mr. Joshi on the Act and Section 2 (d) thereof in isolation has not the support of logic or law. It is said by him that in the Statement of Objects and Reasons, in the preamble and in the Act, there is no mention of agrarian reforms. It may be stated that the Act was enacted to "further the object of the Regulation." The omission of the words "agrarian reforms" is not decisive of the matter. They need not be written therein. In 'State of Bombay v. Bhanji Munji', AIR 1955 SC 41 cited by Mr. Bhabha, referring to the omission of the preamble from The Bombay Act 39 of 1950 amending the Bombay

Land Requisition Act, 1948, Bose J., delivering judgment on behalf of the Supreme Court, observed at p. 44:—

"Our present Chief Justice (Mahajan J. as he then was) pointed out in 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252, at p. 274 that:

"It is unnecessary to state in express terms in the statute itself the precise purpose for which property is being taken, provided from the whole tenor and intentment of the Act it could be gathered that the property was being acquired either for purposes of the State or for purposes of the public and that the intention was to benefit the community at large." Following that decision we hold that the Act is not invalid for this reason."

The amendments brought about by the Act are for carrying out the agrarian reforms contemplated by the Regulation, as would be clear from its tenor and intentment. This is the substance of the argument of Mr. Bhabha. According to him, Section 2 (d) is clarificatory in nature. It is ancillary to the main objects of the Regulation. The Act does not operate in vacuum. The abolition of intermediaries where there are more than one proprietor in a village and the restrictions on sale etc., of land by occupants are some of its basic features. In reply to the affidavit of the petitioners after the Act came into force, the Collector of Daman (respondent No. 2) affirmed that the purpose of the Act is agrarian reforms. By this section doubts, if any, were clarified and the word "village" was defined so as to include a part of the village, thereby giving effect in terms to the maxim that the greater includes the less. The definitions of "agricultural labourer", "land", "landless person", "village", and other related provisions of the Act indicate that the Act has relation to agrarian reforms, land tenures and the elimination of intermediaries. The law is well settled that the Legislature has power in proper cases to pass even retrospective legislation 'Raghubir Singh v. State of Ajmer', AIR 1959 SC 475. The Legislature can legislate prospectively and retrospectively unless there is a constitutional bar. The Act conforms to the pattern followed in other parts of India for giving effect to agrarian reforms, and the argument against its validity on the ground that Section 2(d) is a colourable piece of legislation must fail. The Act including this section is protected by Article 31-A and this, by itself, is an effective answer to the argument of Mr. Joshi. The mistake lies in thinking that this section is a fraud on the Constitution. Far from it, the Act does not attempt indirectly what it cannot do directly. In the words of the Supreme Court at p. 140:—

"The doctrine of colourable legislation really postulates that legislation attempts to do indirectly what it cannot do directly. In other words, though the letter of the law is within the limits of the powers of the Legislature, in substance the law has transgressed those powers and by doing so it has taken the precaution of concealing its real purpose under the cover of apparently legitimate and reasonable provisions (vide: Gajapati Narayan Deo v. State of Orissa, 1954 SCR 1=AIR 1953 SC 375). This position is not and cannot be disputed". ('Sonapur Tea Co. v. Deputy Commissioner', AIR 1962 SC 137.)

The retrospective effect given to the word "village" by Section 2(d) is not invalid as submitted by Mr. Joshi. If the Regulation has protection of Article 31-A when it applies to a proprietor of a whole village, with equal force, the Act including Section 2 (d) will also have the same protection when it applies to a part of a village. In the premises, question No. 2 is answered in the negative.

8. It would be convenient to deal with questions Nos. 3 and 4 together. The petitioner can be regarded as the "proprietor" both under the Regulation and the Act. The dispute between the parties revolves round 90 acres of land and the 20 acres of land classified by the respondents as grass and pasture lands, respectively. There is no dispute about 10 acres of Kharabi (waste) land. These 120 acres form a part of the 180 acres said to have been personally cultivated by the petitioner within the meaning of Section 2(d) of the Regulation. Now, Section 4(b) of the Regulation, does not permit a proprietor to retain pasture or grasslands. He could retain lands under his personal cultivation, not being pasture or grasslands. He could also retain other properties mentioned in Sec. 4(a). This is the effect of Section 4, notwithstanding the operation of Section 3. Section 11 of the Regulation provides for payment of compensation for pasture or grasslands taken over by the Collector. The Regulation does not define "pasture or grasslands". The Act also does not attempt this task, and may be for good reasons. These words, therefore, are to be understood in their ordinary sense, "Land for pasture" has the protection of Article 31-A (2) (a) (iii) of the Constitution. The inclusive definition of 'estate' takes in this category of land expressly but there is no reference in terms to "land for grass" in this provision. The words "for purposes ancillary thereto" in this Article, says Mr. Bhabha, may take in land for grass. The dictionary meaning of grassland is "pasture or grazing land" and of pasture land is "a piece of land covered with grass" (Shorter Oxford English Dictionary Vols. I and II). They

may be interchangeable, but I would not like to hazard any opinion. According to Mr. Joshi, what is excluded from the purview of Section 4(b) are the lands where grass is grown naturally and spontaneously without any human skill and labour. These lands cannot be retained by a proprietor. Amplifying this argument, he contends that pasture or grasslands where inhabitants of villages are allowed to graze their cattle are excluded from Section 4(b), but not private pasture or grasslands held by a proprietor and utilized by him for the purposes of grazing his cattle. Mr. Bhabha submits that this argument does not take note of the fact that Section 4(b) makes no such distinction. It is also the contention of Mr. Joshi that the respondents are bound by the finding of the Supreme Court in the petition filed on behalf of the petitioner that 180 acres of land including these 110 acres are personally cultivated by the petitioner and, therefore, they cannot be regarded as grass or pasture lands. Mr. Bhabha is quick on his feet to correct Mr. Joshi and he says that there is no such finding of the Supreme Court. I agree with him. There was no issue before the Supreme Court whether these lands are grass or pasture lands as ordinarily understood. This is pretty clear notwithstanding the contention to the contrary by Mr. Joshi.

As pointed out earlier, their Lordships of the Supreme Court were only concerned with the larger question, namely, whether the Regulation was protected by Article 31-A. This Article was expressly invoked on behalf of the Union of India, so as to place the Regulation beyond challenge on the ground of violation of Articles 14, 19 and 31 of the Constitution. According to the petitioner 90 acres of land are not grasslands as ordinarily understood; they are tilled or ploughed by and on behalf of the petitioner for the purpose of raising seasonal or rotational agricultural produce such as 'Kodra, Tuar, Ground-nuts etc.', and regular agricultural activities are being carried on the said lands. There are about 2,000 'Khajuri' (date palm) trees thereon, and their classification as grasslands by the respondents behind the back of the petitioner is in violation of the principles of natural justice. It is the case of the respondents that they have been correctly classified as grasslands and therefore, there is no such violation. In the petition before the Supreme Court as regards 20 acres of land, the petitioner admitted that they "are no doubt pasture lands, but the same were used by the petitioner for the purpose of grazing his cattle." It is admitted on behalf of the respondents that there are about 800 Khajuri trees on 120 acres of land including 90 acres of grasslands and not

about 2,000 Khajuri trees as stated by the petitioner.

As regards classification of 90 acres of grasslands, the relevant facts may be shortly stated at this stage. The Indian Revenue Laws in force in the neighbouring States were not extended to the district of Daman when these lands were classified as grasslands. This fact is not disputed by Mr. Bhabha. Mr. Bhabha is also asked to clarify whether they were classified as grasslands under any Portuguese law. He concedes that they were not. In other words, this classification was not by an authority of law. Mr. Bhabha, however, states that the petitioner was given a reasonable opportunity to satisfy the Collector that they were grasslands. In this connection he invites my attention to the averments made in the counter-affidavits that classification of these lands as grasslands is based on the revenue records as prepared by one of the 'talatis' after field-to-field survey for the purpose of entering the names of occupants and proprietors who are entitled to retain them. In the registers (vagadpatras), these lands are shown as grasslands on the basis of the said survey. There is no affidavit of the 'talati' in support of these averments, apart from the fact that the petitioner was not personally served with any notice requiring him to show cause why these lands should not be classified as grasslands. It is not correct as affirmed on behalf of the respondents in the counter-affidavits, that the petitioner did not dispute the fact in the Supreme Court that they were grasslands. A reference to the petition filed in the Supreme Court would seem to show that he did dispute this fact. It is the case of the petitioner that he was given no opportunity to satisfy the Collector that they were not grasslands and the alleged survey inquiry was behind his back. The law is well settled that even in an administrative inquiry, where the rights of persons are affected resulting in serious consequences the principles of natural justice are to be observed and that no decision can be given against a party without giving him reasonable hearing (see 'Xec Ayub v. Govt. of Goa', AIR 1967 Goa 102 (112)). In a very recent decision of the Supreme Court, *A. K. Kraipak v. Union of India* Writ Petns. Nos. 173 and 175 of 1967—(AIR 1969 NSC 108) original jurisdiction, Hegde, J., speaking for the Supreme Court, observed:—

"The concept of rule of law would lose its vitality if the instrumentalities of the State charged with the duty of discharging their functions in a fair and just manner. ... In recent years the concept of quasi-judicial power has been undergoing a radical change. What

was considered as an administrative power some years back is now being considered as a quasi-judicial power This takes us to the question whether the principles of natural justice apply to administrative proceedings The horizon of natural justice is constantly expanding Till very recently it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of this limitation is now questioned What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose."

It may be stated that the Regulation and the rules made thereunder do not provide for an inquiry on the lines of Section 12-A of the Act. This position is conceded by Mr. Bhabha. This seems to be an omission. Under the Act, for the purposes of the Regulation, the Mamlatdar is required to discharge certain duties and perform certain functions; one of such functions is enumerated under clause (f) of this section extracted earlier. There is one thing more. The petitioner cannot be deprived of these lands except by an authority of law. Classification, in this case, has to be by an authority of law before these lands could vest in the Central Government. Article 31(1) of the Constitution makes this position clear. He cannot be deprived of these lands on the basis of an executive inquiry. This section contemplates a quasi judicial inquiry. It would be open to the petitioner to move the Mamlatdar by an application under S. 12-B requiring him to decide whether these lands are really grasslands. If they are not, then the petitioner would be entitled to retain them. As mentioned earlier, Section 5(1) of the Regulation enables the Collector to take charge of all lands and of all rights etc., therein of a proprietor vested in the Government under S. 3. Section 5(2) does not authorize him to take possession of any land or of any right of proprietor therein which may be retained by him under Section 4. The Mamlatdar and the Collector are not constituted under the Regulation as the final authorities to decide whether particular lands are really grasslands or pasture lands. Whether they are so is primarily a question of fact. The view taken by the respondents that they are grasslands

on the basis of an executive inquiry without conforming to the principles of natural justice and also in contravention of Article 31(1) of the Constitution, has not the support of law. It is not binding on the petitioner. This question now has to be decided by the Mamlatdar and the Collector according to law. Mr. Bhabha submits — and rightly — that this Court is not the proper forum to decide the character of these lands. Evidence may have to be led and facts investigated.

Section 12-F (1) provides that no Court shall have jurisdiction to settle, decide or deal with any question which is by or under the Regulation required to be settled, decided or dealt with by the Mamlatdar or the Collector. Section 12-F(2) postulates that no order of the Mamlatdar or the Collector made under the Regulation shall be questioned in any civil or criminal court. This section does not bar the writ jurisdiction of the High Court, but as far as other civil courts are concerned they will have no jurisdiction if the question under consideration is by or under the Regulation required to be settled, decided or dealt with by the Mamlatdar or the Collector. The writ jurisdiction of the High Court is also to be exercised according to well-settled principles. As regards 20 acres of pasture lands in view of a clear admission made by the petitioner in the petition before the Supreme Court that they are "no doubt pasture lands but the same were used by the petitioner for the purpose of grazing his cattle", it is not now open to the petitioner to turn round and say that this admission is not correct. He has to abide by that admission. In the result these lands are to be regarded as pasture lands included in the definition of "estate" under Article 31A(2)(a)(iii) of the Constitution, and, therefore, they have the protection of this Article. Their taking over cannot be questioned on the ground of contravention of Articles 14, 19 and 31. The contention of Mr. Joshi that this Article takes in only public pasture lands and not privately owned pasture lands does not impress me. The tenor of this Article indicates that, within its wide sweep, it does take in privately owned estates including lands for pasture. The petitioner has no case in so far as this category of land is concerned. It vested in the Central Government under the Regulation. The 90 acres of grasslands would vest in the Central Government only after a proper quasi judicial inquiry in terms of the Regulation as amended by the Act. It would be open to the petitioner to move the Mamlatdar by an application for decision on this question. Alternatively, the Revenue Department can itself initiate an enquiry in this behalf. The petitioners need have no apprehension in view of the stand taken

by the respondents—Collector and Mamlatdar — in their counter affidavits, that they will not have a fair hearing in the quasi judicial inquiry proceedings. These respondents are no doubt constituted as Judges in their own cause, but in this inquiry they are, adopting, with respect, the language of his Lordship Hegde, J., "charged with the duty of discharging their functions in a fair and just manner". They are required to act in good faith and objectively. As it is, it is not open to the Mamlatdar and the Collector to regard these lands as grasslands on the basis of their subjective satisfaction based on departmental enquiry. In this view of the matter, I agree with Mr. Joshi, that a direction in the nature of mandamus should be issued to the respondents requiring them to act according to law and not to treat these lands as grasslands or interfere, in any manner, with the possession of the petitioner, unless, as a result of enquiry, these lands are held as grasslands excluded from the purview of Section 4(b) of the Regulation. Demand for justice was made by the petitioner in this behalf before filing the petition. A similar direction prayed for in respect of 20 acres of pasture land is refused. The petition is allowed. The parties should bear their own costs.

9. The case of the petitioners Sunderlal Uttamchand and others in writ Petition No. 233 of 1962 in the Supreme Court under Article 32 of the Constitution was that the village Dholar Dhonaly in the District of Daman consisting of paddy planting lands, mango trees, coconut trees, etc., was purchased at a public auction by them for Rs. 35, 525 in the year 1926. This village consists of about 190 acres of land, including 75 acres of paddy lands and about 15 acres of garden lands. There are about 3,000 Khajuri or toddy trees and also several mango trees etc., on these lands. The Regulation had not the protection of Article 31-A and, therefore, its enforcement against the petitioners be prohibited by a suitable writ etc. The Supreme Court held that the whole of the land in this village is devoted to agricultural or horticultural purposes. In this view of the matter, the extended definition in Article 31-A (2) (a) (iii) covers this village: AIR 1967 SC 1110 (Supra). In other words, the Regulation had the protection of this Article. The petition accordingly was rejected. The case before this Court is that the petitioners are not the owners of the whole village and, therefore, they do not satisfy the definition of "proprietor" under Section 2 (h) of the Regulation. A small part of the land in it belongs to three other owners. The petitioners were not aware of this fact when they moved the Supreme Court. They also do not satisfy this definition because of the additional

ground taken in this petition, namely, that the lands comprised in this village were purchased by them at a public auction in 'inventario' proceedings in accordance with Article 1902 of the Portuguese Civil Code. As translated this Article enables an executor to apply to the Court for partition and sale, at a public auction, of the properties wherein a testator has any share or interest. Section 2(d) of the Act whereby a part of a village is also included in the definition of "village" is ultra vires and void for the same reasons as in the case of the petition filed by the petitioner Gulabbhai Vallabbhai Desai. Their lands, therefore, cannot be taken over by the respondents. The case of the respondents is that the whole village of Dholar Dhonaly belongs to the petitioners. They do not admit that there are other owners. The petitioners satisfy the definition of "proprietor" under Section 2(h) of the Regulation. The statement that the petitioners were not aware when they moved the Supreme Court that this village contained lands belonging to other owners is denied by the respondents. This defence, according to them, is, an afterthought. It was not their case before the Supreme Court that they were not the proprietors of the whole village. They are thus stopped from taking a position inconsistent from that which they took in the Supreme Court. According to the Supreme Court, the petitioners are the proprietors under the Regulation. The petitioners are the grantees of this village, which was sold to them. A part of a village is included in the whole. The petitioners have not produced the sala deed of this village. Section 2 (d) of the Act is not ultra vires and void for the reasons mentioned by the petitioners. There is thus no case for restraining the respondents from enforcing the Regulation in respect of the lands belonging to the petitioners.

10. It may be stated that the additional ground taken in this Court that the petitioners are not the proprietors was not taken in the Supreme Court. They ought to have taken this ground of attack if it had any substance. (Copies of the petitions filed in the Supreme Court by these petitioners and the petitioner Gulabbhai Vallabbhai Desai were received from learned counsel for the parties after they had concluded their arguments). This was an important ground excluding the application of the Regulation. It should be deemed to have been a matter directly and substantially in issue before the Supreme Court. The principle of constructive res judicata would seem to apply in this case as well. This ground of attack must therefore, fail in this Court. The conclusions reached in the petition filed by the petitioner Gulabbhai Vallabbhai Desai on questions Nos. 1 and 2 would also

apply with an equal force to the petition filed by the petitioners, assuming there are other three owners as pleaded by them in their petition. The petitioners have not stated in their petition that they can retain a whole or a part of the lands in this village purchased by them in accordance with Sec. 4 of the Regulation. It is not their case in this Court that these lands including about 15 acres of garden lands are under their personal cultivation and, therefore, they are entitled to retain them under clause (b) of this section. We are not concerned in this case with pasture or grasslands, as in the case of the petitioner Gulabhbhai Vallabhbhai Desai. Mr. Joshi submits that in view of Section 12-A of the Act, the petitioners would move the Mamlatdar for decision on clause (f) cited earlier and on other relevant matters mentioned therein. The petitioners may do so. As it is, the prayer by the petitioners in their petition that the respondents be restrained from enforcing or implementing the provisions of the Regulation in respect of their lands situated in this village is refused. The interim stay granted is hereby vacated. In this view of the matter, the petition is dismissed with costs. The parties should bear their own costs.

Order accordingly.

AIR 1970 GOA, DAMAN AND DIU 73 (V 57 C 13)

R. S. BINDRA, A. J. C.

Jit Singh Chandok, Appellant v. Naraindas Gokuldas, Respondent.

Apelacao No. 100 of 1967, D/- 3-4-1969.

(A) Portuguese Civil Procedure Code, Ss. 979 and 997 — Effect of amendment — Provisions of S. 979 are neither repealed nor amended by clause (2) of S. 99 of Portuguese Decree No. 43525 dated 7-3-1961 — There is no such repeal or amendment even by implication — The decree has the effect of amending Section 997.

(Paras 13, 17, 18)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Statutes enacted to achieve public policy — Rent Restriction Acts — Construction — Principle.

Rent Restriction Acts are meant for the protection and benefit of the tenants and their avowed object could not be achieved if the parties were permitted to contract out of it. In other words, agreements between tenants and landlords which were in conflict with the provisions of the rent legislation have been declared void in a large number of cases because they were found opposed to the principles of public policy enshrined in Section 23 of the Indian Contract Act. Such legislation is therefore to be interpreted

in such a way that the objective of the declared public policy, namely, to offer protection to the tenants against the rapacity of the landlords is achieved. It is not however, permissible for the courts to do violence to the language of the legislation for the purpose of achieving such objectives. Such interpretation can be legitimately adopted when the legislative intentment is not clearly deducible from the language employed. (Para 17)

(C) Civil P. C. (1908), Preamble — Interpretation of Statutes — Repeal by implication.

Repeal by implication is not favoured. Repeal by implication may sometimes be spelt out of unambiguous language used in the Statute. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments on the statute book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Repeal by implication is not to be adopted unless it be inevitable, and retrospection is not to be presumed because the presumption is the other way about. Maxwell on Interpretation of Statutes, 11th Edition, Ref; AIR 1969 SC 1114, Rel. on.

(Paras 11 and 14)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 1114 (V 56) =

1969-1 SCWR 532, Sukhrum Singh v. Harbheji 12, 14 (1890) 15 AC 384 = 59 LJPC 68, Main v. Stark 12

F. P. de Menezes, for Appellant; M. P. Shinkre, for Respondent.

JUDGMENT: The sole question which falls for determination in this appeal filed by Jit Singh Chandok, the tenant, against Naraindas Gokuldas, the landlord, is whether the provisions of Section 979 of the Portuguese Civil Procedure Code, hereinafter called the Code, have been repealed or amended by clause (2) of Section 99 of the Portuguese Decree No. 43525, dated 7-3-1961, hereinafter referred to as the Decree.

2. The facts which have given rise to the legal issue aforementioned between the parties may shortly be stated. One Abdul Razak, a native of Kuwait, had taken the premises in dispute on lease from Naraindas Gokuldas on 9th of June 1961 against total rent of Rs. 396 per mensem for a period of 7 months. On the expiry of that period and while Abdul Razak was away to Kuwait, the landlord instituted a suit for his eviction on 12-2-1962 on the

allegation that the lease agreement had concluded. On his return to Goa, Abdul Razak resisted that suit by denying that the lease had expired by efflux. In his resposta dated 1-6-1962 the landlord prayed for immediate eviction of Abdul Razak under Section 979 of the Code on the allegation that he had failed to pay rent which had fallen due during the pendency of the suit. It appears that Abdul Razak deposited rent in triplicate for a period of six months, January to June 1962, and in consequence the prayer for his immediate eviction was rejected. However, Abdul Razak continued to deposit, within time, the subsequent rents in single until October 1964. That suit was ultimately dismissed by the trial court on 22-1-1963.

Naraindas Gokuldas came up in appeal against that judgment of the trial court but met with no better fate as his appeal was dismissed by this Court on 10-4-1964. On 29-9-1964 the landlord made an application to the trial court for withdrawal of the rents deposited by the tenant. After the office had submitted on 22-12-1964 a complete report in regard to the various deposits made by the tenant, the trial court sent a notice about that fact to the landlord's counsel and that notice was served on the latter on 8-1-1965. However, four days before that date namely, on 4-1-1965 the landlord instituted another suit against Abdul Razak for the latter's eviction. The grounds pleaded in support of that prayer were that Abdul Razak had committed default in the matter of payment of rent from April 1964 onwards, and that since the rents covering the period July 1962 to March 1964 had been deposited in the Court in single without first making an offer to the landlord, the deposits had not the effect of discharging the contractual obligations of the tenant. Abdul Razak defended the suit on the basis that since the deposits had been made during the pendency of the previous suit it was not obligatory on him to first offer the rent each month to the landlord and then deposit the same if the landlord refused to get it. He pleaded further that this Court had held in its judgment dated 10-4-1964 in the previous suit that the rents deposited by him (the tenant) during the pendency of the litigation had the effect of discharging him from his obligations respecting the payment of rent. By way of abundant precaution, Abdul Razak deposited additional money in Court to raise the total deposits to thrice the rent which was said to have fallen in arrears. Deposit in triplicate of the rents in arrears, it may be pointed, gives a complete discharge to the tenant under the Portuguese system of law. The additional deposit was, however, made by Abdul Razak under protest. He had noti-

fied the court that he was not bound to pay beyond the single rent deposited during the pendency of the first suit.

3. In his resposta the landlord reiterated that since the deposits in the first suit had been made without first offering the rent each month to him, those deposits did not have the effect of putting an end to the legal obligation of the tenant in the matter of payment of rents. In particular, it was emphasised that the deposits made after 10-4-1964, the date on which this court had rejected the landlord's appeal in the first suit, had no legal justification behind them and as such the tenant was bound to pay those arrears in triplicate if he were anxious to avoid his eviction.

4. During the pendency of the second suit, out of which the present appeal has arisen, Abdul Razak transferred his rights as a lease-holder of the premises in dispute and the commercial business carried therein to Jit Singh Chandok and it is in this manner that the latter was brought on the record vice Abdul Razak. That transfer was effected by Abdul Razak on 28th of February 1965.

5. The trial Court held in its judgment dated 22nd of December 1966 that the deposits made either before or after 10-4-1964 did not amount to discharge of the obligation of the tenant since they (the deposits) had been made without first offering the rent each month to the landlord. That court was of the view that the deposits without an offer to the landlord had conceivably been made under Section 997 of the Code, but that provision of the Code, the Court held, had been repealed by Clause (2) of Section 99 of the Decree. The Court held further that the deposits made after this Court's judgment dated 10-4-1964 without first making the offer to the landlord had absolutely no justification in law. In support of this latter conclusion reliance was placed on a judgment dated 24-10-1950 of the Supreme Court at Lisbon. However, since the tenant had deposited, in all, thrice the rent in arrears the trial Court disallowed the prayer for tenant's eviction. The Court simultaneously held the landlord entitled to withdraw the entire amount deposited by the tenant.

6. Aggrieved by the aforementioned findings of the trial Court and the judgment rendered by it, the tenant, Jit Singh Chandok, has come up in appeal to this Court.

7. Shri Pinto de Menezes, the learned counsel representing the appellant, vehemently urged that the trial Court was in error in holding that the deposits in single made during the pendency of the first litigation did not exonerate the tenant from his obligations in the matter of payment of rents. It was pointed out by

Shri Pinto de Menezes that the deposits had been made by virtue of the right given by Section 979 of the Code and not under Section 997 of the Code and that it is not obligatory on the tenant to make an offer to the landlord before depositing the rent which fall due during the pendency of a suit. The trial Court was equally wrong, Shri Pinto de Menezes submitted, in holding that Clause (2) of Section 99 of the Decree had in any manner modified or repealed the provisions of the Code in the matter of deposit of rents that accrue due during the pendency of a suit for eviction.

Shri M. P. Shinkre, the learned counsel for the landlord, contended, on the other hand, that Clause (2) of Section 99 of the Decree had amended not only Section 997 of the Code but also Section 979 thereof and as such the tenant was bound to first make the offer of rent to the landlord and it was on latter's refusal that he could deposit the same. The parties' counsel were agreed on the point that the fate of this appeal would be determined by the finding whether or not Clause (2) of Section 99 of the Decree had abrogated or amended Section 979 of the Code. They were also agreed on the point that that question of law is *res integra*.

8. To appreciate the respective submissions made by the parties' counsel, it is necessary that the relevant provisions of the law should first be set out. Sec. 979 of the Code provides that whatever be the ground on which the eviction of the tenant is sought, the landlord is entitled to pray for his immediate eviction if the tenant fails to pay the rents that fall due during the pendency of the suit. If the tenant on being notified of that prayer made by the landlord fails to prove by a document the payment or deposit of those rents, his eviction has necessarily to be directed forthwith. Section 993 of the Code enacts that if the tenant cannot make the payment of rent for any of the reasons mentioned in Section 759 of the Portuguese Civil Code he has the right to deposit the rent in Government treasury within 8 days from the date it fell due.

The next Section 994 enjoins that the tenant shall make an application to the Court, after the deposit, that the landlord may be notified of that fact. The only exception to that statutory requirement is the circumstance that the tenant has been served with summons in an eviction suit instituted against him by the landlord and he (the tenant) has not filed the written statement. In such a situation, the Section says further, the tenant should produce the document of deposit along with the written statement. Section 997 of the Code is to the effect that so long the occasion which justified the first deposit of the rent lasts, the tenant may continue depositing the rents which fall due

thereafter without first tendering the amount to the landlord. It is also provided in that Section that in such a situation it would not be obligatory on the tenant to pray for issue of notice regarding the subsequent deposit to the landlord.

Section 99 of the Decree is comprised of three Clauses. The translation in English of all the three Clauses was provided to this Court by Shri Pinto de Menezes and since Shri M. P. Shinkre did not object to the correctness of that translation, I have decided to reproduce the same here instead of giving the substance of the Section. That translation runs as under:-

"1. In both cases of delay the tenant, if he deposits the rent, single or triple as the case may be, and applies for the notification prescribed in Clause 1 of the preceding section, it is presumed that he has offered previously its payment to the lessor, to end the delay, and that the latter refused it.

2. The deposit and the notification, however, do not exempt the tenant, under the penalty of continuity of the default, of offering to the lessor the subsequent single rent which only if refused shall be deposited; in that case the provision of Section 997, second part, shall be applicable.

3. During the default of the tenant, the lessor can refuse the subsequent rents, which will then be considered in default, or he can accept them without prejudice to his rights."

9. To complete the picture, it looks necessary to give the gist of the preceding four Sections 95 to 98 of the Decree. Section 95 states that the tenant may free himself from the obligation to pay the rent if he deposits the amount which has fallen due provided any of the five contingencies mentioned in Section 759 of the Portuguese Civil Code happen to exist. Those contingencies are:

(1) When the landlord refuses to accept the rent;

(2) When the landlord does not turn up, or send someone, to collect the rent from the tenant at the time it falls due, or at the place mentioned in the contract;

(3) When the landlord is not willing to issue the receipt for the amount offered to him;

(4) When the landlord suffers from any incapacity to receive the rent; and

(5) When the whereabouts of the landlord are not known.

Section 96 provides that the tenant can get out of his obligation to pay rent where he had failed to pay it on the due date, but had offered the same to the landlord within 8 days of that date and the latter had refused to accept it, if he deposits it within that period of 8 days. Section 97

lays down that if the delay exceeds 8 days the tenant can still free himself of the obligation if besides the rent in arrears he deposits, in addition, a compensation equal to double that rent at the latest by the date he files the written statement in the suit, if any, instituted for his eviction. Section 98, in my opinion, is in the nature of a proviso to Sections 96 and 97. Clause (1) of Section 98 provides that the deposit will be effective only, in case of delay on the part of the tenant, if the tenant prays, within a period of 5 days, that the fact of the deposit be notified to the landlord. Clause (2) of that Section states that filing of a duplicate of the challan of deposit along with the written statement by a tenant in a suit instituted for his eviction will have the effect of notification mentioned in clause (1) of the Section. Clause (1) of Section 99 reproduced earlier, it will be noticed, refers to two cases of delay on the part of the tenant. Those cases are obviously of delay not exceeding 8 days and the delay exceeding 8 days.

10. The parties' learned counsel addressed very elaborate and protracted arguments in support of their rival contentions. Shri Pinto de Menezes ultimately accepted as well founded the contention of Shri Shinkre that the deposits made in single by the tenant after the appeal in the first case had been decided by this Court on 10-4-1964 had no legal sanction behind them because they had been made without first offering the money to the landlord. Section 979 of the Code, Shri Menezes conceded, could not be availed of by his client after 10-4-1964. I think this belated stand taken by Shri Menezes is wholly correct. By its terms Section 979 applies only during the period the eviction suit remains pending, and since the suit was finally disposed of by this Court on 10-4-1964 there was no justification for the landlord to make deposits under Section 979 of the rents which fell due after that date. Therefore, the trial court was justified in its conclusion that on the basis of single deposits made after 10-4-1964 the tenant could not have avoided his liability to eviction founded on the plea of non-payment of rent. Deposits after 10-4-1964 could be made only in terms of Section 95 of the Decree. An essential pre-requisite for the applicability of that Section is that someone of the five contingencies mentioned in Section 759 of the Civil Code must exist. It being not the contention of Shri Pinto de Menezes that the deposits after 10-4-1964 had been made because of the existence of any of those contingencies, the deposits made did not amount to discharge of the obligations of the tenant. As a result, I hold that the trial court's direction that the landlord is entitled to claim thrice the rent for the period subsequent to March 1964 is fully justified in law.

11. The real dispute between the parties centres around the point to what sum is the landlord entitled qua the period beginning with July 1962 and ending with March 1964. The deposits in single respecting this period, according to Shri Menezes, were made in exercise of the right given to the tenant by Section 979 of the Code. Shri Shinkre urged, on the other hand, that Section 979 stood repealed by clause (2) of Section 99 of the Decree when it was enforced in this territory on 7-3-1961, and as such, Shri Shinkre contended, the tenant could have deposited the rent, though it fell due during the pendency of the suit, if he had first offered it each month to the landlord and the latter had refused to receive the same. Hence, as mentioned in the beginning of this judgment, the sole question that falls for determination in the appeal is whether or not Section 979 of the Code has been repealed by clause (2) of Section 99 of the Decree. It was not denied by Shri Shinkre, and this also looks obvious, that there is no express repeal of Section 979 of the Code. Therefore, at the best there can be a repeal by implication.

It is stated at page 162 of Maxwell on Interpretation of Statutes, Eleventh Edition, that repeal by implication is not favoured. The learned author also mentions on the same page that a sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption, the author points out, that the legislature did not intend to keep really contradictory enactments on the statute book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction, the author concludes, which offers an escape from it is more likely to be in consonance with the real intention. Earlier on pages 153 and 154 Maxwell has expressed himself as under:—

"An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. It cannot be assumed that Parliament has given with one hand what it has

taken away with the other. But it is impossible to construe absolute contradictions. Consequently, if the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later."

12. The question of repeal by implication has recently been examined by the Supreme Court in the case of Sukhram Singh and another v. Harbheji. That case is reported in (1969) 1 SCWR 532 = (AIR 1969 SC 1114). The relevant head-note of the case is in the following terms:—

"Now a law is undoubtedly retrospective if the law says so expressly but it is not always necessary to say so expressly to make the law retrospective. There are occasions when a law may be held to be retrospective in operation. Retrospection is not to be presumed for the presumption is the other way but many statutes have been regarded as retrospective without a declaration. Thus it is that remedial statutes are always regarded as prospective but declaratory statutes are considered retrospective. Similarly sometimes statutes have a retrospective effect when the declared intention is clearly and unequivocally manifest from the language employed in the particular law or in the context of connected provisions. It is always a question whether the legislature has sufficiently expressed itself. To find this one must look at the general scope and purview of the Act and the remedy the legislature intends to apply in the former state of the law and then determine what the legislature intended to do. This line of investigation is, of course, only open if it is necessary. In the words of Lord Selborne in *Main v. Stark*, (1890) 15 AC 384 at p. 388 there might be something in the context of an Act or, i.e., collected from its language, which might give to words *prima facie* prospective a larger operation. More retrospectivity is not to be given than what can be gathered from expressed or clearly implied intention of the legislature."

13. It is in the background of the well settled rules of interpretation reproduced above that I proceed to examine the proposition if clause (2) of Section 99 of the Decree has impliedly repealed Section 979 of the Code. A perusal of Section 979 and Sections 993 to 998 of the Code would indicate that two categories of deposits are contemplated by the legislature in one category would fall the deposits made before or after the litigation between the landlord and the tenant concerning the demised property, and the second category covers the deposits respecting rents which fell due *pendente lite*. The counsel for the parties were agreed on the proposition that though the deposits of the rents which fell due before or after the litigation

could be made only after one of the contingencies mentioned in Section 759 of the Civil Code is proved to exist, the deposits pertaining to the period when the litigation was pending could be made without first offering the rent to the landlord.

The first part of the proposition is abundantly evident from Section 993 of the Code which provides that when the tenant cannot make the payment of rent due to any of the causes mentioned in S. 759 of the Civil Code he has the right to deposit it within 8 days from the date it fell due. Section 997 of the Code enacts that if the rent has once been deposited in compliance with the provisions of Section 993, then the rents for the subsequent periods can be deposited without first making the tender to the landlord. The second part of the proposition is established by two pronouncements of the Supreme Court at Lisbon, one dated 11th of March 1949 and the other dated 18th of March 1949. The judgment dated 11-3-1949 finds prominent mention in the commentary on the Code by the celebrated author Alberto dos Reis. The relevant parts of the commentary were translated by Shri Pinto de Menezes and produced in this Court during the course of arguments. Shri Alberto dos Reis lent his full-throated support to the two propositions enunciated by the Supreme Court in the judgment dated 11-3-1949. Those propositions are:

(a) that the lessee is permitted to deposit, in single, the rents that fell due *pendente lite* without depositing in triplicate the rents on the non-payment of which the eviction suit had been founded; and

(b) that the deposit of rent that accrued due *pendente lite* is not required to be preceded by a tender to the lessee.

Shri Shinkre could find no fault with either of these two propositions enunciated by the Supreme Court and endorsed by Shri Alberto dos Reis. However, he contended that Section 979 of the Code had been repealed or amended by clause (2) of Section 99 of the Decree and as such the aforementioned judgments of the Supreme Court did not at present represent the law on the subject of deposit of rents that fall due during the pendency of the suit for eviction. Shri Pinto de Menezes was equally emphatic in his contention that clause (2) of Section 99 had modified only the provisions contained in Sections 997 and 998 of the Code and that the provisions of Section 979 of the Code were left altogether untouched. After bestowing anxious thought to the merits of the propositions canvassed by the two counsel, I have reached the conclusion that the one propounded by Shri Pinto de Menezes looks to be more sound and so must prevail.

14. In the first instance, repeal by implication, as stated above, is not favoured. It is correct that repeal by implication may sometimes be spelt out of unambiguous language used in the statute. To quote the words of Maxwell, an interpretation in favour of repeal by implication is not to be adopted unless it be inevitable, and, to cite from the Supreme Court judgment in the case of Sukhran Singh, 1969-1 SCWR 532 = (AIR 1969 SC 1114) (Supra), retrospection is not to be presumed because the presumption is the other way about. I think the proposition of implied repeal of Section 979 of the Code by clause (2) of Section 99 of the Decree is not inevitable if we read those sections along with other relevant provisions of the Code and the Decree. If before the Decree was extended to the territory of Goa the legislature clearly contemplated two categories of deposits, one made during the pendency of the suit and the other before the suit had been instituted or after it had concluded, and if the statutory provisions governing the two categories of deposits differed from each other in vital respects as narrated above, it is not inconceivable that the legislature meant to introduce a change by the relevant provisions of the Decree only respecting the deposits before or after the litigation. If the legislature meant to modify or repeal the provisions of Section 979 of the Code it would not have been difficult for it to express its intention by inserting a specific provision in the Decree.

The legislature must be presumed to be aware of the main features of the two categories of deposits envisaged by the two sets of the provisions contained in the Code. Shri Shinkre was unable to invite my attention to any criticism of the provisions of Section 979 of the Code either in some judicial pronouncement or at the hands of some commentator. In the absence of any criticism of Section 979, it is not unreasonable to presume that the legislature did not contemplate any change therein when the Decree was extended to the territory of Goa, and this conclusion is reinforced by the fact that no specific mention of Section 979 of the Code is made in any repealing provision of the Decree. If the two varieties of provisions bearing on two categories of deposits could stand side by side before 7-3-1961, the date on which the Decree was extended to this territory, it cannot be contended plausibly that the provisions contained in Section 979 cannot stand side by side with the amended provisions of Section 937 of the Code. Therefore, the test of inevitability does not hold good in the present case and so the repeal by implication of Section 979 of the Code has to be ruled out.

15. Intrinsic evidence from the body of the Decree itself is also available to support the conclusion just recorded. The preamble to the Decree mentions that despite some minor legislative measures adopted by the Central and the overseas Governments respecting the lease-contracts, it is primarily the provisions of the Civil Code which still constitute the basic law respecting such contracts. Vital and extensive developments that have taken place in the various urban areas of the overseas territories, the preamble states further, have thrown up such a plethora of problems respecting the law of tenancy that the provisions in the Civil Code do not furnish adequate remedy to provide a solution to them. It is to tide over those problems, the preamble concludes, that there arose the necessity for enacting the provisions contained in the Decree. It is manifest that the main purpose for placing the Decree on the statute book was to overhaul the provisions in the Civil Code relevant to the contracts of tenancy of properties in the urban areas. The modification of some provisions of the Code by the Decree, it is apparent, was not the motive which prompted the enactment of the Decree, and as such that modification cannot be extended by analogy, as contended by Shri Shinkre, and so must be confined to what looks evident from the express language used by the legislature.

16. Another intrinsic piece of evidence which counters in a telling manner the proposition canvassed by Shri Shinkre is provided by the phraseology employed in Sections 95 to 99 of the Decree. Section 95 envisages deposits in cases where the tenant is not at fault. The next two sections, Sections 96 and 97, relate to deposits made after the tenant had been at fault in paying or offering the rent to the landlord. It is provided in Section 97 that if the default in payment of rent has exceeded 8 days the tenant can get over the consequences of default if he deposits the rent together with twice the penalty, provided the deposit is made 'by the date of filing of the written statement' in the suit, if any, instituted by the landlord. It looks clear to me from the underlined (here in ' ') words that the deposits contemplated by Section 97 pertain to the period before the suit had been filed.

In sub-section (2) of Section 98, again, it is mentioned that the function of notice respecting a deposit being issued to the landlord as mentioned in sub-section (1) of the same Section shall be served by production of the duplicate of the challan of deposit along with the written statement in a suit for eviction filed by the landlord. Obviously, Section 98 also does not take us beyond the stage of written statement. The provisions of Section 99 refer only to the deposits contemplated in

the preceding Sections 95 to 98, and since those sections, as shown above, relate to deposit of rents which had fallen due before the institution of the suit, the provisions of Section 99 cannot be held to cover the deposits that fall within the purview of Section 979 of the Code. As such the intrinsic evidence places at considerable discount the proposition advanced by Shri Shinkre.

17. The necessity for special rent legislation, in which category the Decree No. 43525 falls, respecting properties located within the urban areas was felt with the outbreak of the Second World War, and its pace was hastened with the advent of industrial and commercial revolution in the developing countries. Such legislation was primarily undertaken to save the tenants from the harassing tactics of the unscrupulous landlords. Unprecedented movement of the population from the rural to the urban areas during the last few decades has mounted the accommodation problems in the urban areas despite frantic building activity. Welfare States all the world over had consequently no option but to undertake legislation to curb the avarice of the landlords and to normalise their relations with the tenant-class. There is a catena of authorities holding that the Rent Restriction Acts were meant for the protection and benefit of the tenants and that their avowed object could not be achieved if the parties were permitted to contract out of it. In other words, agreements between tenants and landlords which were in conflict with the provisions of the rent legislation have been declared void in a large number of cases because they were found opposed to the principles of public policy enshrined in Section 23 of the Indian Contract Act. Such legislation is therefore, to be interpreted in such a way that the objective of the declared public policy, namely, to offer protection to the tenants against the rapacity of the landlords is achieved. Of course it is not permitted to the courts to do violence to the language of the legislation for the purpose of achieving such objectives. Such interpretation can be legitimately adopted when the legislative intentment is not clearly deducible from the language employed. In the instant case no violence is involved either to the provisions of the Code or of the Decree by recording the conclusions that Clause (2) of Section 99 has not repealed Section 979 of the Code and that the former clause only has the effect of amending Section 997 of the Code. The amendment, if I may say so, is only in one respect, namely, that the valid deposit of rent respecting one month and notification of that deposit to the landlord will not dispense with the necessity of first offering the rent in future to the landlord and depositing it only if he refuses to ac-

cept it. This amendment, I feel convinced, has nothing to do with the deposits made in terms of Section 979 of the Code. Respecting those deposits there was never any necessity of either first offering the rent to the landlord or getting any notice issued to the landlord after the deposit had been made. The interpretation that I have placed on the various provisions of the Code and the Decree does complete justice between the parties. The landlord gets the rent due to him and he should not claim more because the deposits had been made by the tenant within the period allowed to him by the lease agreement. There is absolutely no justification for claiming the compensation amounting to twice the rent because the tenant had been vigilant enough to place the amount at the disposal of the court within the period agreed to between him and the landlord.

18. For the various reasons given above, I hold that Clause (2) of Section 99 of the Decree has neither repealed nor amended Section 979 of the Code in any manner. I hold further that the amendment of Section 997 of the Code by the aforementioned clause of the Decree has no bearing on the real controversy between the parties. The deposits, I may emphasise, had been made by the tenant not in terms of Section 997 of the Code but in exercise of the right vesting in him under Section 979 of the Code. The trial court was consequently wrong in directing that the landlord shall be entitled to draw, apart from the rent originally deposited, twice the penalty which the tenant had deposited after the present suit was instituted by way of abundant precaution and under protest. That amount shall be refunded to the appellant, and not paid to the respondent, respecting the period July 1962 to March 1964.

19. Before concluding I would like to touch in brief a point that was emphasised by Shri Shinkre when Shri Pinto de Menezes read some extracts from the commentary by Alberto dos Reis. The learned Commentator has expressed the opinion that the want of previous tender of rent deposited under Section 979 can be a ground for impugning the deposit made during the pendency of the suit. Such impugnation of the deposit, the author states further, has necessarily to be made in a new suit. Shri Shinkre contended that since admittedly the deposits had been made without first tendering the amounts to the landlord the latter is entitled to impugn those deposits, and that since that impugnation is being made in a suit which was filed subsequent to the one in which the deposits were made, the landlord is well within his rights to contend that as the deposits had been made without first offering the rent to him he is entitled to claim the penalty of twice the

rent in arrears in terms of Section 41 of the Decree. It is correct that according to the opinion of Alberto dos Reis the deposit can be impugned on the score that they were not preceded by tender to the landlord; but such impugnation, the author clarifies further in his commentary, can be made within 10 days. However, since the present suit was instituted long after the deposits had been made in the previous suit and the necessary documents filed therein, it is not open to the landlord to impugn the deposits in this suit. His remedy is clearly barred by time.

20. As a result, I partially accept the appeal and direct that the landlord shall be entitled to withdraw thrice the amount of rent in arrears covering the period April 1964 to October 1964 only, and that he shall withdraw rent in single for the preceding period of July 1962 to March 1964. The balance of the amount in deposit relevant to the latter period shall be refunded to the appellant. In view of the partial success of the parties and the difficult nature of the point involved I leave them to bear their own costs in both the courts.

ORDER

Announced in open Court. Parties' counsel be informed.

Appeal partly allowed.

AIR 1970 GOA, DAMAN & DIU 80
(V 57 C 14)

V. S. JETLEY, J. C.

Chowgule Real Estate and Construction Company Pvt. Ltd., Petitioner v. Government of Goa, Daman and Diu and another, Respondents.

Writ Petn. No. 47 of 1967, D/- 23-8-1969.

(A) Defence of India Act (1962), Ss. 29 (1) and (3), 1 (3) — Requisition and Acquisition of Immovable Property Act (1952) (as amended in 1968), Ss. 25, 3, 6 Proviso — Requisition of plot for defence purpose — Period of requisition not required to be mentioned in requisition order — Purpose still existing — Requisition would be deemed to be under S. 3 of 1952 Act and all provisions of that Act would apply — Proviso to S. 6 of 1952 Act not attracted — (Constitution of India, Art. 352(1)).

Section 29 (1) of the Defence of India Act (1962) does not require that the period should be indicated in an order requisitioning an immovable property. The period of grave emergency envisaged by Article 352 (1) of the Constitution, though indefinite in duration in terms of months and years is definite in terms of Section 1 (3). There can be no grave emergency for ever. As in the life of an individual so also in the life of a nation there are

periods of normalcy and emergency; the former the rule, the latter an exception. If an order requisitioning the plot for defence purpose does not mention the period of requisition, the duration of this period is clearly indicated in Ss. 1 (3) and 29 (3) of the Defence of India Act read with S. 25 of the Requisition and Acquisition of Immovable Property Act (1952). (Para 4)

Section 1 (3) is a duration-cum-saving clause. The Act of 1962 remained in force 6 months after the Proclamation of Emergency was revoked on the 10th January 1968. The effect of Section 25 of 1952 Act is that any immovable property requisitioned by the Central Government or its delegatee under the Act which was not released before the 10th January, 1968, shall, as from that date, be deemed to have been requisitioned under the 1952 Act for the purpose for which such property was held immediately before the said date, and all the provisions of the 1952 Act shall apply accordingly. As a result of these provisions, the legal position is that the plot continues to be under requisition. The concept of defence of India is not ephemeral, it is a whole time affair. The validity of the requisition is being judged in terms of Section 29 (1) of the Act, and not in accordance with Section 25 of the 1952 Act. The result is that the requisition of the plot for defence of India purpose which purpose still exists would be deemed to be requisition under Section 3 of the Requisition and Acquisition of Immovable Property Act, 1952, and all the provisions of that Act would apply accordingly, the redeeming feature being non-application of other stringent provisions of the Act. The legal fiction in Section 25 has to be given full effect. The first proviso to S. 6 of 1952 Act is not attracted. Case law discussed. (Paras 4, 5)

(B) Defence of India Act (1962), Ss. 29 (1), 44 — Requisition of plot for defence purpose — Extraction of metals from quarry for defence work — Remedy for acts of waste is by way of damages, but requisition will not be affected — No colourable exercise of statutory power vested in Central Government — (Requisition and Acquisition of Immovable Property Act (1952), S. 8).

When a plot is requisitioned for defence purpose for extracting metals from quarry for defence work, the remedy for acts of waste is by way of damages, but the requisition will not be affected. The concepts of requisition and acquisition are different, assuming the quarry is subject to the law of diminishing returns unlike timber and wine and also assuming a further depletion of metals. The right, title and interest to the plot is not extinguished. The plot continues to belong to the person from whom it is requisitioned.

is said in the order as to the plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read along with the petition and construed as granting permission to file a fresh suit."

While we agree that the application and the order passed thereon have to be read and considered together, the permission must appear to have been given provided the same is so claimed as required under Order 23, Rule 1(2) of the Code. On a perusal of the application Ex. 81 given by the plaintiff in that suit, he has not sought for any such permission giving him liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim. All that he claims is that he may be permitted to withdraw the suit, and if it has been stated that he withdraws the suit without prejudice to his lawful right and remedy, it cannot mean to convey in any manner that he claimed liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim as required under Order 23, Rule 1, clause (2) of the Civil Procedure Code. There is no reference to the provision made under which permission is sought for as well. That may not matter. But what he has to ask for is such permission, referred to in sub-rule (2), which is so essential so as to avoid any such bar contemplated in clause (3) of Rule 1 of Order 23 of the Code. Such a permission is neither sought for and none granted by the Court so as to say that the bar in instituting a fresh suit in respect of the same or similar subject-matter as one of the suit cannot exist. If these words were there in the application and if the Court were to pass an order that he is so permitted, we would have been inclined to assume the grant of such permission as was done in the case of Narayana Tantri v. Nagappa, AIR 1918 Mad. 126. In that case, in the petition it was prayed for withdrawal of a suit with liberty to bring a fresh suit. The Court had merely endorsed the word 'permitted' and the matter went to the High Court. It was held that the order should be construed as having impliedly granted leave to file a fresh suit. There can arise no difficulty in going so far, if the application really disclosed the mind of a man that he was seeking permission to withdraw the suit with liberty to file a fresh suit in respect of the same subject-matter. Such express words in the application were essential and the same must have been granted by the Court so as to avoid or get over any such bar contemplated under Order 23, Rule 1(3) of the Civil Procedure Code.

25.-27.

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x

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Appeal dismissed.

AIR 1970 GUJARAT 81 (V 57 C 13)*

M. U. SHAH AND N. G. SHELAT, JJ.

Gautamlal Naranlal, Applicant v. The Additional Special Land Acquisition Officer, Ahmedabad and another, Opponents.

Civil Revn. Appls. Nos. 547 to 549 of 1966; 662 to 665 and 277 of 1967; D/- 14-3-1969.

(A) Land Acquisition Act (1894), S. 53 — In view of specific provision under S. 50(2) of Act for advantage of local authority having right to be before Court, it cannot invoke provisions of O. 1, R. 10 of Civil P. C. (Para 7)

(B) Land Acquisition Act (1894), S. 50 (2) (as amended by Gujarat Act 20 of 1965) — By reason of its being directed to appear and adduce evidence under S. 50(2), local authority does not become necessary or proper party in proceeding under Act — Expression 'to appear and adduce evidence' — Meaning: (1909) 13 Cal WN 116, Dissent. from — (Civil P. C. (1908), O. 1, Rr. 3 and 10).

On considering the scheme of the Land Acquisition Act and that general principles contained in O. 1 of Civil P. C. relating to parties, either necessary or proper, it is clear that a local authority or company as the case may be, has no status of a party as such, for it has no right to demand a reference, and against whom no award having the force of a decree can be passed. In other words, even if it is on record by reason of its being given a right to appear and adduce evidence, in regard to the compensation, no order either for payment or for costs can be passed against it by the Court. Nor has it been given even a right to appeal against the Award of the Court. A necessary or a proper party is one against whom there is any relief claimed, or that his presence is so essential to enable the Court to effectively decide any such claim. It must be such a party who if dissatisfied can well be entitled to a right of appeal against any such decision. No such right is at all given to it much less contemplated in the provisions of the Act. That right is given to the Govt. through its representative the Collector and to no other. The mere fact, therefore, that it is allowed a right to appear and adduce evidence would not make it a party to the proceeding as such unless these rights are given to it by the statute. In no case, it would mean that by having to issue any notice under S. 50(2) of the Act as amended by Gujarat State, it changes its character, and makes it a party to the proceeding giving all the rights of a party to any legal proceeding in law. It is a limited right given to it

*(Only portions approved for reporting by High Court are reported here.)

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under S. 50(2) and that too for a limited purpose, and in no case, it can be joined or added as a party-defendant, either because it is a necessary or a proper party as understood in relation to a legal proceeding: (1909) 13 Cal W N 116 & AIR 1959 Bom. 297 & AIR 1929 Rang 115 & AIR 1967 Orissa 180, Rel. on.

(Para 13)

The word 'adduce' in the expression 'to appear and adduce evidence' in S. 50(2) has wider meaning and not merely confined to leading its own evidence. A right of appearance is for the purpose of adducing evidence, and that evidence must necessarily include a right to bring before the Court every type of relevant evidence, inclusive of bringing on record the same through cross-examination of the claimant's witnesses in the case. This right would include demolition of evidence led by the claimant and that can be done also in cross-examination. But the right cannot stand enlarged to an extent as to be styled as a party to the proceeding so as to have full rights of a party in any such legal proceeding. It is difficult to say that for that purpose it can be called a party as understood in law and all that therefore can be said is that while it is entitled to be on record and for the purpose mentioned in S. 50(2), it has a right to appear and adduce evidence, if any, as explained above. It gets no other right under S. 50(2) of the Act. (1909) 13 Cal WN 116, Dissent from.

(Para 16)

(C) Civil P. C. (1908), Preamble — Interpretation of statutes — Objects and reasons appended to Bill cannot be made use of in construing any provision in statute though they may be looked into for purpose of finding out mischief aimed at: AIR 1952 SC 369 & AIR 1963 SC 1356 & AIR 1956 SC 246, Foll. (Para 17)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Orissa 180 (V 54) =
ILR (1967) Cut. 510, State of Orissa v. Amarendra Pratap Singh 14
(1963) AIR 1963 SC 1356 (V 50) =
(1964) 1 SCR 29, S. C. Prashar, I-T. Officer v. Vasantsen Dwarkadas 17
(1959) AIR 1959 Bom. 297 (V 46) =
ILR (1958) Bom. 354, Corporation of the City of Nagpur v. Narendra Kumar Motilal 14
(1956) AIR 1956 SC 246 (V 43) =
1955-2 SCR 1196, A. Thangal Kunju Musaliar v. M. Venkitchalam Poti 17
(1955) AIR 1955 Bom. 262 (V 42) =
57 Bom. L. R. 209, Aswin Shambhuprasad Patel v. National Reyon Corporation Ltd. 16
(1954) AIR 1954 SC 92 (V 41) =
1954 SCR 587, State of W. B. v. Subodh Gopal Bose 17

- (1952) AIR 1952 SC 369 (V 39) =
1953 SCR 1, Aswini Kumar Ghose v. Arabinda Bose 17
(1929) AIR 1929 Rang. 115 (V 16) =
ILR 7 Rang. 20, Mandaley Municipal Committee v. Maung It 14
(1909) 13 Cal W N 116 = 4 Ind. Cas. 332, Municipal Corp. of Pabna v. Jogendra Narain Raikut 14
C. R. As Nos. 547 to 549 of 1966:—
V. S. Parikh, for Applicant; G. N. Desai, Govt. Pleader, for Opponent No. 1; J. M. Thakore, Advocate General with Suresh A. Shah, for Opponent No. 2.
C. R. A. 662/67;
J. M. Thakore, Advocate General with Suresh A. Shah, for Applicant; G. N. Desai, Govt. Pleader, for Opponent No. 1; K. C. Vakharia, for Opponent No. 2.
C. R. A. 663/67;
J. M. Thakore, Advocate General with Suresh A. Shah, for Applicant; G. N. Desai, Govt. Pleader, for Opponent No. 1; A. J. Pandya, for Opponent No. 2.
C. R. A. 664/67;
J. M. Thakore, Advocate General with Suresh A. Shah, for Applicant; G. N. Desai, Govt. Pleader, for Opponent No. 1.
C. R. As Nos. 665/67 and 277/67:—
J. M. Thakore, Advocate General with Suresh A. Shah, for Applicant; G. N. Desai, Govt. Pleader, for Opponent No. 1; S. S. Shevade, for Opponent No. 2.

SHELAT, J.— This group of eight revision applications raises a common question as to whether the Gujarat Housing Board established under the Gujarat Housing Board Act, 1961 which is said to be a local authority contemplated in Section 3, sub-section (3) of the said Act, becomes a necessary or proper party so called under the provisions contained in O. X of the Civil Procedure Code, by reason of their being directed to appear and adduce evidence, if any, under Section 50, sub-section (2) of the Land Acquisition Act, 1894, hereinafter to be referred to as "the Act", as amended by Act XX of 1965 by the Gujarat State, in the land acquisition proceedings taken out by the Local Government for the benefit of the Housing Board. In the event of our finding that the Gujarat Housing Board is not a party either necessary or proper in the proceedings under the Act, we are required to consider as to the meaning given to the words "to appear and adduce evidence, if any" so as to include the right of audience as also to cross-examine the claimant's witnesses etc., in the matter.

2-5. x x x x
6. The Gujarat Housing Board is constituted under the provisions contained in Gujarat Housing Board Act, 1961 and as contemplated in sub-section (3) of Section 3 thereof, it shall be deemed to be a local authority for the purposes of the Act as also for the relevant Land

Acquisition Law. It is common ground that this Board is interested in the land acquisition proceedings as the compensation amount is to come from its funds for the acquisition of those lands and since it is a Local Authority as required in Section 50(2) of the Land Acquisition Act, (hereinafter to be referred to as "the Act") it has a right to appear and adduce evidence for the purpose of determining the amount of compensation. We may set out Section 50 of the Act. It runs thus:—

"50. (1) Where the provisions of this Act are put in force for the purpose of acquiring land at the cost of any fund controlled or managed by a local authority or of any Company, the charges of and incidental to such acquisition shall be defrayed from or by such fund or Company.

(2) In any proceeding held before a Collector or Court in such cases the local authority or Company concerned may appear and adduce evidence for the purpose of determining the amount of compensation;

Provided that no such local authority of Company shall be entitled to demand a reference under Section 18."

Sub-section (2) of Section 50 of the Act, however, has come to be amended by Gujarat Act No. XX of 1965 of the Land Acquisition (Gujarat Unification and Amendment) Act, 1963. By reason of Section 23 thereof, in Section 50 of the principal Act, in sub-section (2) for the words "may appear and adduce evidence" the words "shall be called upon to appear and adduce evidence, if any" shall be substituted. In other words, by reason of this amendment the duty is cast on the Collector or the Court as the case may be, to call upon any such local authority or Company concerned to appear and adduce evidence, if any, for the purpose of determining the amount of compensation, instead of a mere right given to it under the principal Act to appear and adduce evidence for the said purpose. This amended provision has come in force with effect from 9th July, 1965. The Gujarat Housing Board thereupon filed applications in the various Compensation Cases pending before the City Civil Court, Ahmedabad, for being joined as party to the proceedings, and that has raised a question whether such a right given to it under Section 50, sub-section (2) of the Act requires the Court to join it as a party to the proceeding having all the rights that a party to a suit or a legal proceeding can claim. In other words, the Housing Board by reason of its being a Local Authority (acquiring body of the lands in question) as contemplated in Section 50(1) of the Act becomes a necessary or proper party in these cases for the purpose of determination of the com-

penensation. Much though the applications are made by the Gujarat Housing Board under the provisions contained in O. I. R. 10 of the Civil Procedure Code, the claim is made by reason of Section 50(2) as amended, inasmuch as it requires the Court to call upon the Board to appear and adduce evidence, if any, in the proceeding. In other words, it is said that it has been made obligatory on the Court to issue notice in that regard to the Board and that is as good as a notice to the interested parties in the proceedings. When that is so, there is no reason to treat it as a body appearing as something other than a party to the proceeding. Besides, except that it has no right to demand a reference as provided in S. 50(2) proviso, it has all the rights of a party in any such legal proceeding. It should, therefore, be joined as a party in all those Compensation Cases. The contention on the other hand is that such a Body, much though the funds for the acquisition of the land come from it, it does not become the party to the proceedings in any manner, as it is given a limited right to appear and adduce evidence, if any, for the only purpose of determining the amount of compensation. Besides, it was said that if it was intended to be joined as a party to the proceeding, it must have been shown to be a 'person interested' as defined in Section 3(b) of the Act, and the very fact that it has not been so shown, and on the other hand when it has been specifically denied the right to demand even reference under Section 18 of the Act, the Board is not given any such status as that of a party to the proceeding so as to have all the rights of a party or person interested in the same. In fact, he is represented for all purposes by the Local Govt. through Collector which puts the proceedings in motion for acquisition of the property and it is only the Collector who has been recognised as a party to the proceedings, as also for purposes of appeal or so, and no other under the Act. The Board having some interest in meeting the claim of compensation is, however, allowed an access to the proceeding so as to be able to place before the Collector or the Court its evidence in that regard which Collector may not be able to do so. In other words, it was urged that he cannot be treated as a party to the proceeding so as to entitle it to get all the rights of a party in any legal proceeding.

7. Before considering this question as raised before us, it is essential to point out by a reference to Section 53 which says that:

"save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act."

In other words, where there is a provision under Section 50(2) of the Act itself, the provisions of O. I. R. 10 of the Civil Procedure Code may not be available as sought to be invoked by the Board in the Court below. When such a specific provision has been there for the advantage of any such local authority or Company having a right to be before the Court in any such proceeding, we think the Board cannot invoke the aid of provisions contained in O. I. R. 10 of the Civil Procedure Code which relates to joinder of proper parties to the suit.

8. Even if the provisions contained in the Civil Procedure Code were available to the Board, O. I. R. 3 of the Civil Procedure Code would not apply to call such Local Authority as a necessary party to the proceeding for the reason that only those persons can be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise. There is no right to relief against this Board under the Act. The compensation has to be paid by the Collector — and the land acquired has to be taken possession of also by Collector. The award has to be passed against the Collector and in no case against any such acquiring body. Similarly the Board can hardly be called a proper party as contemplated in O. I. R. 10 of the Civil Procedure Code. This provision entitles the Court to strike out or join any person as plaintiff or defendant if it thought that the name of any such person ought to have been joined or whose presence before the Court was considered necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the same. The same considerations would also arise and since no award can be passed against it or that it would not be entitled to file an appeal against any such award under the Act, it would not be even a proper party without whose being on record, Court cannot decide the matter completely. The Board has been given merely a right to adduce evidence in support of the Collector who represents the State which acquires the property for the local authority. In our view, therefore, even if provisions of Civil Procedure Code were to apply and the application be so made, we think that the Board is neither a necessary nor a proper party to the proceeding as a party defendant in any suit. A party is and has to be one against whom there exists any relief and that the Court can grant it so that it can challenge it even in appeal, like any other party in a suit or a legal proceeding.

9. We would now consider the arguments advanced before us and find out by reference to the provisions of the Act as to what is intended by giving such a right to the Board under Section 50(2) of the Act as amended by Gujarat State.

10. Now, as already pointed out hereabove, by reason of sub-section (2) of Section 50 of the Act, any such Local Authority or the Company, as the case may be, does get a right to appear and adduce evidence for the purpose of determining the amount of compensation both before the Collector as also before the Court in any such proceeding under the Act. His right to appear, therefore, commences with the inquiry that the Collector is required to hold for making an award under Section 11 of the Act. Since that right to appear is merely in relation to and for the purpose of determining the amount of compensation, the Collector is not required to issue any notice to him before he reaches that stage, as in that inquiry he may have to consider other matters relating to the land of the claimant in respect of the land to be acquired by the Govt. at the instance of such Local Authority or the Company. But such a local authority is entitled to a notice to appear and adduce evidence, if any, in respect of the compensation for the land acquired that may be fixed by the Collector. In an award to be made by the Collector under Section 11 of the Act, he has to set out his decisions with regard to the true area of the land, the compensation which in his opinion, should be allowed for the land, and the apportionment thereof to be made among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him. Then comes Section 12 under which such an award shall be filed in the Collector's office and it shall be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested. The Collector has to give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made. It would appear therefrom that the "persons interested" before him are no other than those contemplated under Section 3(b) of the Act which defines the expression "persons interested". That includes all persons claiming an interest in compensation to be made on account of the acquisition of the land under this Act. It becomes, therefore, plain that the persons interested referred to so far in the award that may be passed by the Collector, would

be those persons claiming interest in compensation which may be made on account of their land having been acquired by the Government. They are thus no others than the claimants in respect of the compensation amount meaning thereby the persons who are either owners or having any interest in the land acquired for which they can claim compensation or a share therein. Thus that expression does not contemplate any such local authority for whose benefit land is acquired and from whom the compensation is to come. At that stage the Govt. becomes a party proposing the amount of compensation to be made to those persons having interest in land and that creates a liability on the Govt. so much so that the award under Section 11 of the Act binds it. Even the Govt. has no right to demand a reference against that award of the Local Authority or the Collector as the case may be. Thus so far there is no voice given to the Local Authority except having a right to appear and adduce evidence for showing that the compensation claimed was not proper or that it should be fixed at a particular rate on the basis of evidence led by it.

11. If we now turn to Section 18 of the Act, it appears clear that a reference to the Court against any such award can only be made by any person interested, and that too who has not accepted that award. As provided therein, he has to make a written application to the Collector stating his objection, if any, to the measurement of the land, the amount of the compensation or as to apportionment of the compensation among the persons interested. It is worth noting at this stage that the Local Authority or the Company as the case may be, is not given any right to demand a reference under Section 18 in view of a clear Proviso to Section 50 of the Act. In other words, just as Collector is bound by the award, the Local Authority for whom the State Government has chosen to acquire the land is also bound by it. They have no right to have the compensation in any manner reduced once it is given by an award under Section 11 of the Act. The reference, therefore, is intended for the benefit of those persons interested in the compensation made in the award on account of acquisition of their land or any rights therein. In the reference that the Collector is required to make under Section 19 of the Act, he has to set out:—

(a) the situation and the extent of the land etc.,

(b) the names of the persons whom he has reason to think interested in such land,

(c) the amount awarded for damages and paid or tendered under Sections 5 and 17, or either of them, and the amount

of compensation awarded under Section 11, and

(d) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined.

Then comes Section 20 which provides for service of notice. On receipt of any such reference made by the Collector under Sections 18 and 19 of the Act, the Court shall cause a notice, specifying the day on which the Court will proceed to determine the objection, and directing their appearance before the Court on that day, to be served on certain persons set out therein. Those persons are (a) the applicant i.e., the person at whose in-

stance the reference is made by the Collector. (b) all persons interested in the objection, except such (if any) of them as have consented without protest to receive payment of the compensation awarded, and (c) if the objection is in regard to the area of the land or to the amount of the compensation, the Collector. It is from the reference made by the Collector that the Court has to find out the persons who are parties to the proceeding before him. There is no other person contemplated in Section 20 of the Act on whom any such notice is required to be served. As we said above, the Local Authority is not a person interested as could come under Section 3(b) of the Act and where the question involved in the reference is amount of compensation or area, the Collector and that way a representative of Local Government which acquires the land is required to be a party to the proceeding. In fact, we find nowhere any term—such a party—to the proceeding used, and all that they refer to are persons interested in the compensation or where there arise questions of compensation or area of the land, the Collector has to be before the Court in that proceeding. They can be styled as parties of which claimant can well be characterised as it were a plaintiff—and the Collector—a defendant in a suit. The Collector represents all the interests viz. of the State as also for any such acquiring body with whose funds and for whose benefit any land is acquired.

12. Examining the scheme of the Act further, if we refer to Section 26 of the Act, it provides for making the Award by the Judge specifying the amount awarded under clause first of sub-section (1) of Section 23, and also the amounts (if any) respectively awarded under each of the other clauses of the same sub-section, together with the grounds of awarding each of the said amounts. Sub-section (2) of Section 26 says that every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of

Section 2, clause (2), and Section 2, clause (9), respectively, of the Code of Civil Procedure, 1908. Thus, this Award refers to the amount awarded by the Court in favour of the claimant or a person at whose instance a reference for an additional claim etc., is made. That claimant becomes a decree-holder. If more amount is awarded, and the party which has to pay is the Collector representing the Local Government. Section 27 relates to an order to be passed in respect of costs while passing any such award and as to by what persons and in what proportion such costs are to be paid. Sub-section (2) thereof says that when the order of the Collector is not upheld, the costs shall ordinarily be paid by the Collector, unless the Court shall be of opinion that the claim of the applicant was so extravagant or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made or that he should pay a part of the Collector's costs. Section 28 then says that if the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court. In other words, the effect of all these provisions is that the Court recognises only the Collector as a party against whom any such award has to be passed. Neither the Company nor any Local Authority as contemplated in Section 50 of the Act comes in the picture or is recognised as a party against whom any such orders can be passed while making any award either by the Collector under Section 11 or by the Court under Section 26 of the Act. After leaving some sections which deal with apportionment of compensation, there comes Section 31 which provides that the Collector, on making an award under Section 11, shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section. Section 34 then says that when the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of six per centum per annum from the time of so taking possession until it shall have been so paid or deposited. It may be stated here that it is the Collector who is entitled to take possession of the land after the award is made under Section 11 and the land shall there-

upon vest absolutely in the Government as contemplated under Section 16 of the Act. It is by virtue of an agreement between the Local Authority such as the Housing Board in this case, and the Government that on being satisfied about the requirements of any such corporate body that it would initiate the enquiry towards the acquisition of any such lands. All that can come in Chapter VII of the Act and it is thereafter under Section 50 that such Local Authority or Company for whom any such land is acquired is given a right to appear and adduce evidence for the purpose of determining the amount of compensation. We may at this stage refer to Section 54 which provides for appeals in proceedings before Court and there also no other person except the persons interested as we pointed out hereabove or the Collector as the case may be, would become entitled to file appeal against the Award passed under Section 26 of the Act by any Court. It would, thus, appear that at no stage down from the time when the proceedings are initiated, till the stage of appeal, any such Local Authority such as the one in these cases comes in as a party to the proceedings so as to enable any Court to pass any orders against it.

13. With such a scheme of the Act before us, and keeping in mind even the general principles referred to in O. I of the Civil Procedure Code relating to parties — either necessary or proper — to any such or a legal proceeding, we think that a Local Authority or Company as the case may be, has no status of a party as such, for it has no right to demand a reference, and against whom no award having the force of a decree can be passed. In other words, even if it is on record by reason of its being given a right to appear and adduce evidence, in regard to the compensation, no order either for payment or for costs can be passed against it by the Court. Nor has it been given even a right to appeal against the Award of the Court. A necessary or a proper party is one against whom there is any relief claimed, or that his presence is so essential to enable the Court to effectively decide any such claim. It must be such a party who if dissatisfied can well be entitled to a right of appeal against any such decision. No such right is at all given to it much less contemplated in the provisions of the Act. That right is given to the Govt. through its representative the Collector and to no other. The mere fact, therefore, that it is allowed a right to appear and adduce evidence would not make it a party to the proceeding as such unless these rights are given to it by the statute. Thus, the scheme of the Act tends to indicate clearly that such a Local Authority or the Company as the case

may be contemplated under Section 50 of the Act should be given an opportunity to meet any claim of compensation made by the persons interested in the land acquired by the Govt. giving it a proper intimation to appear and adduce evidence if any, in relation to the question of the amount of compensation. It can help the party-Govt. — in reducing its burden in that direction — and more so, as the party required to pay may well take all care to see that adequate evidence is procured and placed before the Land Acquisition Officer or the Court, so that an adequate and reasonable compensation may have to be paid. But in no case, it would mean that by having to issue any such notice under Section 50(2) of the Act as amended by Gujarat State, it changes its character, and makes it a party to the proceeding giving all the rights of a party to any legal proceeding in law. In our view, it is a limited right given to it under Section 50(2) and that too for a limited purpose, and in no case, it can be joined or added as a party-defendant, either because it is a necessary or a proper party as understood in relation to a legal proceeding.

14. Mr. Parikh has in this connection invited a reference to two decisions. The first is a decision in the case of Municipal Corporation, Pabna v. Jogendra Narain Raikut, (1909) 13 Cal. W. N. 116. The facts were that certain lands were acquired by the Government for a Municipal market in Raghhabpur, in the town of Pabna, at the instance of the Pabna Municipality. Claims for compensation were preferred by six sets of claimants. After the award was given by the Land Acquisition Deputy Collector under Section 11 of the Act, the claimants applied for references under Sec. 18 of the Act to the Court of the District Judge of Pabna. In those references the Secretary of State for India in Council was not made a party to the proceedings. In appeal before the High Court, it was held that a company or corporation for whose benefit any land may be acquired by the Collector is not a necessary party in a land acquisition proceeding and S. 50 of the Land Acquisition Act allows such company or corporation to appear simply for the purpose of watching the proceedings or assisting the Secretary of State. It was further held that such a company or corporation has no power to ask for a reference under Section 18 of the Act and that it has no right to appeal against the decree made upon a reference. The proceedings, however, came to be set aside and the matter was remanded as the Secretary of State for India in Council was not made a party to the same. An emphasis was laid by Mr. Parikh, the learned advocate for some of the claimants in revision applications before us,

that the only right that is given to any such Company or Local Authority under Section 50, sub-section (2) of the Act was to appear and adduce evidence for the purpose of determining the amount of compensation and that was in the nature of an advantage to a party simply for the purpose of watching the proceedings or assisting the Secretary of State now the State and no more. While we do agree with the decision that such a Company or Corporation is in no way a necessary or proper party in the proceedings and that the only necessary or proper party would be the Govt. or the Collector in such a case, we are unable to go to the length of agreeing with the decision when it says that the Local Authority or the Company as the case may be, is put in the nature of an additional party simply for the purpose of watching the proceedings or assisting the Secretary of State. It appears that the effect of the words "may appear and adduce evidence for the purpose of determining the amount of compensation" has not been considered. In our view, it involves something more than mere watching of the proceedings or assisting the Secretary of State or the Collector as the case may be, in such proceedings. Another decision referred to by him is the case of Corporation of the City of Nagpur v. Narendrakumar Motilal, AIR 1959 Bom. 297. In the proceedings before the Land Acquisition Officer, the Corporation of the City of Nagpur for which the land was sought to be acquired, was permitted to intervene under the provisions of Section 50(2) for the purpose of determining the amount of compensation. The Corporation was dissatisfied with the award made by the Land Acquisition Officer and had applied under Section 18 of the Act to the Land Acquisition Officer to make a reference to the Civil Court. That application was rejected in limine upon the ground that the applicant Corporation was not a person interested in the compensation within the meaning of Section 18 and was therefore not entitled to move an application for making a reference. The matter was taken to the High Court and after considering the scheme of the Act it was held that in every case of acquisition, it is only the Local Government that can acquire land and for every acquisition, compensation has to be paid. A perusal of Part V of the Act indicates that the duty to pay compensation is solely that of the Local Government. Therefore, in the entire proceedings from the time of the issue of the notification under Section 6 till the payment of compensation, the parties interested in the acquisition are in law the owner of the property and Government who acquires the property. Then it has been observed that no doubt Government acquires property on behalf of an indivi-

dual company or statutory Corporation, but having regard to the scheme of the Act it does not appear that these parties can become parties to the proceedings except to the limited extent indicated in Sec. 50(2) of the Land Acquisition Act. Going further it has been observed that the only parties who may be so to be interested in the payment of compensation are the Government which alone can legally acquire the land, and of course the owner whose land is being acquired. It further held that Section 50(2) cannot be construed to enlarge the right of the Local Authority or Corporation beyond the right expressly mentioned therein, namely, to appear and adduce evidence for the purpose of determining the compensation. The Local Authority or Company do not by virtue of that right become parties to the acquisition proceedings. Later on, the words "claiming an interest in compensation" in Section 3(b) of the Act were held to be limited to the person who pays the compensation under the Act, namely, the Government, and in any event, it cannot include within that expression the person for whom the acquisition is being made. In the case of *Mandalay Municipal Committee v. Maung It*, AIR 1929 Rang. 115, the expression "persons interested" in sub-section (b) of Section 4 of the Act came to be explained as meaning persons interested by reason of their interest in the land acquired as owners, tenants and the like, and not persons interested as acquiring the land through the Secretary of State. Such a person is not entitled to separate notice under Section 20 though he has the right to appear and adduce evidence under Section 50(2) of the Act. The same view appears to have been taken in the case of *State of Orissa v. Amarendra Pratap Singh*, AIR 1967 Orissa 180. As observed in that case, Sections 3(b), 18, 20, 21 and 50 make it clear that a company or a local authority for whose benefit the acquisition is made is not entitled to demand a reference under Sec. 18 and is not a necessary party to such proceedings though it can in any proceeding before the Collector or the Court appear and adduce evidence for the purpose of determining the amount of compensation. It also follows that it has no right to file any appeal against the judgment of the Court. It would thus appear that having regard to the definition of the expression "persons interested" in Section 3(b) and taking into account the scheme of the Act as a whole, much though the funds for acquisition of the land were to be paid by them, they cannot be said to be persons interested as to claim any right to have a reference made or to have any appeal filed against any such award passed by the Court. They are not recognis-

ed under the Act as parties to the proceedings.

15. It was, however, pointed out by the learned Advocate General appearing for the Gujarat Housing Board that these decisions were prior to the amendment that came to be effected by Act 20 of 1965 which provides or casts a duty on the Court to issue notice on such Local Authority or the Company as the case may be, to appear and adduce evidence, if any, in regard to the determination of the amount of compensation under Section 50(2) of the Act. According to him, once the duty is cast on Collector or the Court to direct notice to be issued to appear, even for a limited purpose, he is before the Court, a party and more so when he is given a right to adduce evidence. He urged that the effective meaning should be given to those words used in Section 50(2) in such a manner as to meet the intention of the Legislature, that except that it cannot demand a reference as forbidden by the Proviso to Section 50 of the Act, for all other purposes he is a party to the proceeding and should be treated as such. Now it is true that by reason of the amendment to Section 50(2) of the Act, a duty is cast on the Collector or the Court to issue a notice, but in our view, it has made no difference in the substantial part of the section and in fact that has remained the same. Before amendment, it had a right to appear and adduce evidence and it depended upon it to so appear, if it chose. That discretion has remained the same. The difference now is that a notice is issued to him in regard to the matter to be heard which before the amendment, it had itself to remain on the look out if it so desired to appear. It is in our view an intimation sent to it so as to avail of the opportunity given to it to help the Collector by adducing its own evidence relating to the determination of the compensation for the land. In our view, the right has remained the same, and by reason of any such notice given to it, it is in no way enlarged as is sought to be claimed viz. of being treated as a party to the proceeding.

16. We do, however, feel that the words "appear and adduce evidence, if any," in any such proceeding even though for a limited purpose viz. in regard to the question of compensation, should be given an effective meaning and that it cannot be allowed to remain or leave it as an illusory right to any such local authority or the company as the case may be, by saying that it has merely a right to watch or assist the Collector in the proceeding. The learned Advocate General urged that the words "appear and adduce evidence" have to be given full meaning

so such so that the expression "adduce evidence" would be included within the meaning of the term "pleading" as used in the provisions of the Civil Procedure Code. As to the expression "appear", it was pointed out that in respect of Local Authority there was no question of any physical appearance of any such Board and that appearance was to be by some authorized person on its behalf. Now it cannot adduce evidence, without appearing, and therefore, as provided therein such a Local Authority becomes entitled to appear through its representative and that the appearance is obviously intended for the purpose of meeting the case in regard to compensation for the land acquired, to be determined in the case. Thus it can appear even through an advocate or any authorised agent for the purpose of adducing evidence. This right of adducing evidence may well be treated as a part of pleading as pointed out by a reference to the observation made in a decision in the case of *Aswin Shambhuprasad Patel v. National Reyon Corporation Ltd.*, 57 Bom LR 209=(AIR 1955 Bom 262). Those observations are:—

"The contention put forward by Mr. Bengeri before me is that "pleading" is included in the expression "appearance, application or act in or to any Court". In my opinion it is clear that "pleading" would not be included in any of these expressions. The right of audience in Court, the right to address the Court, the right to examine and cross-examine witnesses, are all parts of pleading with which Order III does not deal at all."

While therefore the expression "appear" may not include a claim for pleading, the "right to adduce evidence, if any," would certainly be included in the term "pleading" and therefore such a right would include a right to examine and cross-examine witnesses. In our view, the expression "adduce" used therein appears to have wider meaning and not merely confined to leading its own evidence. Thus a right of appearance is for the purpose of adducing evidence, and that evidence must necessarily include a right to bring before the Court every type of relevant evidence, inclusive of bringing on record the same through cross-examination of the claimant's witnesses in the case. In *Prem's Judicial Dictionary* at page 79, the term "adduce" has been explained as meaning "to bring forward proofs or evidence in support of some statement or proposition already made." The right to give evidence is in relation to an inquiry for determining compensation, and any evidence led by the Board would be of hardly any effective use unless it is also allowed to challenge the evidence led by the claimant by being allowed to cross-

examine his witnesses in the case. It can then meet the evidence of the claimant, both oral or documentary, and unless that right is included in any such right of merely examining or leading evidence by the Local Authority, it would not be enough or proper. That right, in our opinion, is impliedly there once it is given a right to appear and adduce evidence. It would include demolition of evidence led by the claimant and that can be done also in cross-examination. Not to give such a meaning to those words, would make the right if not entirely illusory or ineffective, highly unsatisfactory so much so that it may not be as effective a right given to it for the purpose intended thereby. That appears to be the only way of making those expressions effective in meaning intended to be given by Section 50 (2) of the Act. But that right cannot further stand enlarged to an extent as to be styled as a party to the proceeding so as to have full rights of a party in any such legal proceeding. It is difficult to say that for that purpose it can be called a party as understood in law and all that therefore, we may say is that while it is entitled to be on record and for the purpose mentioned in Section 50 (2), it has a right to appear and adduce evidence, if any, as explained above. It gets no other right under Section 50 (2) of the Act. It was urged by Mr. Desai, the learned Government Pleader appearing for the State, that with the direction to issue notice to the acquiring body, it has to be taken that it was a notice issued for appearing in the matter for all purposes as would be issued to the claimant and the Collector under Section 20 of the Act. Besides, it was said that the Legislature added or amended those words in Section 50 (2) as it related to the Local Authority or Company referred to in Section 50 of the Act, and that otherwise it would have been required to add words to that effect both in Section 9 and Section 20 of the Act the former touching the proceedings before the Land Acquisition Officer and the latter before the Court. Now it is true that the Courts below have taken the view that Section 20 would have been so amended, but that does not determine the question. The provisions of the Act have to be read as a whole and it would not make any difference, if any such provision were clear enough to give the indication that it was to be a notice as contemplated in Section 20 viz. as if to a party to the proceeding. But proviso to Section 50 does not give him a right to demand a reference. As already pointed out hereabove, the Local Authority or the Company contemplated in Section 50(1) of the Act, does not become a party against whom an award could be passed, or even give it a right of appeal under the Act. Besides, it

is allowed to appear only for a limited purpose of adducing evidence and that too for only the determination of the amount of compensation to be passed for the land acquired by the Government for it.

17. An attempt was, however, made to take into account the objects and reasons given in the Bill No XIII of 1963 published in the Gujarat Government Gazette of 7th March 1963 in so far as the amendment to S 50 (2) of the Act is concerned. The reasons given for that amendment in clause 23 thereof are as under:

"In the case of acquisition of land for company etc., the company ultimately pays for the acquisition of the land. It is, therefore, fair and equitable that the company should be joined as a party in the proceedings because mere right to lead evidence as provided in the existing Section 50 is not enough. This clause therefore provides for an amendment to Section 50 to achieve the object."

If this clause were to be read for enabling the Court to give proper meaning to Section 50(2) of the Act as amended, it can be said that the intention was to join the Local Authority or the Company, as the case may be, as a party to the proceedings, as in its opinion, a mere right to lead evidence as provided in the existing Section 50 of the Act was not enough. It was, however, pointed out by a reference to the decision in the case of Aswini Kumar Ghose v. Arabindeo Bose, AIR 1952 SC 369 where it was held that the statement of objects and reasons appended to the Bill should be ruled out as an aid to the construction of a Statute. The relevant observations are as under:—

"The Statement of Objects and Reasons, seeks only to explain what reasons induced the mover to introduce the bill in the House and what objects he sought to achieve. But those objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law. The Bill may have undergone radical changes during its passage through the House or Houses, and there is no guarantee that the reasons which led to its introduction and the objects thereby sought to be achieved have remained the same throughout till the Bill emerges from the House as an Act of the Legislature, for they do not form part of the Bill and are not voted upon by the members. The statement of Objects and Reasons appended to the Bill should be ruled out as an aid to the construction of a statute."

This proposition has not been challenged by the learned Advocate General though no doubt he invited reference to two other decisions of the Supreme Court to this regard. The first is the decision in the case of S. C. Prashar, Income-tax Officer v. Vasanten Dwarkadas, (1964) 1 SCR 29

at p. 54—(AIR 1963 SC 1356 at p 1367) some observations made by the Court were referred to:

"But the Statement of Objects and Reasons can be referred to for the purpose of ascertaining the circumstances which led to the legislation in order to find out what was the mischief which the legislation aimed at."

Another decision is in the case of A. Thanagal Kunju Musallam v. M. Venkitchalam Potu, (1955) 2 SCR 1196 = (AIR 1956 SC 246) The observations referred to are at page 1237 (of SCR) = at p. 265 (of AIR). They are as under:—

"It has been said that although the statement of the objects and reasons appended to a bill is not admissible as an aid to the construction of the Act as passed see Aswini Kumar Ghose's case 1953 SCR 1 = AIR 1952 SC 369, yet it may be referred to only for the limited purpose of ascertaining the conditions prevailing at the time which necessitated the making of the law (see Subodh Gopal Bose's case, (1954) SCR 587 at page 628 = (AIR 1954 SC 92 at pages 104, 105).")

It follows therefrom that the objects and reasons appended to the Bill cannot be made use of when the construction of any provision in the statute is to be made, though no doubt they may be looked into for the purpose of finding out the mischief aimed at. Now it is clear that the amended part of Section 50(2) of the Act is neither ambiguous nor is such as would require us to look into the circumstances then prevailing which necessitated the amendment. In our view, while construing the effect of the amended provision, no such reference is called for and we cannot look into the same to say that thereby it was intended to allow the Local Authority or the Company as a party in a legal proceeding. We have considered the effect of this part of Section 50(2) after taking into consideration the scheme of the Act and the relevant provisions negating any such effect being given to the same as urged before us. It is equally clear to us that the amended provision contained in Section 50(2) of the Act does not alter the position as it stood before except in the sense that the Collector or the Court, as the case may be, is required to give an intimation to any such Local authority or the Company for appearance and adducing evidence, if any, in respect of the determination of the question of the amount of compensation for the land acquired. However, in our view the proper order that should have been passed was to allow it to be on record of the case, so as to enable it to appear and adduce evidence, if any, for the limited purpose contemplated under Section 50(2) of the Act. Besides, in our view these words "appear and adduce evidence, if any," used in Section 50(2) of the Act,

have to be given effective and proper meaning so as to entitle it to cross-examine the witnesses examined by the claimant, and also adduce its own evidence in respect of the determination of the question of the amount of compensation for the lands acquired. That would further entitle it to be heard by the Collector or the Court even though the Collector has all the rights of being a party to the proceeding.

18. In the result, therefore, the orders passed in Revision Applications Nos. 277, 662, 663, 664 and 665 of 1967 shall be set aside and we direct that the applicant in each of these applications shall be allowed to be on record of the case though not as a party-defendant to the proceeding as the Collector in the case. The applicant shall be allowed to appear for adducing its evidence in the case as contemplated in Section 50(2) of the Act so much so as to enable it to cross-examine also the witnesses examined by the claimant and also advance arguments in the manner for that limited purpose.

19. Similar orders are passed in the other Revision Applications Nos. 547, 548 & 549 of 1966, and that way the orders passed by the Court below shall stand so modified.

20. In the circumstances, we make no order as to costs in all the applications.

Order accordingly.

AIR 1970 GUJARAT 91 (V 57 C 14)

N. G. SHELAT AND B. R. SOMPURA, JJ.

Collector, Baroda and another, Appellants v. Haridas Maganlal Parikh and others, Respondents.

A. F. O. D. No. 30 of 1964, D/- 26-7-1968; against order of Joint Civil J., Senior Division, Baroda in Land Reference No. 1 of 1961.

Land Acquisition Act (1894), Ss. 23 and 4 — Market value of land — Determination — Evidence — Acquired land agricultural — Agreement for sale of same land entered into about three months prior to notification under S. 4 — Evidentiary value — Purchaser and purpose of purchase bona fide — Such agreement though does not create "interest in property" as required by S. 54, Transfer of Property Act, is still best evidence — Under such agreement price fixed at Rs. 51,000 but earnest money only at Rs. 2000 — Agreement also stipulating nine months, with provision for extension for six months more for vacation of land after payment of price — Yet such agreement reflects market value of that land as on date of notification under S. 4—(Transfer of Property Act (1882), S. 54).

CM/FM/B175/69/JRM/B

Where the land acquired is agricultural and an agreement for sale of the same land has been entered into about three months prior to the notification under S. 4 of the Land Acquisition Act, and the purchaser and the purpose of the purchase are bona fide, such an agreement, despite the fact that it does not create interest in the property as contemplated by Section 54, Transfer of Property Act, is the best evidence for determining the market value of the land for purposes of Section 23. Though under such agreement the price is fixed at Rs. 51000 but the earnest money only at Rs. 2000 and nine months with provision for extension for six months more is also stipulated for vacation of the land after the payment of the price, it still reflects the market value of that land as on the date of the notification under Section 4.

(Paras 6 and 8)

The best method of determination of the true market price of a land under Section 23 (1) is to base it on instances of sale of the same land or a portion of it and all that is then required is that it should have taken place by about the same time or within a reasonable time before the notification is issued under Section 4. The next best method is to look for other instances comparable in time and quality. Further, while making such determination, the potential value of the land has to be taken into consideration but where the market value is to be determined on the basis of the sale instances in the nearby locality, such potential value should not be separately assessed. The test is a test of sale in market and that will necessarily require a willing seller and a prudent purchaser.

(Para 3)

An agreement of sale no doubt is not a sale itself. It does not in fact create interest in the property as contemplated under Section 54, Transfer of Property Act. On that account alone, it cannot be eliminated from being considered as a relevant and good piece of evidence for determining the market value of a land if it is established that it was a bona fide transaction between a willing purchaser and a willing vendor.

(Para 5)

When the acquired Land is vast agricultural property and an agreement to sell it for housing purposes, stipulates nine months with provision for extension for six months more for vacating it after payment of the price, such stipulation is perfectly natural and quite necessary in such transactions involving large property. There is nothing unusual in it. The period provided in that agreement cannot affect the fixing of the price of the property when that agreement took place or even within such a short period as nine months. While such an agreement of sale, not shown to be

speculative or imprudent in which event it may not be treated as bona fide, may not stand on the same footing as a sale transferring the right to the property, it can be said to be indicative of and in reality reflecting the price of that property as on the date, on which it has been entered into. (Para 7)

Thus, where such an agreement is in respect of the same land as that acquired and it had been entered into only three months prior to the date of the notification under Section 4, it can serve as a very good piece of evidence for determining the market price of that land. When the property remains only with the vendor during the period stipulated in that agreement, the price of Rs. 51,000 fixed under it cannot be taken in any way less having regard to that period. In such a case, the amount of Rs. 2,000 fixed as deposit also cannot be said to be far less since much depends upon that land agreed to be sold for housing purposes, being turned into non-agricultural use which also requires to be permitted by the Revenue and Town Planning authorities. Therefore, in such a case the market value of that land as on the date of the notification under S. 4 is as given in that agreement. AIR 1968 Guj 5 and ILR (1966) Guj 1006 and AIR 1967 SC 465, Foll.; (1908) 10 Bom LR 907, Ref.

(Para 8)

Cases Referred: Chronological Paras
(1988) AIR 1968 Guj 5 (V 55).

Ambalal Mansukhram v. Addl.
Special Land Acquisition Officer 3

(1967) AIR 1967 SC 465 (V 54) =

(1967) 1 SCR 489, Raghubans
Narain Singh v. Uttar Pradesh
Govt. 3, 5

(1966) ILR (1966) Guj 1006, Land
Acquisition Officer, Surat v.

Dalichand Virchand Shroff 3

(1908) 10 Bom LR 907, Govt. of
Bombay v. Merwanji Muncherji 5

G. N. Desai, Govt. Pleader, for Appel-
lants; S. B. Majmudar, for Respondents.

JUDGMENT: The land bearing S. No. 70 admeasuring 3 vighas 1 vasa (1 acre 32 gunthas) situated in the limits of the village of Jetalpur in Baroda Taluka belonging to the respondents came to be acquired by the Government for the purpose of construction of houses for the members of the staff of the Electricity Board, at Baroda, in pursuance of a notification issued on 11-4-60 under S. 4 of the Land Acquisition Act, hereinafter to be referred to as 'the Act'. Jetalpur village adjoins the Alkapuri area of Baroda City. The owners of that land claimed Rs. 98,010 by way of compensation under Section 23 of the Act before the Special Land Acquisition Officer, who awarded in all Rs. 9,995-80 nP, inclusive of solatium at

the rate of 15 per cent on the amount of compensation. It was valued at the rate of Rs. 4800 per one acre of land. Feeling dissatisfied with that award, a reference was made under Section 18 of the Act by the Land Acquisition Officer at their instance in the Court of the District Judge at Baroda. The claim made therein was at the rate of 10 annas per one square foot of land i.e., at the rate of Rs. 27,225 per one acre of land. That claim together with other claims made by them came to be allowed by the Joint Civil Judge (S. D.) Baroda who heard the reference. The opponents were thereby directed to pay Rs. 48,635-20 nP, and the costs of the reference to the claimants with interest at 4 per cent on the above amount from the date of possession to that of payment. Feeling dissatisfied with that order passed on 25th February 1963 by Mr. N. J. Patel, Joint Civil Judge (Senior Division), Baroda, the opponents have come in appeal before this Court.

2. The map Ex. 44 shows the situation of S. No. 70 as also other survey numbers situated in the Race Course Circle and round about the same. This S. No. 70 is situated in the Race Course Circle and that Race Course Circle is outside the municipal limits of Baroda, though no doubt it adjoins the municipal limits. In other words, the circular Race Course Road is the end of the municipal limits of Baroda. It further appears that a road coming from the Baroda Railway Station joins the Race Course Road at a point opposite to S. Nos. 70 and 74. S. No. 74 belongs to Government and the passage for S. No. 70 appears to be passing through that land for going on to the road to the east. It appears further clear from the evidence on record that at the time of the acquisition of the land, there were existing various societies such as Alkapuri Co-operative Housing Society, Milan Co-operative Housing Society, Gautamnagar Housing Society and Sarabhai Co-operative Housing Society round about and in the vicinity of that area. At a distance of about 100 feet from the land under acquisition there was the State Transport Workshop. Sarabhai Chemical Works, as the evidence discloses, is at a distance of about a furlong or so from the land under acquisition. There were some other factories though no doubt at some distance from the acquired land in that area. The land under acquisition was an agricultural land and it was not converted for non-agricultural use so far. While the area within the municipal limits had much developed, this part of the area where the land under acquisition is situated though not developed so much, it can be said to be having a building potentiality for the reason that it was situated in a fairly good and developed area.

2-A. The claimants based the claim for compensation for the land under acquisition on two grounds. The first was on the basis of the said land agreed to be purchased by some persons on behalf of Vijayanagar Co-operative Housing Society for a sum of Rupees 51,001 under an agreement of sale at Ex. 41 dated 2nd January 1960. According to the claimants, that was the best piece of evidence — it being in respect of the same land and by about the same time when the notification under Section 4 came to be issued for the acquisition of that land. They also relied upon certain instances of sale having taken place in respect of lands or plots in the nearby localities by about the same time so as to show that the land under acquisition was worth at any rate 10 annas per square foot of land. The trial Court accepted the price for which that land was agreed to be sold to Vijayanagar Co-operative Housing Society in the month of January, 1960 and awarded compensation on that basis. That has been, however, challenged by the learned Govt. Pleader. According to him, the situation of the land under acquisition can be said to be not such as to entitle the claimants to claim compensation at the rate they have asked for. According to him, this land was an agricultural land and was not even converted for the non-agricultural use by obtaining necessary permission from the Collector as required under the provisions of the Land Revenue Code. He further contended that it was not within the municipal limits and cannot be said to be a land in a developed area, for, the real development had taken place within the municipal limits of Baroda and not so much beyond those limits viz. in the village where the land under acquisition is situated. He also pointed out that the land was almost blocked on all sides and for going on to the road in the east, there is merely a foot-track passing through S. No. 74 as would appear from the map Ex. 40 in the case. It cannot, therefore, be said to be just abutting on the road on that side. On that basis, an attempt was made to refer to various other instances of sale of lands in the nearby locality and have the same compared with the land under acquisition for ascertaining the market value of the land. With regard to the agreement of sale as per Ex. 41 in respect of this land and two other lands S. Nos. 41/1 and 41/2 belonging to the claimants themselves, it was urged that it can hardly be said to be a real instance of sale so as to serve a good and correct guide for ascertaining the market value of the land. According to him, it is difficult to call it a genuine transaction between a willing vendor and a willing vendee and even if it was found to be a bona fide transaction between two willing persons, having regard to certain

terms set out therein, it cannot be said that the price mentioned therein correctly reflects the market price of the land under acquisition by about that time.

3. Now before we consider the arguments advanced by the learned advocates appearing for the parties, we would refer to a decision in the case of Ambalal Mansukhram Joshi v. Addl. Special Land Acquisition Officer, AIR 1968 Guj 5 where, it was observed that the best method of determination of the true market price of a plot of land is to base it on instances of sale of the same land or a portion of it at about the same time. The next best method is to look for other instances comparable in time and quality. Almost the same view has been expressed by this Court in the case of Land Acquisition Officer, Surat v. Dalichand Virchand Shroff, reported in ILR (1966) Guj 1006. Therein it is observed as under:—

"Ordinarily a sale instance of the very land which is acquired would afford the best guidance for assessing the value of the acquired land, if the sale has taken place within a reasonable time from the date of the notification under Section 4 of the Act and there is no evidence of any rise or fall in the prices during the interval. When the evidence for ascertaining the market value of the acquired property consists of the price paid or realised in respect of a part of the same land then it must be first established that it was a bona fide transaction and secondly that the transaction had taken place within a reasonable time before the notification under Section 4 of the Act." In other words, it follows that of the comparable instances both in point of time as also its quality which would help the Court in ascertaining the market value of the land under Section 23 (1) of the Act, the sale instance, if any, of that very land or a portion of that land which is acquired would afford the best guidance and all that is then required is, that it should have taken place by about the same time or within a reasonable time before the notification is issued under Section 4 of the Act. The agreement of sale Ex. 41, as already stated hereabove, is in respect of lands including S. No. 70 i. e., the land under acquisition. It is dated 2-1-60. The market price was to be determined as on 11-4-60 i.e., within so short a period as of about 3 months or so. Thus, if such an instance as per Ex. 41 is found to be a bona fide transaction intended to lead to a sale of that property, it would certainly serve as the best piece of evidence to the exclusion of any other piece of evidence in the circumstances of the case. Another point which requires to be mentioned is that while determining the market value of the land, as observed in ILR (1966) Guj 1006 referred to above, the poten-

tial value of the land has to be taken into consideration, but where the market value is to be determined on the basis of the sale instances of properties in the nearby locality, the potential value of the land should not be separately assessed because the prices evidenced by the sale instances cover the potential value. The test is a test of sale in market and that would necessarily require a willing seller and a prudent purchaser. We may as well refer to the observations made by the Supreme Court in the case of Raghubans Narain Singh v. Uttar Pradesh Govt., AIR 1967 SC 465 to which our attention was invited by Mr. Majmudar, the learned advocate for the respondents, that market value on the basis of which compensation is payable under S. 23 of the Act means the price that a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all its existing advantages, and its potential possibilities when laid out in its most advantageous manner excluding any advantages due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired." It was on that basis that the Supreme Court ruled out the contention raised on behalf of the appellant that the High Court's judgment suffered from an infirmity in that it failed to take into account the potential value of the land as a building site in view of the evidence as to the town's recent development. In other words, when the market value of the land has to be ascertained on the basis of some such instances of sale, either in respect of the acquired property or any portion thereof, or in respect of properties in the near by vicinity, all those considerations having been covered thereunder, they need not require to be assessed separately. If, therefore, the determination of the price of the land under acquisition has to be on any such instances of sale, the other considerations which were raised by either side before us, viz., about the land being better situated and that again in a developed locality, or about the same suffering from certain disadvantages as pointed out by the learned Govt. Pleader viz., about the area not so far developed or about the same being an agricultural land till that date, lose their importance.

4. With these broad principles before us, we have to consider the agreement of sale as per Ex. 41 dated 2-1-60. A faint attempt was made to suggest that the transaction cannot be easily said to be a genuine or a bona fide one. He pointed out that though the entire property was sold for such a large amount, the earnest money paid by the purchasers was far too small viz., Rs. 2000 only and that the evidence about the claimants having

received that amount was even shaky. It was, besides, said that it was not in fact a sale as such under a registered sale-deed which can validly pass title to the property comprised thereunder. Then it was alternatively urged that even if such an agreement of sale were taken into account for ascertaining the market value of the land under acquisition, some of the terms set out therein were such by reason of which it would not be possible to call such a transaction an instance of sale which should serve a good and conclusive guide for fixing the market value of the land under acquisition. Those two circumstances were that while vendors bound themselves to part with the land on receipt of the consideration set out therein, there was no corresponding liability on the vendees to purchase the same. As stated therein, it was optional for them to purchase if they so desired and that the only penalty that they had to pay was the forfeiture of the amount of earnest money of Rs. 2000/- paid to the vendors. The vendors were, thus, not in a position to enforce the contract against them. The other factor on which the learned Govt. Pleader placed considerable stress was that a period of nine months was fixed for vacating the land on payment of the amount and that again a further period of six months would have to be extended, if necessary. Thus, the transaction according to him, was covering a price not actually as it stood on the date of the transaction viz. In January 1960 but it covered the longer period of about 15 months and that, therefore, the market price cannot be ascertained on the basis of any such agreement of sale as it stood on 2-1-1960.

5. We have, therefore, first to find out as to whether such an agreement of sale can be treated as a relevant and good piece of evidence justifying the Court to take into account for the ascertainment of the market value of the land comprised thereunder and later on acquired by the Government. An agreement of sale no doubt is not a sale itself. It does not in fact create interest in the property as contemplated under Section 54 of the Transfer of Property Act. On that account alone, it cannot be eliminated from being considered as a relevant and good piece of evidence if it is established that it was a bona fide transaction between a willing purchaser and a willing vendor. In fact in this respect Mr. Majmudar invited a reference to a decision of the Supreme Court in AIR 1967 S. C. 465 (Supra), where even an offer made by a person for the purchase of any property and though not accepted, was treated to be a relevant piece of evidence, and if that evidence is accepted as reliable, it can well serve as a good piece of evidence for determining the market value on that basis. In that

case, the claimant led the evidence of one Zaidi a Deputy Collector who had just retired and who prior to his retirement had written two letters to the claimant dated Oct. 14, 1945 and Nov. 20, 1945 expressing his desire to purchase the land in question with a view to build a residential house for himself so that he could live therein after his retirement. In those letters he had offered Rs. 18,000/-, but that offer was not accepted by the claimant (appellant) as he demanded Rupees 24,000/- as price of the land. This part of the evidence was accepted by the learned Dist. Judge and, in his view, the offer conveyed by Zaidi was genuine and bona fide and that on that basis he valued the land at Rs. 18,000/-. The matter was taken to the High Court at Allahabad which took a different view and in respect of that part of the evidence it was observed that it cannot afford a true test about the value of the property. The other instances of sale of the nearby locality were then considered and the final order was passed. The appellant claimant preferred an appeal to the Supreme Court against that decision and there while dealing with that part of the evidence about an offer made by witness Zaidi for the purchase of that property sought to be relied upon, their Lordships of the Supreme Court observed thus:

"The evidence of witness Zaidi being the evidence of an offer made by him cannot of course be equated in importance with the evidence of proper specimen sales of properties in the neighbourhood. Obviously an offer does not come within the category of sales and purchases but nonetheless if a person who had made an offer himself gives evidence such evidence is relevant in that it is evidence that in his opinion that land was of a certain value. But the evidence that the owner refused an offer so made amounts to this only that in his opinion his land was worth more than the figure of value named or that the offer was for some other reason such that he was not willing to accept". Going further, it was observed that "it has also been held that an agreement to sell is a relevant matter and can be used in relation to fixing the value of the acquired land. (cf. Governor General in Council v. Ghiasuddin, (1929) 30 Pun LR 212) (sic.)" Then the Supreme Court considered the effect of the evidence relating to witness Zaidi's offer it being in the nature of an offer not similar to an offer made by an irresponsible broker as commented in the case of Govt. of Bombay v. Merwanji Muncherji, (1908) 10 Bom LR 907. That part of the evidence was accepted by the Supreme Court and it upheld the view of the District Judge as against that of the High Court in that case. The valuation made by the District Court on that evidence, as observed by the

Supreme Court, rested on a better footing in the circumstances of the case and ought to have been accepted by the High Court. This decision, therefore, not only recognises any such evidence of an offer for purchasing any property under acquisition prior to the date of notification issued for the same by the Government, but that even such evidence can serve as a good piece of evidence which can be acted upon in the circumstances of the case. It also appears that an agreement to sell in respect of any such property would be a relevant matter and can be used in relation to fixing the market value of the land. Such an agreement to sell stands on a stronger and better footing than what a onesided offer can help in determining the price of the land under acquisition. The agreement of sale is a bilateral contract enforceable in law. The vendor agrees to sell the property and the purchaser agrees to purchase the same as per the conditions set out in the agreement. There is an agreement of price in respect of the property comprised thereunder. What remains to be done is to have a deed passed in respect of the said property as per the terms or conditions set out in that agreement. In our view, therefore, such an agreement of sale, apart from the same being perfectly a relevant piece of evidence, can also be a basis for fixing the market value of the land under acquisition provided of course it is found to be a bona fide transaction between a willing or a prudent purchaser and a willing vendor.

6. Of the claimants, one of the claimants has been examined at Ex. 39 and he has referred to the transaction entered into. The purchasers were the chief organizers of the proposed Vijaynagar Co-operative Housing Society. Of these three persons one Sudhakar J. Mehta has been examined at Ex. 53 in the case. If we turn to the evidence of Sudhakar Mehta, it appears that he was serving as the General Manager in the Sarabhai Chemicals since last 13 years or so. As we said above, Sarabhai Chemicals has been at a distance of about a furlong or so from the land under acquisition. In fact all the Sarabhai Group factories have been situated in that locality and there are some Housing Colonies nearby. He has then said that he, one Vithalbhai Shah and Ratilal Raval had proposed to have a housing society. They had selected the lands bearing survey Nos. 70, 41/1 & 41/2 belonging to the claimants for the purpose of putting houses for the members of that society. Those lands were selected by them because they were near the place where they were working. He has then stated that Rs. 2000 were paid by way of earnest money and the agreement of sale as per Ex. 41 was executed by them. His evidence also shows that as soon as they

came to learn about those lands having been notified for acquisition for the Gujarat Electricity Board, they moved in the matter by saying that they had already purchased the same for the construction of houses for persons working in that area and that they should not acquire the same. Since nothing came out, they were then required to cancel the agreement on 19-6-60 and obtained back the amount of Rs. 2000 paid by them by way of earnest money. From this evidence read with that of the claimant at Ex. 39, it appears abundantly clear that these lands were agreed to be purchased for genuine and bona fide purpose. It was not a transaction between one individual or the other out to enter into speculative market as we come across some irresponsible brokers entering into agreement for the purchase of lands in the hope of rising prices of lands in the near future. This was a transaction on behalf of members of a co-operative society of whom one was the General Manager of Sarabhai Chemicals. The purpose was, as we said above, for the construction of houses for the members of that society and more particularly in the interest of those who were working in that factory area nearby. Thus, the purchasers were, in our view, bona fide purchasers. The purpose for the purchase of those lands was again a genuine purpose. Not a single question has been put to this witness whereby any suggestion has been made about the doubtful character of purpose or about their having not been bona fide purchasers in respect of these lands. In fact, they made an attempt to see that the lands remained with them and the acquisition was dropped. It was only when that could not happen that they had to cancel the same and get back the amount. In this connection, it is worth noting that there is nothing to show much less to suggest even in a remote manner that they knew of any such impending acquisition by about the time when they entered into the transaction with the owners of this property. There is no suggestion made in the cross-examination of Sudhakar about the transaction being of a speculative or collusive character. Nor is any suggestion made about their having not paid any amount by way of earnest money to them. It may be worth noting that later on the Government did not acquire the two other lands S. Nos. 41/1 and 41/2 which were adjacent to S. No. 70 and these persons who later on formed another society viz., Gautamnagar Housing Society purchased those two lands by even giving a somewhat higher price than what they had agreed to pay for the same under the agreement of sale. That strengthens the conclusion that we have reached about their bona fide desire of going for such lands for the purpose of

construction of houses for the members of such a society. It is no doubt true, as pointed out by Mr. Desai, the learned Government Pleader, that the claimant Haridas Ex. 39 has admitted about his having not credited the sum of Rs. 2000 in his account books. He has also admitted about his having not mentioned about the Banakhat in the claim petition. He has, however, averred about his having received a sum of Rs. 2000 from the organizers of the society at the time when the agreement of sale had taken place and there is hardly any good ground to reject his evidence particularly when it finds support from Shri Sudhakar Mehta Ex. 53 in the case. The writing itself refers to the same. The mere fact that he had not credited the sum in his account books does not justify us to hold that no such amount was received and that the transaction was sham. As to his having not mentioned about the Banakhat in the claim petition, he has explained the same by saying that he had already intimated that fact earlier to the Land Acquisition Officer. In fact an attempt was made to see that the lands were not acquired particularly when they were agreed to be sold to a Housing Society. We do not think that this evidence read with that of Sudhakar at Ex. 53 can justify us to say in any way about the transaction being sham or that it was not bona fide. The learned Judge has believed that evidence and we think quite rightly.

7. The contention of the learned Govt. Pleader then was that even if such a transaction was a genuine one, having regard to certain conditions set out in the agreement, it cannot be treated as a good and conclusive piece of evidence for the ascertainment of the market value of the land under acquisition. According to him, having regard to the conditions set out in the agreement, the risk of the purchasers was in respect of a mere loss of Rupees 2000 in case they were not to purchase the property even after the period of about 15th months, and that there was no right given to the vendors to enforce the specific performance of the contract against the purchasers. Their right was only to forfeit the amount of Rs. 2000 which was given to them by way of earnest money. That appears to be no doubt true. But we have to take into account the nature of the transaction and the character of the property as it then stood. As we said above, it was an agricultural land. It was not so far converted into the use for non-agricultural purpose. Now as set out in the agreement, that was required to be done. Then they had to obtain the necessary permission or sanction from the revenue authorities as also the Town Planning authorities before using the same for housing purposes. Even the title to

the property would have to be cleared before sale-deed could be executed. Now all these things were required to be done by the purchasers obviously with the full co-operation and help of the vendors. All that would take necessarily some time and it was from that point of view that they had fixed a period of nine months within which all those requirements were to be carried out. If any more time was needed, it was to be extended by six months more. This provision for the period was perfectly natural and quite necessary in such transactions involving large property. There is nothing unusual therein. The period provided in the agreement cannot affect the fixing of the price of the property when it took place or even within such a short period of nine months. Thereafter it has been provided that if after all that has been done they did not purchase the same, the vendors had a right to forfeit the amount of earnest money, and if on the other hand, the vendors failed to pass a registered sale-deed on payment of full consideration and after having carried out the conditions set out in the agreement, they were entitled to have it enforced by having recourse to any remedy in accordance with law. Now this shows the extent of their readiness and willingness to pay the balance of the amount and take over the property. The purchasers could have easily asked for the lands on payment of the amount even within a short period of a few days or a month or so if all those requirements could be carried out within that period. There was nothing to prevent them from claiming so. If they did not, the vendors were entitled to forfeit Rs. 2000 the earnest money paid to them. The vendors may have felt such a bargain a proper one, for they may well hope that they can get purchasers for such a price or more later on and in fact, as the evidence shows, these very people purchased the two other lands out of this agreement later on at a higher rate, after they were dropped from acquisition by the Government. What mattered was the agreement between the parties and it is nowhere shown that it was a speculative or imprudent transaction which in that event may not be treated as a bona fide transaction. While, therefore, such an agreement of sale may not stand on the same footing as a sale transaction transferring right to the property, it can be said to be indicative of and in reality reflecting the price of the property as on that date viz. in January 1960 or thereabout.

8. In our view, therefore, since it was in respect of the same land bearing S. No. 70 under acquisition and it took place only three months before the date of the notification issued under Section 4 of the Act for acquisition of that land, it can

serve as a very good piece of evidence for determining the market price of the land under acquisition. The price cannot be taken in any way less having regard to the period fixed for the reason that the property remained with the vendors during that period. The amount of Rs. 2000 as deposit cannot also be said to be far less for much depended upon the lands being turned into non-agricultural use and again required to be permitted by the Revenue and Town Planning authorities. We are satisfied that the market value of the land as it stood as on the date when the notification was published under Section 4 was as given in the agreement of sale. That has been accepted by the learned Judge below and we agree with him.

9. In the view that we have taken in agreement with the learned trial Judge, it is unnecessary to go into other instances of sale and evidence in the case. In the result, therefore, the order passed by the learned Civil Judge is proper and calls for no interference whatsoever.

10. The appeal is dismissed. The appellant shall pay the costs of the respondents and bear his own.

Appeal dismissed.

AIR 1970 GUJARAT 97 (V 57 C 15)*

AKBAR S. SARELA AND B. R. SOMPURA, JJ.

Manshanker Prabhashanker Dwivedi and another, Appellants v. The State of Gujarat, Respondent.

Criminal Appeals Nos. 486 and 555 of 1966, D/- 9-9-1968, from judgment of Special Judge, Surendranagar, in Special Case No. 2 of 1966.

(A) Penal Code (1860), Sections 161, 21 (9) and 21 (12) (before amendment in 1964) — Senior Lecturer of a Government College — Appointment by University as an Examiner — Acceptance of bribe for giving more marks to a candidate — Accused not guilty either under Section 161 Penal Code or under Section 5(1)(d) of Prevention of Corruption Act — (Civil Services — Bombay Civil Services Conduct and Discipline Rules, Rule 21 — Lecturer of a Government College — University appointing him as an examiner — Government, held, could have no control over him as an examiner — Fact that disciplinary action could be taken for his conduct as an examiner, no criterion) — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Ambiguous provision of law — Interpreted in fav-

* (Only portions approved for reporting by the High Court are reported here.)

EM/GM/C119/69/TVN/D

our of subject) — (Words and Phrases — 'Otherwise' — 'Officer' — Meaning) — (Prevention of Corruption Act (1947), S. 5 (1) (d)).

The accused, a senior Lecturer in a Government college was appointed by the University as an examiner in Physics practical examination at another college centre. It was not suggested that the appointment was because he was a lecturer in a Government college. It appeared that he, while he was such an examiner, received Rs. 500 as bribe for giving more marks to one of the students who sat for the examination.

Held, the accused could not be convicted either under Section 161 of Penal Code or under Section 5 (1) (d) of the Prevention of Corruption Act. (Para 36)

The ingredients of Section 161, Penal Code are that the accused should be a public servant and secondly, that the act which is a reward or favour was in the matter of doing any official act or done in the exercise of official functions. Though he was a public servant in the sense that he was in the Government service as a senior Lecturer in a Government college, the bribe in this case was obtained not in connection with any official act or in connection with exercise of his official functions as such servant but in connection with his work as an Examiner of the University. As such Examiner he was not a public servant because he was appointed as such Examiner independently of his being Government servant in a Government college and was being paid by the University fees for the work done for that University. (Paras 34 and 36)

Neither Cl. (9) nor Cl. (12) of Section 21 of Penal Code which, among other clauses denotes as to who are public officers within the meaning of that expression in the Code, could also be of no assistance to the prosecution. For Cl. (9) to apply, the person should be an officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty and from this portion of the clause read in conjunction with the last portion of it, it is evident that such pay, remuneration or commission must come from the Government. This is implied in the context and the words immediately preceding supply the context when they refer to Government as the paying authority. Any other interpretation would widen the scope of the last part of the ninth clause to absurd limits. The context supplies another indication also in the words "every officer" which means that the person receiving the fee etc., from the Government must hold some office, no matter it is humble or an exalted one. (Para 34)

The context of the clause as it stood before amendment in 1964 as a whole indicates that the connection with the

Government is necessary either in respect of the payment of the remuneration or in respect of the performance of a public duty. Together with the rule of construction that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which had failed to explain itself. It must be held that Cl. (9) as it stood then did not attract the current case. The rule of construction above stated has greater force in respect of laws imposing criminal liability. (Para 34)

Clause (12) of Section 21 of Penal Code could not also be applied for the reason, firstly that the accused was not an officer in the service of the University and secondly, even if it should be assumed to be a local authority, the accused could not be treated as being in its service, which implies existence of a relationship of master and servant. There was no such relationship between the accused and the University. (Para 35)

It was argued that since under R. 21 of the Bombay Civil Services Conduct and Discipline Rules, a Government servant could not, without previous permission of the Government, engage in any work while on duty or on leave other than his public duties, he must be held to be a Government servant even when he was an Examiner. The argument was rejected on the ground that from what was contained in the above Rule, it did not follow that even as an Examiner he continued to be under control of the Government. Whether in respect of misconduct in that work the Government could institute a departmental proceeding against him was also held not material. (Para 36)

Under Section 5 (1) (d) of the Prevention of Corruption Act, two elements are to be satisfied. (i) the public servant should obtain for himself or for any other person any valuable thing or pecuniary advantage and (ii) he must have done so by corrupt or illegal means or by otherwise abusing his position as public servant. In this case, though the acceptance of the amount could be said to be corrupt or illegal, it was not in abuse of his position as a public servant. At the most it could be an abuse of his position as an examiner of the University. It could not be argued that the requirement as to abuse of position as a public servant is attached to the employment of means indicated by the expression 'otherwise' and not means which are corrupt or illegal, so that it was sufficient under Section 5 (1) (d) if the receipt of the valuable thing or pecuniary advantage was corrupt or illegal, and that it was not further necessary that it should be in abuse of his position as a public

servant. The word 'otherwise' was linked with the words 'corrupt or illegal' and could not go with the words "abusing his position". The word "otherwise" should mean 'by other like means' and it was in that sense that the expression must be interpreted. Further, the word 'by' before the word 'otherwise' indicated the manner of obtaining the bribe. So, the expression 'abusing his position' must go with both. The above construction would also be consistent with the scheme of the section. (Para 39)

The guiding factor for the construction of a clause of this nature is the language used, language being construed according to fair commonsense, keeping in mind the object of the legislature. The construction placed must be such as promotes and not defeats the object of the Act. The object of the Act is to prevent and deal with corruption and bribery amongst public servants. It is with reference to this object that the penal provisions must be construed and if so construed the abuse of position would be the necessary ingredient of the offence; the abuse being either by corrupt or illegal means or by otherwise. Such a construction would thus be within the spirit of the enactment. AIR 1962 S.C. 195 & AIR 1962 S.C. 1821 & AIR 1957 S.C. 13 and (1862-63) 12 Bom. HCR 1 & (1901) ILR 28 Cal. 344 & AIR 1954 S.C. 364 & AIR 1955 S.C. 404 & AIR 1963 S.C. 1116 & AIR 1956 S.C. 476, Rel. on. (Paras 38 & 39)

(B) Prevention of Corruption Act (1947), S. 5 — "In the discharge of his duties" — Interpretation — Ingredients of S. 5(1) (d) — (Words and Phrases).

The ingredients of the particular offence in CL (d) of S. 5(1) of the Act are: (1) that he should be a public servant; (2) that he should use some corrupt or illegal means or otherwise abuse his position as a public servant; (3) that he should have thereby obtained a valuable thing or pecuniary advantage; and (4) for himself or for any other person. In order to bring the charge home to an accused person under the above clause it is not necessary that the public servant in question, while misconducting himself should have done so in the discharge of his duty. The expression 'in the discharge of his duties' is mere descriptive of the offence and it is not an ingredient thereof. AIR 1962 S. C. 195, Foll. (Para 40)

(C) Penal Code (1860), S. 21(12) — "In the pay of" means "in the employment of" — (Words and Phrases — "In the pay of").

In the context of the provision under S. 21(12) of the Penal Code, the word 'pay' must be construed to mean wages or money given for service. "In the pay of" construed in the light of the context of the whole clause would carry the

meaning 'in the employment of'. AIR 1935 Bom. 333, Foll. (Para 35)

Cases Referred: Chronological Paras
 (1963) AIR 1963 S.C. 1116 (V 50)=
 (1963) 2 Cri. L. J. 186, Narayanan
 v. State of Kerala 38, 39, 40
 (1962) AIR 1962 S.C. 195 (V 49)=
 1962 (1) Cri. L. J. 203, Dhanesh-
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 mia v. Delhi Administration 34
 (1957) AIR 1957 S.C. 13 (V 44)=
 1957 Cri. L. J. 1, G. A. Monterio
 v. State of Ajmer 34
 (1956) AIR 1956 S.C. 476 (V 43)=
 1956 Cri. L. J. 837, Ram Krishna
 v. State of Delhi 39
 (1955) AIR 1955 S.C. 404 (V 42)=
 1955 SCR 1427, Shivnandan v.
 Punjab National Bank 35
 (1954) AIR 1954 S.C. 364 (V 41)=
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 Ram Gopal v. Govt. of Hydera-
 bad 35
 (1935) AIR 1935 Bom. 333 (V 22)=
 37 Bom. L. R. 410, Goolbai v.
 Pestonji 35
 (1901) ILR 28 Cal. 344=4 Cal. W.N.
 798, Nazamuddin v. Queen
 Empress 34
 (1872) 4 P.C. 184=26 L.T. 45, Dyke
 v. Elliot, The Gauntlet 38
 (1862-63) 12 Bom HCR 1, Reg. v.
 Ramajirao Jivbaji 34

In Criminal Appeal No. 486 of 1966:

H. M. Choksi for G. A. Pandit, for Ap-
 pellant; G. M. Vidyarthi, Asst. Govt.
 Pleader, for the State.

In Criminal Appeal No. 555 of 1966:

H. K. Thakore, for Appellant; G. M.
 Vidyarthi, Asst. Govt. Pleader, for the
 State.

SARELA, J.— The appellant in Crimi-
 nal Appeal No. 486/66, Manshankar Pra-
 bhashankar Dwivedi (hereinafter refer-
 red to as accused No. 1), was at the rele-
 vant time a senior Lecturer at the D. K.
 V. College, Jamnagar, which is a Gov-
 ernment College. The appellant in Crimi-
 nal Appeal No. 555/66, Vallabhdas Gor-
 dhandas Thakkar (hereinafter referred to
 as accused No. 2) was a legal practitioner
 taking Income-tax and Sales-tax cases.
 He also resided at Jamnagar. In April
 1964 the Physics Practical Examination
 for F.Y.B.Sc. equivalent to Inter Science
 was to be held by the Gujarat Univer-
 sity and one of the centres was Surendra-
 nagar. The accused No. 1 had been ap-
 pointed as the Examiner for Physics
 Practical. It is in respect of that examina-
 tion that he is alleged to have accepted
 a gratification of Rs. 500/- other than
 legal remuneration for showing favour
 to one candidate Jayendra Jayantilal by
 giving him more marks in the said exa-
 mination. It was alleged by the prosecu-

tion that he obtained that sum through accused No. 2 on 27-4-1964. Therefore, the charge against accused No. 1 was under S. 161, Indian Penal Code and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947, and the charge against accused No. 2 was under Section 165-A of the Indian Penal Code and under Section 5(2) of the Prevention of Corruption Act, 1947 read with Section 114 of the Indian Penal Code. Both these charges against both the accused have been found proved by the learned Special Judge, Surendranagar, who by his judgment and order dated 27-5-1966 convicted them of these offences and sentenced each of them to rigorous imprisonment for two years and a fine of Rs. 1000/- in default of payment of which to undergo further rigorous imprisonment for six months. Against those convictions and sentences these appeals have been filed.

(2-30) x x x x x

31. For these reasons we agree with the learned Special Judge that the prosecution case against the accused in respect of the demand and acceptance of bribe of Rs. 500/- for the purpose of giving more marks to Jayendra has been made out.

32. It is argued on behalf of the accused that even if the prosecution case as to demand and acceptance of the bribe is held to be established, neither Section 161, Indian Penal Code, nor Section 5(1) (d) of the Prevention of Corruption Act would be attracted in this case. The argument as regards Section 161, Indian Penal Code, is that the offence under that section relates to a public servant who attempts to obtain or obtains a bribe and one of the necessary ingredients of the offence is that he does so as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in the exercise of his official function favour or disfavour to any person. Therefore, the necessary ingredients are firstly that the person is a public servant and secondly that the act which is a reward or favour was in the matter of doing any official act or done in the exercise of official functions. In this case, it was argued, accused No. 1 was no doubt a public servant in the sense that he was in the Government service as a senior Lecturer in a Government College, but the bribe in this case was obtained not in connection with any official act or in connection with exercise of his official functions as such servant but in connection with his work as an Examiner of the Gujarat University. As such Examiner he was not a public servant because he was appointed as such Examiner independently of his being Government servant in a Government College and was

being paid by the Gujarat University fees for the work done for that University. It has nothing to do with his being a Government servant. It was conceded that if even as an Examiner he was a public servant then as this bribe was obtained for giving more marks it would be in connection with an official act or in exercise of his official functions, but as he cannot be called a public servant in relation to his office as such Examiner the basic requirement of Section 161, Indian Penal Code, was lacking in this case. As regards Section 5(1)(d) of the Prevention of Corruption Act the argument is that that provision also concerns an offence committed by a public servant and if accused No. 1 as an Examiner of the Gujarat University is not a public servant in relation to acceptance of bribe in this case then clause (d) of Section 5(1) would also not be attracted because although he is generally a public servant being in the service of the Government as a senior Lecturer, the necessary ingredient for the offence under clause (d) is that he abuses his position as a public servant. In the present case he has no doubt abused his position as an Examiner but not as a Government servant in which capacity only he is a public servant.

33. The learned Special Judge accepted the submission that as a Government servant the offence would not fall under Section 161, Indian Penal Code, as the acceptance of bribe was not in the doing of an official act or in the exercise of his official functions as such servant. But the learned Judge took the view that accused No. 1 was even as an Examiner, a public servant and for that view he relied on clause Ninth of Section 21 of the Indian Penal Code as it then stood. As regards the argument relating to Section 5(1) (d) of the Prevention of Corruption Act the learned Judge took the view that having regard to Supreme Court decision in *Dhaneswar v. Delhi Administration*, AIR 1962 S.C. 195, it was not necessary that the misconduct which is an offence under clause (d) of Section 5(1) should be committed in the discharge of the public servant's duties and therefore the clause is much wider than Section 161 of the Indian Penal Code and even if the offence did not fall under Section 161, Indian Penal Code, it would fall under that clause. He also took the view that if the payment is held to have been obtained by corrupt or illegal means it was not necessary that the accused should abuse his position as a public servant or that he should have obtained the money while acting as a public servant.

34. The learned Assistant Government Pleader relied on the Ninth clause of Section 21 of the Indian Penal Code as it then stood. That clause read as under:—

"Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government or to make any survey, assessment or contract on behalf of the Government or to execute any revenue process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government or to make, authenticate or keep any document relating to the pecuniary interest of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty."

The words on which reliance was placed are "and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty." It was not contended either before the lower Court or before us that as an Examiner accused No. 1 was an officer in the service or pay of the Government. The contention was that accused No. 1 fell within the four corners of the words "or remunerated by fees or commission for the performance of any public duty" and it was this contention which found favour with the lower Court. The argument is that examining the question papers is in the nature of a public duty and accused No. 1 was remunerated for the performance of that duty by fees by the Gujarat University. It was argued by Mr. Choksi, the learned advocate for accused No. 1, that if the last words of clause Ninth on which reliance is placed are read in the context of the words which immediately precede them or in the context of the Ninth clause as a whole it is obvious that when that part of the clause speaks of being remunerated by fees or commission what is implicit is being so remunerated by Government. That argument will have to be accepted for more than one reason. The clause does not say remunerated by whom. If it does not say so the reason obviously is that this is implied in the context and the words immediately preceding supply the context when they refer to Government as the paying authority. Any other interpretation would widen the scope of the last part of the Ninth clause to absurd limits. Discharge of functions relating to education may be treated as a public duty. Tendering the sick amongst the poor would also be considered as a public duty. If the last words of clause Ninth are read without any qualification, an honorary doctor working in a hospital run by a trust and receiving honorarium would be covered by it and would become a public servant. The context supplies another indication also in the words "every offi-

cer". The person to be remunerated by fees or commission must be an officer. The word 'officer' implies the holding of an office. In *R. K. Dalmia v. Delhi Administration*, AIR 1962 S.C. 1821 paras 285 and 286, it was urged that an Investigator appointed by Government under Section 33(1) of the Insurance Act, 1938, was a public servant in view of the Ninth clause of Section 21 of the Indian Penal Code. The Supreme Court pointed out that the Investigator Annadhanam was not an employee of the Government but was a Chartered Accountant who had been directed by the order of the Central Government to investigate into the affairs of the Insurance Company and to report to the Government on the investigation made by him. Of course, he was to get some remuneration for the work he was entrusted with. Then with reference to Ninth clause of Section 21, Indian Penal Code, the Supreme Court said:—

"According to this clause, every officer in the service or pay of the Government or remunerated by fees or commission for the purpose of any public duty would be a public servant. A person who is directed to investigate into the affairs of an Insurance Company under Section 33(1) of the Insurance Act, does not ipso facto become an officer. There is no office which he holds. He is not employed in service and therefore this definition would not apply to Annadhanam."

Reference may also be made to the observations of the Supreme Court in *G. A. Monterio v. State of Ajmer*, AIR 1957 SC 13. There also the last words of Ninth clause beginning with the words "and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty" were construed. The appellant in that case was a class III servant employed as a metal examiner, also called Chaser, in the Railway Carriage Workshops at Ajmer. It was argued that he was not a public servant. Their Lordships referred to the dictum of West J. in *Reg v. Ramajirao Jivbaji*, (1862-63) 12 Bom. HCR 1 where it was stated that "the word 'officer' meant some person employed to exercise to some extent and in certain circumstances a delegated function of Government. He was either himself armed with some authority or representative character or his duties were immediately auxiliary to those of some one who was so armed." They also referred to a Calcutta decision in *Nazamuddin v. Queen Empress*, (1901) ILR 28 Cal. 344 where it was held that "an officer in the service or pay of Government within the terms of Section 21, Indian Penal Code, is one who is appointed to some office for the performance of some public duty" and their Lordships of the Supreme Court went on to say:—

"The true test, therefore, in order to determine whether a person is an officer of the Government is: (i) whether he is in the service or pay of the Government and (ii) whether he is entrusted with the performance of any public duty. If both these requirements are satisfied it matters not the least what is the nature of his office, whether the duties he is performing are of an exalted character or very humble indeed."

These observations indicate that a person to be an officer must hold some office though it does not matter whether the office is humble or exalted. The holding of an office implies the charge of a duty attached to that office. Now, the person who is remunerated by fees or commission must be an officer. Therefore, the use of the word 'officer' read in the context of the immediately preceding words where Government is referred to as the paying authority would indicate that the remuneration contemplated by the concluding words is remuneration by Government. It will now be convenient to refer what Mr. Choksi rightly calls the legislative interpretation of this part of the clause. It appears that in December 1964 this clause and clause twelfth were amended. Before referring to these amendments it would be convenient to refer to clause twelfth as it stood before the amendment. That clause read as under:—

"Every officer in the service or pay of a local authority or of a corporation engaged in any trade or industry which is established by a Central, Provincial or State Act or of a Government Company as defined in Section 617 of the Companies Act, 1956".

By the amendments introduced by Act 40/1964, the last words of the Ninth clause namely "every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty" were taken out of that clause and introduced in the new Twelfth clause which after amendment reads as under:—

"Every person—

- (a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;
- (b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government Company as defined in Section 617 of the Companies Act, 1956 (1 of 1956)."

It will be noticed that under clause (a) of the said clause which now corresponds to the last part of the old Ninth clause the expression 'every officer' is changed

to 'every person' and the words 'by the Government' are added after the words 'performance of any public duty'. Mr. Choksi argued that this amendment, particularly the addition of the words 'by the Government' shows the legislative interpretation of the clause under consideration. There is considerable substance in that submission. At any rate, the doubt, if any, which could rise in the interpretation of the last words of the Ninth clause as it stood before its amendment in December 1964 must be resolved firstly by reference to the context of the clause as a whole and that context indicates that the connection with the Government is necessary either in respect of the payment of the remuneration or in respect of the performance of a public duty and secondly by application of the rule of construction to which reference is made by Maxwell on Interpretation of Statutes at page 265 to which Mr. Choksi invited our attention. There it is stated that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is particularly so in respect of laws which impose criminal liability. We are therefore of the view that the last words of clause Ninth of Section 21 of the Indian Penal Code as it stood before amendment are not attracted in this case.

35. It was, however, argued alternatively by the learned Assistant Government Pleader that the case would at any rate fall under clause Twelfth as it then stood. Clause Twelfth as it stood before the amendment made in December 1964 has been earlier set out. It covered two categories of persons: (i) an officer in the service or pay of a local authority or (ii) of a corporation engaged in any trade or industry which is established by the Central, Provincial or State Act or of a Government Company as defined in Sec. 617 of the Companies Act, 1956. It is not the contention of the learned Assistant Government Pleader that accused No. 1 would fall in the second category. His contention is that he would fall under the first category. To fall in that category it must be proved firstly that he is an officer in the service or pay of a local authority. Much argument has been advanced before us whether the Gujarat University is or is not a local authority. It is not necessary to decide that question. We shall assume that it is a local authority. Even so it is difficult to hold that accused No. 1 is an officer in the service or pay of that authority. We have earlier pointed out that to be an officer a person must hold office. But the further question is whether he can be said to be in the service or pay of the

Gujarat University which, for the present, is assumed to be a local authority. The word 'service' means according to Concise Oxford Dictionary 'being a servant' and according to Chamber's 20th Century Dictionary 'condition of being servant; working for another'. In Aiyyar's Law Lexicon the definition is 'Being employed to serve another'. Bearing these meanings in mind it is obvious that the expression 'in the service of' implies a relationship of master and servant. It is obvious that there was no such relationship between accused No. 1 and the Gujarat University. Explaining the difference between a servant, a contractor and an agent their Lordships of the Supreme Court in *Lakshminarayan Ram Gopal v. Hyderabad Government*, AIR 1954 SC 364, accept as correct the following statement of law in Halsbury's Laws of England—

"An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given him in the course of his work; and independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result. An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."

The same principles of law are reiterated in slightly different words by the Supreme Court in *Shivnandan v. Punjab National Bank*, AIR 1955 S.C. 404. Therefore, the important test whether or not there is a relationship of master and servant is the existence of right of controlling the manner in which the other does the work. The mode of payment for service, the time for which the servant is engaged, the nature of those services or the power of dismissal may have some relevance as pointed out by the Bombay High Court in *Goolbai v. Pestonji*, AIR 1935 Bom 333; but the right of control as to the manner in which the other does the work is the conclusive test. On this test it cannot be said that accused No. 1 was in the service of the Gujarat University. It is also not possible to say that he was 'in the pay' of that University. The word 'pay' here must be construed in the light of the context and would mean wages or money given for service. 'In the pay of' construed in the light of the context of

the whole clause would carry the meaning "in the employment of". If that is so, accused No. 1, who received on agreement remuneration for certain agreed work, cannot fall in that category. In our opinion, the Twelfth clause as it stood before amendment of December 1964 was not attracted.

36. If, therefore accused No. 1 was not a public servant within the meaning of that expression used in Section 161 of the Indian Penal Code with reference to the work in respect of which he accepted the bribe Section 161 would not be attracted. The learned Assistant Government Pleader did argue as a last resort, so far as this Section is concerned, that with respect to the work of examining and assessing the papers on behalf of the Gujarat University accused No. 1 can be said to be doing his official act or discharging his official function as a senior Lecturer in the employ of Government. His contention was that this employment as an Examiner could not have been made except with the permission of the Government and therefore with respect to that work he continues to be subject to Government control and as he continues to be subject to Government control, the work that he does although independent of Government work must be treated as work done in the exercise of his official functions. It is not possible to accept that submission. His being a Government servant is not the necessary qualification for his being appointed as an Examiner. It is not so alleged. It has also not been alleged that his being a Government servant confers on him the advantage of his being appointed as an Examiner. Even if that was alleged, that would not make any difference. It is not even alleged that to be an Examiner accused No. 1 should have been a teacher in some institution; though even if that was the necessary qualification it would not make much difference. It is true that under Rule 21 of the Bombay Civil Services Conduct and Discipline Rules to which the learned Assistant Government Pleader invited our attention a Government servant was not without the previous permission of the Government to engage in any work while on duty or on leave other than his public duties. It may, therefore, be assumed that while accepting the work as an Examiner under the Gujarat University the Government had given to accused No. 1 the necessary permission as contemplated by Rule 21. But it does not follow that therefore in respect of that work accused No. 1 continued to be under the control of the Government. Whether in respect of misconduct in that work the Government could institute a departmental proceeding against him is not a matter for consideration here. Assuming that such a departmental proceeding could be instituted, the scope of the de-

partmental inquiry being very wide, it does not follow that therefore the act falls within the four corners of Section 161 of the Indian Penal Code, that is to say, it is in the nature of an official act or has reference to the exercise of official functions. That argument must, therefore, be rejected.

37. That takes us to the question of construction of clause (d) of Section 5(1) of Prevention of Corruption Act. That clause reads as under:—

"A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

“(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage;”

This provision was amended by Act No. 40/64 by omitting the words ‘in the discharge of his duty’ but the amendment does not make any difference on the question of interpretation of clause (d) having regard to the Supreme Court ruling to which reference will be made presently. The clause lays down two ingredients: (i) the public servant obtains for himself or for any other person any valuable thing or pecuniary advantage and (ii) he does so by corrupt or illegal means or by otherwise abusing his position as public servant. The first ingredient above-mentioned is satisfied in this case. The argument on behalf of accused No. 1 is that the second ingredient is not satisfied. It is conceded that if the prosecution case is held proved the means employed by the accused No. 1 can be said to be corrupt or illegal but it is argued that this is not enough and it is necessary that there must be an abuse of his position as a public servant and here no such abuse was involved as accused No. 1 was at the most abusing his position as an examiner but not as a public servant. The learned Assistant Government Pleader urges that the requirement as to abuse of position as a public servant is attached to the employment of means indicated by the expression ‘otherwise’ and not means which are corrupt or illegal. If the means are corrupt or illegal, says the learned Assistant Government Pleader, no abuse of position as a public servant is necessary. In the alternative he argues that even if in respect of employment of corrupt and illegal means the abuse of position as a public servant is necessary there has been such abuse in this case.

38. This calls for construction of the first part of the said clause (d) namely the part covered by the words ‘by corrupt or illegal means or by otherwise abusing his position as public servant’. Before construing this part it would be worthwhile to set out the broad principles of con-

struction in such cases. The principles are set out in a passage in the decision of the Judicial Committee in *Dyke v. Elliott, The Gauntlet*, (1872-4 PC 184) quoted by the Supreme Court in *M. Narayanan v. State of Kerala*, AIR 1963 SC 1116. That passage reads as under:—

“No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omisus*, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.” Earlier the Supreme Court refers to the object of the statute under the Prevention of Corruption Act and the provisions it makes for carrying out that object, and goes on to observe:

“As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object i.e., to prevent corruption among public servants and to prevent harassment of the honest among them.”

Therefore, the guiding factor for the construction of a clause of this nature is the language used, language being construed according to fair commonsense, keeping in mind the object of the legislature. The construction placed must be such as promotes and not defeats the object of the Act.

39. With these principles in mind we may now have a look at clause (d). It is obvious that the word ‘otherwise’ is linked with the words ‘corrupt or illegal’. In *Aiyer's Law Lexicon* one of the meanings given to the word ‘otherwise’ is ‘by other like means’ and it is in that sense that the expression has been interpreted by the Supreme Court in *M. Narayanan's case*, AIR 1963 SC 1116 (supra) where their Lordships said:

“The word ‘otherwise’ has wide connotation and if no limitation is placed on it the words ‘corrupt’, ‘illegal’ and ‘otherwise’ mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to

be put on that word and that limitation is that it takes colour from the preceding words alongwith which it appears in the clause, that is to say, something savouring of dishonest act on his part."

Now, bearing this in mind we have to consider whether the words 'abusing his position as a public servant' go only with the words 'by otherwise' or go also with the words 'corrupt or illegal means'. It will be noticed that the second part of the clause namely the one which relates to the obtaining of the valuable thing or pecuniary advantage relates to the object of the public servant namely the obtaining of a bribe. The first part concerns the manner of achieving that object. The manner is the use of means and use of position. As to the use of means the clause expressly mentions corrupt or illegal. But the legislature does not want to limit itself to these means only and so goes on to use the word 'otherwise'. If the meaning to be given to the word 'otherwise' is as earlier stated, the words 'by corrupt or illegal means' or 'by otherwise' form a single clause and do not form two clauses. If that is so the abuse of position as public servant that is referred to is the abuse by corrupt or illegal means or by otherwise. In support of the construction which the learned Assistant Government Pleader seeks to put on the clause he relies on the use of the word 'by' before the word 'otherwise'. He says that thereby the legislature expressed the intention to separate two positions. According to him 'by otherwise' would be another manner and it is only in respect of this second manner that it is necessary to prove the abuse of position as a public servant. While the argument is not wholly divorced from the language of the clause the use of the preposition 'by' on which reliance is placed for deriving support to this argument is explainable even on the construction earlier mentioned. The preposition 'by' obviously indicates the manner of obtaining the bribe. If that is so the expression 'abusing his position' must go with both. This construction is consistent with the scheme of the section. As pointed out by the Supreme Court in *Ram Krishna v. State of Delhi*, AIR 1956 SC 476, bribery as defined in Section 161, Indian Penal Code, if it is habitual, falls within clause (a) of Section 5(1). Bribery of the kind specified in Section 165, if it is habitual, is comprised in clause (b). Clause (c) contemplates criminal breach of trust by a public servant and the wording takes us to Section 405 of the Code. Then follows clause (d). Clause (e) concerns the position of pecuniary resources or property disproportionate to his known sources of income for which the public servant cannot satisfactorily account. In clauses (a), (b) and (c) the abuse of position by a public ser-

vant is clearly implied. Clause (e) also carries the same implication. It would be reasonable to put on clause (d) a construction which is consistent with the other clauses of the sub-section. Such a construction would also keep the offence within the limitation and within the object of the Act. The object is to prevent and deal with corruption and bribery amongst public servants. It is with reference to this object that the penal provisions must be construed and if so construed the abuse of position would be the necessary ingredient of the offence; the abuse being either by corrupt or illegal means or by otherwise. Such a construction would thus be within the spirit of the enactment.

40. It would not be convenient to refer to some observations made in two Supreme Court decisions to which our attention has been invited. In AIR 1962 S. C. 195 (Supra) in which the expression 'in the discharge of his duties' used in Section 5 was interpreted as being mere descriptive of the offence and not forming an ingredient of the offence, their Lordships set out the ingredients of the offence under Clause (d) in these words:-

"The ingredients of the particular offence in Clause (d) of Section 5(1) of the Act are: (1) that he should be a public servant, (2) that he should use some corrupt or illegal means or otherwise abuse his position as a public servant, (3) that he should have thereby obtained a valuable thing or pecuniary advantage, and (4) for himself or for any other person. In order to bring the charge home to an accused person under Clause (d) aforesaid of the section it is not necessary that the public servant in question, while misconducting himself should have done so in the discharge of his duty".

This is no doubt not a direct authority on the question as to whether the expression 'abusing his position as public servant' covers the whole of the first part of Cl. (d) but it would appear that that was what was assumed by their Lordships of the Supreme Court for earlier in that very para they stated that:

"The legislature advisedly widened the scope of the crime by giving a very wide definition in Section 5 with a view to punish those who, holding public office and taking advantage of their official position, obtain any valuable thing or pecuniary advantage".

The decision which is more to the point, however, is the one in AIR 1963 S. C. 1116 (supra). There the Supreme Court was concerned with the meaning and ambit of the word 'otherwise' used in the Clause. They said:-

"Let us look at the clause 'by otherwise abusing the position of a public servant', for the argument mainly turns upon the

said clause. The phraseology is very comprehensive. It covers acts done 'otherwise' than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is, that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage."

This is, therefore, the gist of the offence. If that is so it is not possible to divorce the words 'by corrupt or illegal means' from the requirement of abusing the position as a public servant. Later on their Lordships say:

"On a plain reading of the express words used in the clause, we have no doubt that every benefit obtained by a public servant for himself, or for any other person by abusing his position as a public servant falls within the mischief of the said clause." These observations support the conclusion we have reached.

41. The learned Assistant Government Pleader argues that even if that is the true construction of clause (d) the prosecution has proved that there has been an abuse of position as a public servant on the part of accused No. 1. The argument is similar to the one advanced in respect of Section 161 of the Indian Penal Code. The argument is this. The accused No. 1 did not cease to be a Government servant while he was working as an Examiner. In fact he could not have worked as Examiner but for the permission given to him as a public servant and therefore, there was some connection, however, indirect, between his office as a public servant and his work as Examiner. His abuse of his position as Examiner would be an abuse of the permission given to him by the Government as Examiner, that is to say, it is argued, it would amount to an abuse of permitted use of his office and if that is so he must be said to have abused his position as a public servant. We consider the argument too farfetched. We have dealt with it earlier and do not think it necessary to add to what we have stated.

42. For these reasons although the prosecution case against the accused has been proved on merits, it is not possible to bring the misconduct of either of the accused under any of the offences with which they are charged. They are, accordingly, entitled to an acquittal.

43. The appeals are therefore, allowed. The convictions of and sentences on the appellants are set aside and the appellants are acquitted. Fine, if paid, to be refunded.

Appeals allowed.

AIR 1970 GUJARAT 106 (V 57 C 16)*

B. R. SOMPURA, J.

Jaykant Harkishandas Shah, Appellant v. Durgashanker Valji Pandya, Respondent.

Second Appeal No. 1190 of 1965, D/- 3-12-1968, against Order of Dist. J., Rajkot, in Civil Appeal No. 21 of 1965.

Contract Act (1872), Section 11 — Contracts imposing personal liability — Premises taken on lease and new business started by de facto guardian on behalf of minor — Guardian has no authority to do so — (Transfer of Property Act (1882), Sections 6 (h), 7 and 108-B — Applicability.)

A de facto guardian of a minor has no authority to take a premises on lease and start a new business there on behalf of the minor. (Paras 8 and 9)

Where a minor is charged with obligations by the other contracting party, the principle that a contract entered into with an infant is not voidable but void will apply. A de facto guardian cannot alienate the property of a minor without legal necessity. A de facto guardian cannot also start a new business on behalf of the minor which will impose a liability on the minor. (Para 8)

There is nothing in the Transfer of Property Act according to which it can be said that a minor is disqualified to be a transferee. The minor not being the transferor then, there is no question of application of Sec. 7, Transfer of Property Act. Section 11, Contract Act will also not come in the way then. But when a lease is created, it is not the transfer of immovable property or interest therein simpliciter in favour of a minor. The same is coupled with an obligation on the part of the minor to pay stipulated rent. Ordinarily, in a gift or other transfer of property in favour of a minor there is no reciprocal obligation cast on the minor but in a lease reciprocal obligations are cast on him. He has to perform several obligations as mentioned in Sec. 108-B, Transfer of Property Act. For the creation of a lease an agreement between two parties is necessary and to enter into that agreement there is a bar of Section 11. As such, in cases of lease also it is clear that the de facto guardian has no authority to create obligations to bind the estate of a minor by acts which are not for necessity. Thus the de facto guardian cannot take a premises on lease and start a new business there on behalf of the minor. AIR 1943 Bom 187 & AIR 1953 Bom 273 & AIR 1932 PC 182, Foll.; AIR 1954 Bom 347, Expl. and Foll.; AIR 1933 Bom 15 (FB) Ref. (Para 9)

*(Only portions approved for reporting by the High Court are reported here.)

Cases Referred: Chronological Paras

- (1954) AIR 1954 Bom. 347 (V 41)=
56 Bom. L. R. 341, Vijayakumar
Motilal v. Newzealand Insurance
Co. Ltd. 7
- (1953) AIR 1953 Bom. 273 (V 40)=
55 Bom. L. R. 40, Tattya Mohyaji
v. Rabha Dadaji 7
- (1943) AIR 1943 Bom. 187 (V 30)=
45 Bom. L. R. 259, Malkarjun
Annarao v. Sarubai Shivyogi 7
- (1933) AIR 1933 Bom. 15 (V 20)=
34 Bom. L. R. 1483 (FB), Tulsidas
Jesingbhai v. Raisingji Fulabhai 7
- (1932) AIR 1932 PC 182 (V 19)=
34 Bom. L. R. 1079, Benaras
Bank Ltd. v. Hari Narain 8
- (1903) 5 Bom. L. R. 421=ILR 30
Cal 539 (PC), Mohori Bibee v.
Dharmodas 7

H. M. Chinoy, for Appellant; Suresh
M. Shah, for Respondent.

JUDGMENT:— [His Lordship after nar-
rating the facts and referring to the evi-
dence in paras 1 to 6, observed:]

7. It is the contention of Mr. Chinoy that a de facto guardian cannot impose liability by executing a lease deed on behalf of the minor and if such lease deed is executed the same would be null and void and that the de facto guardian has no right to start a new business on behalf of the minor and the minor is not bound if any liability is incurred for any such business. He relied upon a Privy Council decision in Mohori Bibee v. Dharmodas, (1903) 5 Bom. L. R. 421, where their Lordships held that a contract entered into with an infant is not voidable but void and the infant is not under any obligation to repay the money that he received under the contract. This decision was considered by the Bombay High Court in Vijayakumar Motilal v. Newzealand Insurance Co. Ltd., AIR 1954 Bom. 347, where Desai J., after considering the decision of the Privy Council in Mohori Bibee's case, (1903) 5 Bom. L. R. 421, observed:—

"The proposition laid down by their Lordships of the Privy Council being in general terms would have led to startling results if very strictly applied. For in that case instead of guarding the interest of minors over whom the law throws its aegis of protection, it would have done incalculable harm to their rights and caused much hardship. Pushed to a logical conclusion the Privy Council decision would have made it impossible for a minor to get benefit under or enforce any contract entered into by him when the consideration had been wholly received by the other contracting party. But no such difficult position has arisen, since the Courts in India have, as a rule, in effect, confined the application of the Privy Council ruling only to cases where

a minor is charged with obligations and the other contracting party seeks to enforce those obligations against the minor." Under the circumstances, where the minor is being charged with obligations by the other contracting party, the dictum laid down by the Privy Council in Mohori Bibee's case, (1903) 5 Bom. L. R. 421, that a contract entered into with an infant is not voidable but void will apply. Regarding the position of a de facto guardian, in a Full Bench decision of the Bombay High Court in Tulsidas Jesingbhai v. Raisingji Fulabhai, 34 Bom. L. R. 1483= (AIR 1933 Bom. 15 (FB)), Chief Justice Beaumont at p. 1493 observed as under:—

"Dealing with the matter as one of principle I apprehend that if a person claims the right to sell the property of another, he must establish his title so to do. In many cases the right to deal with the property of another may arise from the legal relationship between the parties. But it is extremely strange to suggest that such a power can be acquired by a relationship which has no legal sanction. A so-called guardian de facto is not a guardian at all. He is merely a person who has assumed without authority to act as guardian, and it is a strong thing to hold that by such assumption he has acquired the right to deal with the minor's immoveable property."

In that case the Full Bench held that under the Hindu Law a de facto guardian of a minor can validly sell the property of the minor to a third person for legal necessity. After referring to the above case, in Malkarjun Annarao v. Sarubai Shivyogi, 45 Bom. L. R. 259 at p. 265= (AIR 1943 Bom. 187 at p. 190), Divatia J. observed:—

"In the case of a person who is not a manager but a de facto guardian it has been held by a Full Bench of our High Court in 34 Bom. L. R. 1483= (AIR 1933 Bom. 15 (FB)), that such guardian can validly sell the minor's property only for his benefit or legal necessity. It would therefore be void if no legal necessity was proved. It is thus quite clear that if such alienation is made either by a manager of a Hindu family or a de facto guardian of the minor's interest in the property, it is not voidable but is void in its inception. If the alienation is made by a natural guardian or a guardian appointed by the Court then only it is required to be avoided within three years after attaining majority."

Again the question regarding the alienation by a de facto guardian had come up for consideration before a Division Bench of the Bombay High Court in Tattya Mohyaji v. Rabha Dadaji, 55 Bom. L. R. 40= (AIR 1953 Bom. 273). After referring to the observations made by Mr. Justice Divatia in Malkarjun's case, 45 Bom. L. R.

259=(AIR 1943 Bom. 187), their Lordships observed at p. 46 (of Bom. L. R.)=(at p. 276 of AIR) as under:—

"Apart from authorities it seems to us that an alienation by a de facto guardian of the minor's property without justifying necessity must be held to be void ab initio, as has been held by Mr. Justice Divatia in 45 Bom. L. R. 259=(AIR 1943 Bom. 187)."

8. Under the circumstances, it is clear that a de facto guardian cannot alienate the property of a minor without legal necessity. In the present case, it is clear from the evidence that the business started in the suit premises in the name and style of Jaykant Dinner Club was a new business. In the case of Benaras Bank Ltd. v. Hari Narain, 34 Bom. L. R. 1079=(AIR 1932 PC 182), the Privy Council held that a manager of a joint Hindu family has no power to impose upon a minor member of the family the risk and liability of a new business started by him and that it makes no difference that the manager is the father of the minor. Under the circumstances, it is clear that a de facto guardian of a minor cannot start a new business on behalf of the minor, which would impose liability on the minor. Hence he cannot enter into a new business on behalf of the minor, by which the liability to pay the rent would be incurred on behalf of the minor. It is no doubt true that the above decisions refer to alterations of immoveable properties on behalf of minors by de facto guardians, but the same principle would equally apply where the de facto guardian enters into a contract on behalf of a minor by which a liability for the minor is created and the act of the de facto guardian is without any legal necessity.

9. Mr. Shah supported the reasoning of the learned District Judge. The District Judge dismissed the first appeal filed by the minor confirming the trial Court view that the minor was bound by the transactions, on the ground that there was nothing in law preventing the minor from being a transferee under the Transfer of Property Act. He relied upon Sections 6 and 7 of the Transfer of Property Act, 1882. According to Section 6(h) of T. P. Act, no transfer can be made to a person legally disqualified to be transferee. Section 7 of the said Act provides that every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part. There is nothing in the Transfer of Property Act according to which it can be said that a minor is disqualified to be a transferee. There is no question of application of Section 7 because in the case under appeal the minor is not the

transferor. Section 11 of the Indian Contract Act, 1872, would not come in the way of transfer of property in favour of the minor. But when a lease is created, it is not the transfer of immoveable property or interest therein simpliciter in favour of a minor. The same is coupled with an obligation on the part of the minor to pay stipulated rent, and when obligation is created against a minor by such transfer, one has to consider whether the minor is bound by such transfer. Ordinarily, in a gift or other transfer of property in favour of a minor there is no reciprocal obligation cast on the minor, but in a lease reciprocal obligation is cast on the lessee (minor) to perform several obligations as mentioned in Section 108-B of the Transfer of Property Act. In this case, the lease deed dated 4th April 1953, is produced at Ex. 26. The same provides for a yearly rent and the time limit fixed is one year. The document is signed both by the lessor and the lessee and defendant No. 2 has signed therein as a guardian on behalf of defendant No. 1. By a lease deed, transfer of interest in the immoveable property is created in favour of the lessee. But that transfer of interest is not similar to that where property is transferred to a minor by gift or otherwise. Here, by transfer of interest an obligation is cast upon the lessee to observe and perform several covenants entered into by the parties. Under the circumstances, for the creation of a lease an agreement between two parties is necessary and for entering into that agreement there is a bar of Section 11 of the Indian Contract Act, according to which all agreements are contracts if they are made by free consent of the parties competent to contract for a lawful consideration and with lawful object and not expressed or declared to be void. In the present appeal, we are not concerned with an act directly of a minor but of a de facto guardian on behalf of a minor. Under the circumstances, in cases of lease even it is clear that the de facto guardian has no authority to create obligations to bind the estate of a minor by acts which are not for necessity.

Appeal allowed.

AIR 1970 GUJARAT 108 (V 57 C 17)

P. N. BHAGWATI, C. J. AND A. R. BAKSHI, J.

Jayantilal Amrutlal Shodhan, Applicant v. The Union of India and others, Opponents.

Special Civil Appln. No. 58 of 1967, D/-12/13/14-3-1968.

(A) Defence of India Rules (1962), Part 12-A (Gold Control) Rules 126-M and 126-L — Seizure contemplated by

IM/JM/E140/69/JHS/D

and the stated purposes for effectuating which the rules are made. There can be no hard and fast rule or straight-jacket formula in this respect. The question must always be, whether the provisions of the rules can, on a reasonable view of the matter, be said to be related to the stated purpose and if they are, they must be held to be within the scope and ambit of Section 3. If this test is applied, the challenge to the validity of Rules 126-L, 126-M and 126-P on this ground must fail. The Rules are reasonably related to the purpose of securing the defence of India and maintenance of supplies and services essential to the life of the community. (1920) 1 KB 829 and 1952 AC 427 and AIR 1966 Bom 70, Foll.

(Paras 14 and 15)

(I) Defence of India Rules (1962), Part XII-A (Gold Control) Rule 126-L (16) — Rule is not retrospective and must be construed as attracting penalty only in those cases where act or omission rendering gold liable to confiscation is done after coming into force of rule — Held, that, as petitioner owned undeclared gold since commencement of Part XII-A, his failure to declare it within prescribed time in contravention of Rule 126-L (1) and his retaining possession of it in contravention of Rule 126-I (10) rendered the undeclared gold liable to confiscation at the latest by 28th February, 1963 and if it has been seized by authorised person, it could be confiscated under Rule 126-M at any time prior to 24th June, 1963 when R. 126-L (16) was introduced — Fact that petitioner continued to be in possession of it even up to 20th November, 1964, when it was uncovered by raiding party, was not an act or omission which rendered it liable to confiscation — The act or omission which rendered the undeclared gold liable to confiscation had already been committed prior to 24th June, 1963 and the penalty provided in Rule 126-L (16) was therefore, not attracted.

(Paras 18 and 19)

(J) Defence of India Rules (1962), Part XII-A (Gold Control) R. 126-L (16) — Offence contemplated by rule is not a continuing offence — (Penal Code (1860), Section 40 — Continuing offence.)

(Para 19)

Cases Referred: Chronological Paras

- (1967) Special Civil Appn. No. 434 of 1967 = 9 Guj LR 777, Premchand Jechand v. K. G. Sanghrani 13
- (1966) AIR 1966 Bom 70 (V 53) = 67 Bom LR 234, Amichand v. G. B. Kotak 15
- (1964) AIR 1964 SC 381 (V 51) = (1964) 1 Cri LJ 269, Makhan Singh v. State of Punjab 12

- (1963) AIR 1963 SC 822 (V 50) = 1963 (1) Cri LJ 809, Radha Kishan v. State of Uttar Pradesh 5
- (1961) AIR 1961 SC 1602 (V 48) = (1962) 2 SCR 125, Jyoti Pershad v. Union Territory of Delhi 13
- (1958) AIR 1958 SC 538 (V 45) = 1959 SCR 279, Ram Krishna Dalmia v. S. R. Tendolkar 13
- (1952) 1952 AC 427 = 96 SJ 395, Attorney General for Canada v. Hallet and Carey Ltd. 15
- (1937) 1937 Ch 210 = (1937) 4 All ER 405, Sutherland Publishing Co. v. Caxton Publishing Co. 8
- (1920) 1920-1 KB 829 = 89 LKKB 387, Chester v. Bateson 15
- (1886) 11 App Cas 627 = 55 LJPC 69, Salmon v. Duncombe 8

I. M. Nanavati with K. S. Nanavati, for Applicant; P. P. Khambhatta with K. H. Kaji with K. L. Talsania, Addl. Government Pleader, for Opponents. The Attorney-General served.

BHAGWATI, C. J.: This petition challenges the validity of certain provisions of the Gold Control Rules, 1963. On 26th October 1962, simultaneously with the Declaration of Emergency under Article 358 of the Constitution, the President promulgated the Defence of India Ordinance, 1962, pursuant to S. 3 of the Defence of India Ordinance, the Central Government made the Defence of India Rules, 1962. The Defence of India Ordinance was subsequently repealed by the Defence of India Act, 1962 on 12th December 1962 but by virtue of the saving provision, the Defence of India Rules, 1962, were continued in force. The Defence of India Act was passed, as its Preamble shows, to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for trial of certain offences and for matters connected therewith. Section 3, sub-section (1) read as follows:

"3. (1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community." Section 3 sub-section (2) provided that without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for and may empower any authority to make orders providing for all or any of the matters enumerated in clauses (1) to (57). One of the matters enumerated was that set out in clause (33), namely:

"(33) controlling the possession, use or disposal of, or dealing in, coin, bullion, bank notes, currency notes, securities or foreign exchange;"

On 9th January 1963, the Central Government, in exercise of the power conferred under S. 3 of the Defence of India Act, amended the Defence of India Rules by introducing Part XII-A comprising Rules 126-A to 126-Z, (hereinafter referred to as the Gold Control Rules, 1963). Rule 126-A, clause (a), defined "Board" to mean the Board constituted under Rule 126-J and Rule 126-J, clauses (1) and (2) laid down the constitution and functions of the Board. Clause (4) of Rule 126-J conferred power on the Board to authorise by general or special order "any person to exercise all or any of the powers exercisable by it under this Part other than the power to hear appeals under Rule 126-M and this present power of authorisation" and different persons could be authorised by the Board to exercise different powers. Rule 126-I, clause (1) required every person (not being a dealer or refiner required to apply for a licence, or licensed under Part XII-A) to make a declaration to the Board in the prescribed form as to the quantity, description and other prescribed particulars of gold, other than ornaments, owned by him, within thirty days from the commencement of Part XII-A. Part XII-A came into force on 9th January 1963 and therefore the period of thirty days limited by Rule 126-I, clause (1) for making a declaration under that rule was due to expire on 8th February 1963 but the Central Government extended the period upto 28th February 1963. The petitioner was admittedly not a dealer or refiner required to apply for a licence or licensed under Part XII-A and he was therefore required under Rule 126-I, clause (1) to make a declaration to the Board in the prescribed form as to the quantity, description and other prescribed particulars of gold owned by him. He accordingly made such declaration on 7th February 1963 and in that declaration he showed that he owned only six gold bars and twenty-five gold sovereigns.

2. Now according to the respondents the petitioner also owned further eight gold bars weighing 23,229 Gms. and one hundred fifty gold sovereigns weighing 1,223 Gms. which were not declared by him and he remained in possession of this quantity of gold (hereinafter referred to as the undeclared gold). This undeclared gold was secreted by the petitioner beneath the earth two and a half feet deep at four points in the strong room of his cellar. It appears that sometime prior to 18th November 1964, the tax authorities received information that some gold was lying secreted in the residential premises of the petitioner and, therefore, on

18th November 1964, some senior officers of the Income-tax Department raided the residential premises of the petitioner and carried on search of the residential premises. On 20th November while the search was in progress, the petitioner, realising that the officers conducting the search were on the point of discovering the undeclared gold which was lying secreted in the strong room of the cellar, came out with the story that his late mother had secreted some valuables in the strong room of the cellar at certain points and offered to point out the spots where according to him the valuables were secreted. When earth was dug out at those spots upto a depth of two and a half feet, cement containers were found embedded in the earth and in the cement containers was the undeclared gold of the estimated value of Rs. 2,83,320/-. The undeclared gold was deposited in a locker in the Safe Deposit Vault of the Bank of India Ltd., in the joint names of the petitioner and one of the Income-tax Officers. Thereafter on 17th December 1964, one R. M. Shelat, Deputy Superintendent of Central Excise, went to the residence of the petitioner with two Panchas and in the presence of the Panchas he seized the undeclared gold under Rule 126-L, Clause (2). The petitioner thereafter made frantic effort to purchase Gold Bonds against the undeclared gold as also to subscribe for the National Defence Gold Bonds, 1980 by utilising the undeclared gold but his efforts were unsuccessful since the authorities refused to make the undeclared gold available for either of these two purposes. In the meantime, a notice dated 5th June 1965 was issued by the Assistant Collector of Central Excise, Baroda, calling upon the petitioner to show cause why the undeclared gold which was seized as aforesaid and in respect of which an offence as mentioned in para 1 of the notice appeared to have been committed, should not be confiscated under Rule 126-M and penalty should not be imposed under Rule 126-L, clause (16). The petitioner filed a statement in reply to the show cause notice on 28th June 1965. The Collector of Central Excise did not proceed with the hearing for some time but ultimately, by a letter dated 6th January 1967, he fixed the date of hearing on 20th January 1967 and intimated to the petitioner that he may remain present for the purpose of hearing at the appointed time on that date. The petitioner thereupon filed the present petition challenging the validity of the show cause notice dated 5th June 1965.

3. Before we set out the grounds of challenge, it would be convenient at this stage to refer to some of the relevant provisions of the Gold Control Rules. We have already referred to Rule 126-J and

Rule 126-L, clause (1). Rule 126-L, clause (10) is also material and it runs as under:
 "126-L.

(10) No person other than a dealer and a refiner, licensed under this Part, shall acquire or have in his possession or under his control any quantity of gold required to be declared under this rule unless such gold has been included in a declaration or further declaration made thereunder;

Rule 126-L is the next important rule and it provides, omitting portions immaterial:

"126-L.

(2) Any person authorised by the Central Government by writing in this behalf may—

(a) enter and search any premises, not being a refinery or establishment referred to in sub-rule (1), vaults, lockers or any other place whether above or below ground;

(b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be, contravened, along with the package, covering or receptacle, if any, in which such gold is found and thereafter take all measures necessary for their safe custody.

(16) Any person who in relation to any gold does or omits to do any act which act or omission would render such gold liable to confiscation under Rule 126-M, or abets the doing or omission of such an act shall be liable, in addition to any liability for any punishment under this Part to a penalty not exceeding five times, the value of the gold or one thousand rupees, whichever is more; ...

It may be pointed out that clause (16) was not originally part of Rule 126-L but it was introduced by an amendment made by the Defence of India (Seventh Amendment) Rules, 1963 which came into force from 24th June 1963. Another amendment made by the Defence of India (Seventh Amendment) Rules, 1963 was that the reference to the Board was deleted and instead, a provision was made for appointment of an Administrator who was to discharge substantially the same functions as the Board. Rule 126-M provided for confiscation of gold seized under Rule 126-L.

"126-M. (1) Any gold seized under Rule 126-L together with the package, covering or receptacle, if any, in which such gold is found shall be liable to confiscation.

(2) Such confiscation may be adjudged,

(3) An appeal shall lie to the Board against every adjudication of confiscation under sub-rule (2)."

Rule 126-X which is the last Rule requiring to be noticed reads as under:

"126-X.— Until the Board is constituted in accordance with the provisions of this Part and holds its first meeting, all or any of the functions of the Board may be performed by the Central Government."

The Board was constituted in accordance with the provisions of Part XII-A but it did not hold its first meeting and, therefore, at the material time, the Central Government was entitled to perform the functions of the Board under Rule 126-X. Having noticed the relevant provisions of the Gold Control Rules, let us now examine the grounds on which the validity of the impugned show cause notice was challenged on behalf of the petitioner.

4. There were four grounds on which the petitioner challenged the validity of the impugned show cause notice and they were:

(A).— R. M. Shelat who seized the undeclared gold was not duly authorised by the Central Government under Rule 126-L clause 2 and, therefore the seizure of the undeclared gold was not a valid seizure under Rule 126-L and it was not liable to be confiscated under Rule 126-M.

(B).— Rules 126-L, 126-M and 126-P suffered from the vice of excessive delegation of legislative power and were therefore null and void.

(C).— Rules 126-L, 126-M and 126-P were ultra vires Section 3 of the Defence of India Act inasmuch as they were not made for carrying out one or more of the purposes set out in Section 3, sub-section (1).

(D).— Rule 126-L, clause (16) under which penalty was sought to be imposed on the petitioner was not applicable in the present case since, on the facts alleged in the show cause notice, the omission to declare the undeclared gold within the prescribed period and remaining in possession of it had already rendered the undeclared gold liable to confiscation prior to the introduction of Rule 126-L, clause (16) and Rule 126-L, clause (16) could not be applied retrospectively so as to take in cases where some act or omission rendering gold liable to confiscation was

been denied promotion. The opinion of the appointing authority, however, would be completely subjective and cannot be questioned in a court of law unless it is shown to be mala fide. The reason for this is that it is for the appointing authority to assess the work of its servants, and to know the performance of their work, the quality of their standard, their output and the like and it is not for the court to sit in appeal over the opinion of the appointing authority unless such an opinion is shown to be tainted by a mala fide or colourable intention.

Our attention was drawn to a Full Bench (Division Bench?) decision of this court in *Gopi Nath Kaul v. State of J & K* AIR 1957 J & K 31 where it was held that the question of promotion depends purely on the subjective satisfaction of the appointing authority, which was not bound to give reasons for its decision. In this case their Lordships observed as follows:

"..... it is the appointing authority which is the judge of merit and ability and this court cannot substitute its judgment for that of the appointing authority Under these circumstances it is not possible to hold that any statutory rule was violated by the respondents in the case of the petitioner. We, however, consider it necessary to emphasize that it would have been proper if the appointing authority had assigned these reasons in the different orders by which the petitioner was superseded. If these reasons had then been vouchsafed, it would have not been necessary for the respondents to explain these supersessions by filing affidavits."

The same view was taken in a previous Full Bench case in *Mohd. Aslam v. V. L. Vishin*, AIR 1957 J & K 8, where also their Lordships pointed out that it was desirable that the appointing authority should mention in its order the grounds of merit and ability which had been taken into consideration while making promotion of a member of service to a higher class. It is true that these decisions do not hold that it is imperative for the appointing authority to give reasons for promotion, although it is desirable to do so.

16-17. With great respect to these authorities we might like to mention that they do not appear to have approached the question from the various aspects which we have discussed above, nor have they considered the special language of R. 25 (2), particularly the word 'grounds' which by necessary intendment requires reasons to be given by the appointing authority showing that the conditions mentioned in Rule 25(2) have been fulfilled. While, therefore, we fully agree with the first part of the decision of the Full Bench namely that the question of promotion depends on the subjective satisfaction of the appointing authority, we do not agree

with the other part of the judgment that the statute does not require reasons to be given. As pointed out above, the only irresistible inference that can be drawn from the circumstances mentioned above and the peculiar language of Rule 25(2) is that the rule-makers intended not expressly but impliedly that the appointing authority must give reasons for giving promotion to a member of a service in order to show that the conditions mentioned in the rule have been complied with. The answer to question 2 is therefore given in the affirmative.

Question 3.

Whether or not the Government servants have a legal right to promotion under the rules so as to make the act of promotion a judicial act requiring an objective consideration?

Question 4

Whether or not the appointing authority is to follow the principles of natural justice by giving a reasonable opportunity to the Government servants of being heard before a promotion is decided upon?

These two questions are inter-connected and will be taken up together.

18. The main argument of Mr. Bhasin appearing for the petitioners was that in view of the statutory rules providing for conditions of service of Government servants every Government servant has a right to be promoted in accordance with the provisions of the rules and that such a right has to be exercised objectively after conforming to the rules of natural justice. In other words the argument was that the act of promotion being a judicial act, the Government servant is entitled to be heard before any action is taken against him — otherwise the power of granting promotion may be used arbitrarily so as to cause serious injustice. In our opinion the argument is based on a wrong premise namely that a Government servant has a legal right to be promoted. We have already pointed out above that the relationship between the Government and its servants is just like the relationship of any other master and servant with the difference that in the case of Government servants some of the service conditions are regulated by statutory rules and constitutional safeguards. The Government has the power to change or alter rules even unilaterally without obtaining the consent of the Government servant and such an altered rule will be binding on the Government servant. In *Roshan Lal v. Union of India*, AIR 1967 SC 1889 their Lordships of Supreme Court defined the exact relationship of Government and its servants and adverting to their incidents observed as follows:—

"It is true that the origin of Government service is contractual. There is an

offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emoluments of the Government servant and his terms of service are governed by statute or statutory rule which may be unilaterally altered by the Government without the consent of the employee."

19. Reliance was, however, placed by Mr. Bhasin on the leading case of *Ridge v. Baldwin*, (1963) 2 All E R 66, where their Lordships held that in exercising the power of dismissal conferred by the Municipal Corporations Act the watch committee were bound to observe the principles of natural justice by giving a proper opportunity to the accused of being heard. In our opinion this principle applies where an authority whether administrative or quasi-judicial is dealing with the rights of citizens in which case the rules of natural justice are at once attracted even though there may be no provisions for hearing the person condemned.

20. In *Bhagwan v. Ram Chand*, AIR 1965 SC 1767, their Lordships of the Supreme Court pointed out that the observations in the *Ridge*'s case, 1963-2 All ER 66, referred to above were to be applied and called into aid only when an authority is dealing with the rights of citizens. Their Lordships observed as follows:—

"If it appears that the authority or body has been given power to determine questions affecting the rights of citizens, the very nature of the power would inevitably impose the limitation that the power should be exercised in conformity with the principles of natural justice..... This question has been considered by this Court on several occasions..... and it has been held adopting the view expressed by the House of Lords in *Ridge v. Baldwin*, 1964 AC 40, that the extent of the area where the principles of natural justice have to be followed and judicial approach has to be adopted must depend primarily on the nature of the jurisdiction and the power conferred on any authority or body by statutory provisions to deal with the questions affecting the rights of citizens."

In view of this clear pronouncement of the Supreme Court, it is manifest, that the rule in *Ridge*'s case, 1963-2 All ER 66,

cannot apply to promotions in services which are purely administrative in character and depend upon the subjective satisfaction of the appointing authority concerned.

Unless the rule itself requires notice to be given to the Government servant, the principles of natural justice cannot be imported into administrative actions concerning Government servants. Indeed if we accept the argument of the learned counsel for the petitioners and insist on the appointing authority to follow the dilatory procedure of hearing the Government servants concerned at every stage of their promotion or selection, we would be placing insurmountable obstacles in the smooth running and the scientific functioning of the services of the State and would introduce an element of inordinate delay making confusion worse founded. We might mention here that the rules do provide a full opportunity to the Government servants whose promotion is withheld by way of penalty or where other penalties are imposed on the Government servants. The rule-makers have, therefore, incorporated the principle of natural justice where they thought that an opportunity to be given to the Government servant concerned to be heard was necessary.

21. Similarly reliance was placed on *Jaisinghani v. Union of India*, AIR 1967 SC 1427 wherein it was pointed out that the absence of arbitrary power was the first essential of the rule of law on which our Constitution is based. In that case their Lordships were dealing with the conditions of service of an income-tax officer and the rules were silent on certain important matters regarding the conditions of service of income-tax employees. In the instant case since the discretion to grant promotion is clearly governed by Rule 25(2), the question of applying the dictum laid down by the Supreme Court does not arise. The rules regarding promotion provide sufficient guarantee against any arbitrary exercise of power inasmuch as they lay down, as held by us, that reasons for promotion must be given and secondly where promotion is withheld by way of penalty, a reasonable opportunity to the Government servant concerned of being heard in the matter is also provided for. For these reasons therefore this case does not appear to be of any assistance to the learned counsel for the petitioners.

22. Reliance was then placed on *S. K. Ghose v. Union of India*, AIR 1968 SC 1385 at p. 1389. This case also does not apply, because in the case before their Lordships there was a clear finding by the Court that seniority was disturbed in contravention of a specific provision of the rule by an arbitrary exercise of

power. It is not disputed that if the appointing authority acts contrary to the express provisions of Rule 25(2) or if its action is tainted with malice in law, the petitioners can always approach the court for striking down the order impugned.

23. Similarly reliance was placed on Collector of Monghyr v. Keshav Prasad, AIR 1962 SC 1694, where their Lordships were dealing with the statutory provisions of the Bihar Private Irrigation Works Act. This case also can be distinguished on the ground that there their Lordships were dealing with a section of the statute which dealt with the rights of citizens and therefore the rule of natural justice would naturally apply.

24. Our attention was also drawn to High Court of Calcutta v. Arun Kumar, AIR 1962 SC 1704. This case far from helping the petitioners fortifies the view taken by us in the present case. In that case the action of the High Court in denying promotion to a judicial officer was challenged by a suit which ultimately came up to the Supreme Court. Their Lordships of the Supreme Court justified the action of the High Court and held that the High Court was the sole administrative authority to determine the question of promotion of Munsiffs to Sub-Judges' grade and this exercise of power could not be interfered with, because it depended upon the subjective satisfaction of the High Court. Reliance in that case was placed on Rule 49(a) under which the judicial officer was entitled to a notice if promotion was withheld as a penalty and their Lordships held that that was a clear distinction between withholding promotion as a penalty and granting promotion to a junior man on the basis of merit and ability. In this connection their Lordships observed as follows:—

"Rule 49 on which reliance was placed by the plaintiff to make out his right to be considered for promotion as a subordinate judge is in the first instance, not a right but only a safeguard to a public servant that punishment by withholding of promotion shall not be imposed upon him unless he has been given adequate opportunity of showing cause against the action proposed to be taken. It is also clear that R. 49 comes into play only when proceedings are taken by way of disciplinary action against a public servant. In such disciplinary proceedings, the Government servant proceeded against has a right to insist upon the procedure being strictly followed."

In the instant cases also Rule 30 is the exact replica of Rule 49 and the observations made by their Lordships apply, *mutatis mutandis*, to these cases also. Thus the position is that no Government servant has a right to promotion which

is to be made according to the provisions of the rules. A promotion by-passing the senior servant may take place in either of the following two ways:

(1) A junior person may be appointed on the basis of merit and ability superseding the senior man. In such a case the senior man has no right at all because merit prevails over seniority.

(2) A junior man may be promoted to a higher post by superseding a senior man because the senior man though equal in merit to the junior servant is guilty of negligence or other laches as a result of which his promotion is withheld. In such a case the appointing authority under Rule 30 is bound to hear the Government servant before withholding his promotion.

25. Thus, in any case, it cannot be said that a Government servant has a legal right to promotion.

26. In AIR 1968 Cal 35, Arun Kumar v. State of West Bengal, it was clearly held that promotion cannot be claimed as a matter of right. To the same effect is another decision in AIR 1959 Mad 270.

27. In State of Mysore v. S. Mahmood, AIR 1968 SC 1113 at p. 1115 their Lordships were discussing a similar rule regarding promotion based on seniority-cum-merit. Their Lordships observed as follows:—

"Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted."

28-29. In view of the authorities discussed above, it is manifest that under Rule 25(2) of the Rules promotion cannot be claimed as of right and therefore the argument that a Government servant has a legal right to promotion must be rejected. For the reasons that we have already given in holding that the principles of natural justice cannot be applied to matters of promotion which are purely administrative in nature and do not deal with the right of citizens, it follows that there was no question of giving a reasonable opportunity to the Government servant concerned of being heard before promotion is refused to him unless the appointing authority withholds promotion by way of penalty. For these reasons, therefore, the answers to questions 3 and 4 are given in the negative.

Question 5:

Whether in granting promotion under Rule 25(2) and (3) to one Government servant and not to the other rights of equality under Art. 16 of the Constitution of India are infringed?

29-A. It is well settled that the concept of equality contained in Art. 16 of the Constitution of India cannot be attracted where a promotion of Government servant is made on the basis of merit. Before this Article would apply, it must be established that the Government servants are similarly circumstanced and have been selected for hostile discrimination. Where the rule provides for promotion to be made on the basis of merit and ability alone if the person who seeks promotion does not possess the requisite merit and ability and when he is not similarly circumstanced with his junior who is of a superior merit, then in the event of the junior being promoted, the senior cannot take shelter under the infraction of Art. 16 of the Constitution of India. This point was fully discussed by the Supreme Court in *General Manager, Southern Ry. v. Rangachari*, AIR 1962 SC 36 where their Lordships observed as follows:—

"This equality of opportunity need not be confused with absolute equality as such. What is guaranteed is equality of opportunity and nothing more. Art. 16(1) or (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Any provision as to the qualifications for the employment or the appointment to office reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity; but in regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Art. 16(1) guarantees is equality of opportunity to all citizens who enter service." (See pp. 40-41 of the Report).

30. This principle was further reiterated in a recent judgment of the Supreme Court in *U. Sankunil Menon v. State of Rajasthan*, AIR 1968 SC 81 at p. 84 where their Lordships observed as under:—

"It is entirely wrong to think that every one, appointed to the same post, is entitled to claim that he must be paid identical emoluments as any other person appointed to the same post, disregarding the method of recruitment, or the source from which the officer is drawn for appointment to that post. No such equality is required either by Art. 14 or Art. 16 of the Constitution."

31. Similar observations were made by their Lordships in the leading case of *All India Station Masters' and Assistant Station Masters' Association, Delhi v. General Manager, Central Railway*, AIR

1960 SC 384 where their Lordships observed as follows:—

"..... There is in our opinion, no escape from the conclusion that equality of opportunity in matters of promotion must mean equality as between members of the same class of employees, and not equality between members of separate independent classes."

32. For these reasons we hold that in granting promotion to a Government servant in accordance with the conditions prescribed in Rr. 25(2) and 25(3), Art. 16 of the Constitution of India is not infringed in any way. Indeed, if the appointing authority acts contrary to the rules or where its action is mala fide amounting to an arbitrary or colourable exercise of jurisdiction, the aggrieved Government servant can always approach the Court for an appropriate remedy. For the reasons given above, the answer to question 5 is given in the negative.

Question 6:

The principle governing inter se seniority of Government servants as contained in the rules.

33-33-A. The rules lay down a very scientific system of regulating inter se seniority between various Government servants who have been divided into various classes. Rule 24 of the Rules (which is the pertinent rule) runs as follows:— "The seniority of a person who is subject to these rules has reference to the service, class, category or grade with reference to which the question has arisen. Such seniority shall be determined by the date of his first appointment to such service, class, category or grade as the case may be.

Note 1:— The rule in this clause will not affect the seniority on the date on which these rules come into force of a member of any service, class, category or grade as fixed in accordance with the rules and orders in force before the date on which these rules come into force.

Interpretation: The words 'date of first appointment' occurring in the above rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to good work and conduct and/or passing of any examination or examinations and/or tests.

Provided that the inter se seniority of two or more persons appointed to the same service, class, category or grade simultaneously will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of their being posted to different stations, be determined;

- (a) in the case of those promoted by their relative seniority in the lower service, class, category or grade.
- (b) in the case of those recruited direct except those who do not join their duties when vacancies are offered to them according to the positions attained by and assigned to them in order of merit at the time of competitive examination or on the basis of merit, ability and physical fitness etc. in case no such examination is held for the purpose of making selections;
- (c) as between those promoted and recruited direct by the order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the rules.

Note 2— Any substantive appointments or permanent promotions made in any department prior to 15th May 1958, will not be disturbed if otherwise in order unless such appointments or promotions are already the subject of any appeal, review or revision or otherwise pending decision.

(2) A member of a service, class, category or grade unless he is reduced in seniority as a punishment shall retain seniority in such service or grade as determined by sub-rule (1) notwithstanding any delay in the completion of his probation or his appointment as a member of such service, class, category or grade.

(3) where a member of any service, class, category or grade is reduced to a lower service, class, category or grade he shall be placed at the top of the latter unless the authority ordering such reduction directs that he shall rank in such lower service, class, category or grade next below any specified member thereof."

This rule provides, to begin with, that seniority is to be governed with reference to service, class, category or grade which is held by the Government servant and has to be determined by the date of his first appointment to such service, class, category or grade. The words 'first appointment' have been further defined as relating to the date of the first substantive appointment, that is to say, the date of the permanent appointment against a clear vacancy. So far the question presents no difficulty. For instance if A is appointed to a lower class such as a Mun-siff and B is appointed also to that class, then the person out of these who has been appointed first in point of time would be deemed to be senior provided the appointment has been made against a clear vacancy. In case this is not so, then the date on which one of these persons has been confirmed or rather has secured the

permanent appointment would be the date from which his seniority would run. Proviso to Rule 24 contemplates a situation where inter se seniority of two or more persons is to be determined when they have been appointed to a post on the same date.

This is indeed a vexed question and has presented a lot of difficulty to the courts as also to the appointing authorities, but on a careful perusal of the rule it is not difficult to find an easy solution to this problem. The proviso lays down that in cases where persons have been appointed on the same date, their inter se seniority would be determined in the following manner:

(1) In the case of those promoted by their relative seniority in the lower service, class, category or grade from which they have been promoted. Thus, for instance, A, B and C are Tehsildars who have been promoted simultaneously as Assistant Commissioners, but A was appointed Tehsildar before the others. In such cases therefore A will be deemed to be senior to the others, although all the three have been promoted at one and the same time. But their seniority would be governed by Cl. (a) of the proviso which refers to the date of their permanent or substantive appointment.

(2) In the case of employees recruited direct, their seniority will be governed according to the positions attained by them or assigned to them in the competitive examination or on the basis of merit, ability etc. In such cases there is no difficulty in determining the seniority of the Government servant.

(3) As between some persons promoted and others recruited direct their seniority will be governed by the order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the rules. The difficulty may arise: what would happen where the rules do not prescribe the date of allocation, in which case it is obvious that the principles governing cl. (a) would naturally apply and the promotee will be deemed to be senior to the direct recruit unless there is a rule to the contrary.

Sub-rules (2) and (3) of Rule 24 deal with circumstances where a person loses or retains his seniority and is not germane for our purposes. For these reasons answer to question No. 6 is given accordingly.

34. Since the Benches concerned have not heard the writ petitions on merits, we have refrained from making any observations regarding the merits of each of the writ petitions. The writ petitions will now go back to the Bench concerned for hearing on merits in the light of the opinion expressed by us.

35. ANANT SINGH, J.:— I fully agree with C. J.

36. BHAT J.:— I have had the privilege of going through the lucid and learned judgment of my Lord, the Hon'ble Chief Justice in this case. Some of these cases were originally placed before me and at that time, according to the petitions, the only dispute was with respect to the interpretation of Rule 25 of the J & K Civil Services (Classification, Control and Appeal) Rules, 1956, (hereinafter referred to as 'the Rules' in this judgment). As such questions arise frequently in this Court, I thought that the interpretation of this Rule should be considered by a Full Bench and therefore, made a reference to the Full Bench. No proposition of law other than the interpretation of Rule 25 was argued before me; therefore, there was no occasion for me to formulate any questions. The different propositions which form the subject matter of the Hon'ble Chief Justice's order were for the first time propounded before the Full Bench by the learned counsel for the petitioners. Anyhow after going through the lucid and learned judgment of my Lord the Hon'ble Chief Justice I slightly differ from his Lordship's interpretation of sub-rules (2) and (3) of Rule 25. I would add a few words to indicate how I understand this Rule 25. On other matters I am in general agreement with the conclusions arrived at by his Lordship.

37. Rule 2 of the Rules defines the various terms used in this Rule 25. The words that occur in this Rule 25 are 'service, class, selection, category and grade'. "Service" has been defined in R. 2 (e) as 'a member of a service means a person holding or appointed to a whole time pensionable post'. "Class" as defined in Rule 2 (d) means the posts borne on the cadre of a service between which and the other posts borne on the cadre of the same service, promotions and transfers are not ordinarily admissible. "Selection category" has been defined in Rule 2(c) as a category declared to be Selection category. "Promotion" has been defined in Rule 2(h) meaning the appointment of a member of service or class of a service, in any category or grade to a higher category, or grade of such service or class.

38. The Government of Jammu and Kashmir on 19-10-1955 prepared a classification of Gazetted Services which was sanctioned by the Cabinet order No. 1630-C of 1955 dated 1-10-1955. In this classification 21 services have been mentioned; under each service, class and categories have been enumerated which means that first there is a service, then there is a class in that service and in the class there are different categories. It is not material for the purpose in hand how far with the change of times the classifications mentioned therein are applicable in their entirety. The point is only about the

scheme of this classification and its application to the Rules because the Rules which were issued by the Cabinet by means of an order No. 962-C of 1956 dated 14-6-1956 seem to be based on this classification.

39. The contention of the petitioners has been that Rule 25(2) is an exception and Rule 25(3) is the general rule. On the other hand it is argued on behalf of the State—though the learned Addl. Advocate General changed his stand about the interpretation of these sub-rules (2) and (3) as pointed out by his Lordship, the Hon. Chief Justice, is that sub-rule (2) is the general rule and sub-rule (3) is the residuary Rule. I should not hesitate to mention that the Rule is not very happily worded but when we read this Rule in conjunction with the definitions, in my opinion the sphere and ambit of the two sub-rules is more or less clearly demarcated. As already remarked in a service there can be different classes and under the classes there can be categories. In the categories themselves there are different grades. We have to keep in view that promotion means the appointment of a member of service or class of a service, in any category or grade to a higher category or grade of such service or class. Therefore promotion can be given to an employee in a particular service from one grade to another, from one category to another, or from one class to another in that service. There can be selection grades, selection categories or selection posts also. Promotion from one service to another is not covered by these Rules. Sub-rule (2) of Rule 25 according to me applies to cases where an employee is promoted from one class to another or to a Selection category or grade in any particular class or service. It is significant to note that the words 'grade' and 'category' simpliciter are not mentioned in this sub-rule. Therefore, in my opinion, when there is a promotion from one grade to another or from one category to another, or from one post to another (which are not selection posts, selection categories or grades) sub-rule (3) applies. The analysis would be therefore like this:

Merit and ability will be the guiding principles seniority coming in only to tilt the balance in favour of an employee when merit and ability are otherwise equal in the following cases i.e. when promotions are:—

(i) from one class of service to another class in that service:

(ii) to a Selection post or Selection category or grade in any class or in any service: These promotions are further subject to the passing of any tests that the Government may require, which means that even on the ground of merit and ability, an employee cannot be promoted to

such posts unless the person to be promoted possesses the qualifications prescribed for that job by the Government:

(iii) from one grade to another, from one category to another in the same class or service, have to be made on the basis of seniority. In such cases also there are two riders (a) the promotion of an employee may be withheld as a penalty; (b) an employee may be given special promotion for his conspicuous merit and ability.

This (in short) is how I understand and interpret these two sub-rules, which have a clear and separate ambit of application.

40. The next important point to be considered is how should merit and ability be assessed and whether the appointment made on the basis of merit and ability ignoring seniority should be expressed and in what particular form or manner. There are authorities of this Court namely AIR 1957 J and K 8 and AIR 1957 J and K 31, wherein it has been held that the determination of merit and ability is the exclusive jurisdiction of the appointing authority. In the first place the words 'merit and ability' are elusive concepts and the so-called selection by the appointing authority on this basis can be arbitrary, capricious and even mala fide. This point has been discussed at length by my Lord the Chief Justice. I have only to add that it is no doubt true that it is for the appointing authority to determine the merit and ability of his subordinates, and his assessment would be final. That assessment cannot be disturbed by the Court as if sitting in appeal but what is required under the Rules is, as I would put it, that this subjective satisfaction should be objectively expressed which in other words means that such an order should be self-speaking.

It cannot be laid down in any detail how the order should express itself as the circumstances of different cases may be entirely different; but whatever the nature of the order it must indicate that the appointing authority has applied its mind to all aspects of the case while promoting a junior over the head of a senior on the basis of merit and ability. About sub-rule (2) the two conditions when seniority can be ignored are where the promotion of an employee is withheld by way of punishment or anybody is given special promotion for his conspicuous merit and ability. In very many cases, as I conceive, this should be the obverse and the reverse of the same proposition. If 'A' is promoted on the ground of conspicuous merit and ability, it presumes that 'B' has been denied this right because there was something wrong about him and therefore, his promotion has been withheld, withholding of a promotion

under Rule 30 (iii) is a punishment and under Rule 35 no such punishment can be inflicted upon a person unless he is given an adequate opportunity of making a representation against such withholding. This matter also is difficult and no hard and fast rules can be laid down in the abstract. Each case will depend upon its own merits. If the appointing authority has promoted somebody capriciously or arbitrarily, characterising him a person of conspicuous merit and ability, and it is proved that the order was passed mala fide, it can be quashed in proper proceedings in a Court of law.

41. The next point on which I wish to record a few words is the application of Article 16 (1) of the Constitution of India, as applied to the State, to matters of promotion. His Lordship, the Hon'ble Chief Justice has discussed this matter in detail but I think it requires a little further clarification. Under Art. 16 (1):-

"there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".

It postulates equality of opportunity to all citizens in respect of any appointment or matters relating to employment which means that not only to the initial appointment has every citizen an equal right, but, when one is appointed, in matters which relate to his employment he is not to be discriminated against and he has to enjoy equality of opportunity. The words 'matters relating to employment' are very wide. It has been clearly laid down in AIR 1962 SC 36 and reiterated in AIR 1967 SC 1427 that this Article covers even the case of promotion as the matter of promotion is as much a matter relating to employment as other matters such as salary, periodical increments, leave, gratuity, pension, age of superannuation etc., etc. Therefore, I need not quote the authorities as that has been done by my Lord, the Hon'ble Chief Justice in this behalf. The conclusion I would draw from these authorities is that if the employees are similarly situated they cannot be discriminated against in the matter of promotion also. But where the jobs are such as are covered by sub-rule (2) of Rule 25 or where the promotion of a particular employee is withheld as a matter of punishment or another person is given promotion for his conspicuous merit and ability, there can be no infringement of his right of equality to promotion. In such cases the person by-passed can make no grievance against a promotion on the ground of mere seniority if the above conditions are fulfilled.

Reference answered accordingly.

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FULL BENCH

S. M. F. ALI, C. J.; JANKI NATH BHAT,
JASWANT SINGH AND JALAL-UD-
DIN AND ANANT SINGH, JJ.Dhani Ram Shah, Appellant v. Mst.
Bhag Del, Respondent.Civil Second Appeal No. 93 of 1966, D/-
10-9-1969, against Judgment of Dist. J.,
Badarwah, D/- 16-7-1966.

(A) Jammu and Kashmir Right of
Prior Purchase Act (2 of Smt. 1933),
Ss. 14 and 15 — Sale of agricultural land
situated within town area limits — Right
of prior purchase is to be governed by
S. 14 and not S. 15 — Expression "urban
immovable property" as conceived by the
Act does not embrace within its ambit
agricultural lands situate in a town. AIR
1952 J & K 20, Approved; 1912 Pun Re
26 & (1881) 8 QBD 421 & (1836) 1 M &
W 101 & (1889) 22 QBD 513 & (1894) 4
AC 347 & (1950) 2 All ER 832 & AIR 1953
All 168 & (1953) 1 QBD 136 & AIR 1953
Cal 176, Ref. (Paras 13, 26, 40, 44)

(B) J. and K. Laws Consolidation Act
(Smt. 1977), S. 4 (1) (b) — Constitution of
Jammu and Kashmir, S. 157 — Advice
tendered by Board of Judicial Advisers
is binding only so long as it is not ex-
pressly or impliedly overruled by the
Supreme Court.

Per Majority (Jaswant Singh, J. contra):
The decision of the Board of Judicial
Advisers does not amount to a legislative
enactment and is binding only so long as
it is not expressly or impliedly overruled
by the Supreme Court. Full Bench deci-
sion of J. and K. High Court in Sirajuddin
case reported in AIR 1969 J & K 62 (FB),
Explained and Clarified. Case law dis-
cussed. (Para 48)

Cases Referred: Chronological Paras

- {1969} AIR 1969 J & K 62 (V 56) =
1968 Kash LJ 311 (FB), Syed
Siraj-ul-din v. Karim Dhar 33, 46, 48
(1965) AIR 1965 All 65 (V 52) =
1964 All LJ 389 (FB), Kishan
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(1964) AIR 1964 Cal 396 (V 51),
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(1960) AIR 1960 SC 862 (V 47) =
(1960) 3 SCR 311, Sarwar Lal v.
State of Hyderabad 22
(1959) AIR 1959 SC 422 (V 46) =
(1959) Supp (1) SCR 623, N. T.
Veluswamy Thevar v. Raja Nainar 25
(1959) AIR 1959 Cal 176 (V 46) =
1959 Cri LJ 318, Jhagru Tewari
v. State of W. B. 25
(1958) AIR 1958 SC 838 (V 55) =
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Khazan Singh 46

- (1958) AIR 1958 All 168 (V 45) =
1957 All LJ 944, Triheni Kurmi
v. M. Ram Dulari 25
(1956) AIR 1956 SC 60 (V 42),
Director of Endowment Govt. of
Hyderabad v. Akram Ali 22
(1955) AIR 1955 SC 352 (V 42),
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booh Begum 22, 32
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ram Lavar 18, 32
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= ILR (1953) 5 Assam 389 (FB),
Onkarnal Jwalaprasad v. Commr.
of Taxes, Assam 8
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57 Cal WN 127, Radharani Das
v. Sisir Kumar 19, 32
(1953) 1953-1 QBD 136 = 1952-2
All ER 893, Birch v. Wigan Cor-
poration 25
(1952) AIR 1952 J & K 20 (V 39) =
10 J & K LR 168, Sultan Safi v.
Shaban Safi 5, 7, 8, 13, 16,
23, 27
(1951) AIR 1951 Pepsu 33 (V 38) =
2 Pepsu LR 245 (FB), Santoo v.
Sohan Lal 18
(1950) (1950) 2 All ER 832 = 1951-1
KB 333, Newman v. Lipman 25
(1939) AIR 1939 Lah 81 (V 26) =
40 Cri LJ 497 (FB), Parmanand
v. Emperor 25
(1926) 1928 IR 402, Irish Free State
in Hull v. McKenna 31
(1912) 1912 Pun Re 28 = 1912 Pun
LR 23 14
(1894) 1894-4 AC 847 = 63 LJ PC
75, Institute of Patent Agents v.
Lockwood 24
(1889) 22 QBD 513 = 58 LJ QB 174,
Curtis v. Stovin 23
(1881) 8 QBD 421 = 51 LJ QB 82,
Yorkshire Fire Life Insurance Co.
v. Clayton 23
(1859) 28 LJ MC 91 = 8 Cox CC
143, R. v. Skeen 25
(1836) 1 M & W 101 = 150 ER 368,
Lyde v. Barnard 23
J & K LR (VIII) 2001 P 210, Dharam
Singh v. Sita Ram 46

Ishwar Singh, for Appellant; S. P.
Gupta, for Respondent.

JASWANT SINGH, J.:— This seeming-
ly simple but mysteriously complex civil
second appeal which is directed against the
judgment and decree dated 16-7-1966 of
the learned District Judge, Badarwah,
whereby he affirmed the decree for pos-
session of the suit land on the basis of the
right of prior purchase has wended its
way to this bench in the following cir-
cumstances;

2. Devi Saran, respondent No. 2 sold land measuring 3 kanals and 9 Marlas comprised in Khasra No. 1403, Khewat No. 1910 Min, situate in the town of Kishtwar in favour of Dhani Ram appellant in lieu of Rs. 4,000 vide sale deed dated 1-10-1960. Smt. Bhag Dei, respondent No. 1 thereupon instituted a suit for possession of the said land asserting inter alia that she being the wife of and as such the lawful heir of the vendor was entitled to a right of prior purchase in respect of the said land in preference to Dhani Ram appellant vendee, who was a stranger.

3. The appellant resisted the suit not on the ground that the plaintiff-responder had no right of prior purchase but on the ground that she having assented to the sale in his favour was not entitled to enforce her right. It was further averred that the land being situate within the town area limits and having been purchased for the purpose of construction had lost its agricultural character.

4. On the pleadings of the parties, the following issues were struck in the case.

1. Whether plaintiff had waived her superior right and if so how? O. P. D. 1.

2. Whether the suit land was located within the limits of Town Area Committee and was no more an agricultural land and if so what was its effect on the suit? O. P. P.

3. Whether the court-fee was insufficient? O. P. D. 1.

4. Whether the sale price as mentioned in the sale deed was fixed in good faith and actually paid? O. P. D. 1.

5. In case of non-proof of Issue No. 4 what was the market value of the suit land? O. P. Parties.

6. Relief.

5. The contesting defendant i.e., Dhani Ram appellant examined Padam Nabh, Amer Nath, and Ram Lal while the plaintiff appeared as a witness on her own behalf. On a consideration of the evidence adduced in the case, the learned Sub-Judge decreed the suit holding that there was no evidence to prove that the plaintiff had waived her superior right of pre-emption and that though the land was situate in the town of Kishtwar there was no evidence to show that it had ceased to be used as agricultural land. On appeal the learned District Judge, Bhaderwah, affirmed the findings recorded by the trial Court and dismissed the appeal holding that the mere fact that the land in question was situate within the town area limits of Kishtwar was not sufficient to destroy its character as agricultural land and the same was governed by the provisions of Section 14 of the Right of Prior Purchase Act.

The defendant thereupon preferred a further appeal to this Court which came

up before my Lord the Hon'ble Chief Justice who by his order dated 13th December, 1968 referred it to a Full Bench as in his Lordship's opinion the appeal raised substantial question of law of great public importance relating to the interpretation of Sections 14 and 15 of the Right of Prior Purchase Act, hereinafter referred to as the Act, and the view of the law expounded in the Judgment of the Board of Judicial Advisers reported in 10 J & K LR 168 = (AIR 1952 J. & K. 20) required reconsideration. On the matter coming up before the Full Bench consisting of Hon'ble Chief Justice, and my learned brothers Hon'ble Bhat, J., and Hon'ble Anant Singh, J., it decided to place the appeal for decision before a bench of five judges as in its opinion it also involved the question as to the binding nature of the decisions rendered by His Highness' Board of Judicial Advisers and this Bench was constituted in consequence.

6. Appearing for the appellant Shri Ishwar Singh has contended that the land in question being situate within the Town Area Limits of Kishtwar, it was urban immovable property within the meaning of Section 3 (3) of the Right of Prior Purchase Act and was, therefore, governed not by the provisions of Section 14 (as held by the Courts below) but by Section 15 of the Act.

7. While elucidating his submission he has placed before us in juxtaposition the definitions of the expression "Urban immovable property" as occurring in our local Act and as contained in the Punjab Pre-emption Act and has tried to impress upon us that agricultural land situate within the town area limits falls within the ambit of 'urban immovable property' and is, therefore, governed by Section 15 of the Act. He has also referred to the recitals in the sale deed and contended that the land in question having been purchased for purpose of construction it cannot in any event be deemed to be agricultural land and must be treated as urban immovable property and hence governed by Section 15 of the Act. He has further contended that the view of the law expressed by His Highness' Board of Judicial Advisers in 10 J & K LR 168 = (AIR 1952 J & K 20), is neither correct nor has it any binding force after the 13th May, 1954 i.e., from the 14th of May, 1954, the date from which the jurisdiction of the Supreme Court was extended to the State of Jammu and Kashmir and the jurisdiction of the authority functioning as Privy Council in the State i.e., of His Highness' Board of Judicial Advisers was abolished by means of the Constitution (Application to Jammu and Kashmir) Order, 1954. He has in this connection drawn our attention to a single Bench decision of the Andhra Pradesh High

Court reported in AIR 1955 Andhra Pra 491 (sic).

8. Shri S. P. Gupta, learned counsel for the respondent, has on the other hand, submitted that the land in question was agricultural and right of prior purchase in respect of agricultural land wherever situate is governed not by Section 15 but by Section 14 of the Act and the Courts below were right in applying the said provision to the instant case. He has further submitted that the view of the law expressed by the Board of Judicial Advisors in 10 J & K LR 168—(AIR 1952 J & K 20) having been accepted by and merged in the Command Order of His Highness the same was binding on all Courts in the State unless it was overruled by the Supreme Court. He has further contended that the said Command Order had the force of law and has to be followed until repealed or amended by an Act of Legislature. He has in this connection invited our attention to a Full Bench decision of the Assam High Court reported in AIR 1954 Assam 139.

9. The crucial point for determination in this case is whether the sale of agricultural land situated within town area limits is governed by Section 14 or 15 of the Jammu & Kashmir Right of Prior Purchase Act No. 11 of 1993 (1936 A. D.). The determination of this question assumes importance because the line of pre-emptors in a case governed by Section 14 is different from that governed by Section 15 of the Act. While construing these sections we have to keep in view the three categories of immovable properties as envisaged by the Act. These categories are "agricultural land" "village immovable property" and "urban immovable property". Let us now see the meaning assigned to each one of these expressions by the Act. A reference to Section 3 (1) of the Act would reveal that for the purposes of the Act, the definition of "agricultural land" as contained in the Jammu Alienation of Land Act of 1990 (now The Jammu and Kashmir Alienation of Land Act 5 of 1995 (1938 AD)) has been adopted by the framer of the former Act. The expression is defined in the latter Act as under:—

"the expression "Land" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes subservient to agriculture or for pasture and includes—

(a) the sites of buildings and other structure on such land.

(b) a share in the profit of an estate or holding.

(c) any dues or any fixed percentage of the land revenue payable by an inferior land-owner to a superior land-owner.

(d) a right to receive rent.

(e) any right to water enjoyed by the owner or occupier of land as such, and

(f) any right of occupancy."

10. The other two expressions namely "village immovable property" and "urban immovable property" are defined in Section 3 of the former Act, as follows:—

"village immovable property" shall mean immovable property within the limits of a village, other than agricultural land.

"Urban immovable property" shall mean immovable property within the limits of a town.

For the purposes of this Act any specific area may be considered as town:—

(a) If it is declared as such by the Government by a notification in the Government Gazette, or,

(b) If so found by the Courts."

11. Now we must first of all be clear about the import, ambit and scope of the expression "agricultural land". A careful analysis of the definition of the expression as set out above would show that for the purposes of the Jammu and Kashmir Right of Prior Purchase Act, it is the character of the land rather than its situation which determines whether the land is agricultural or not. In other words, for the purpose of the Act it is the use to which the land is put which is material for deciding the question and not its location. Thus if the land which is not occupied as the site of any building in a town or village but is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture it would be treated as "agricultural land" no matter whether it is situated in a town or a village.

12. Now though the definition of "urban immovable property" as contained in S. 3 (3) of the Act is not happily worded, it is difficult to assume that having once included land occupied or let for agricultural or pastoral purposes even if situate in a town within the definition of "agricultural land" the framer of the Act intended to include it again within the purview of "urban immovable property". In order to resolve the apparent conflict and avoid anomalous results we must give harmonious meaning to these expressions namely, "Agricultural land", "Village immovable property," and "Urban immovable property" occurring in the Act. It is a recognized rule of interpretation of statutes that expressions used therein would ordinarily be understood in a sense in which they harmonise with the object of the statute and effectuate the intention of the Legislature. Following the salutary principle of harmonious construction of statutes we are led to conclude that the definition contained in clause (1) of Section 3 of the Act controls

the definition in clause (3) thereof and the expression "urban immovable property" means immovable property other than agricultural land situate within the limits of a town.

13. It is also well to bear in mind that this is not a matter which is *res integra* for the State. An identical question came up for consideration before the Board of Judicial Advisors in *Sultan Sufi v. Shaban Sufi*, 10 J & K LR 168=(AIR 1952 J & K 20) where it was conclusively laid down as under:—

"The fourteenth section opens with the provision that "the right of prior purchase in respect of "agricultural land" and "village immovable property" shall vest in four categories of persons none of which includes the owners of property contiguous to the property sold.

"There can be no doubt that the words "agricultural land" occurring in this section includes agricultural land in an urban area as well as in a village. It is equally clear that the expression "immovable property" in this section does not include "agricultural land."

There is no doubt that if this definition of urban immovable property be imported in the fifteenth section and no account be taken of the fourteenth section the argument would be sustainable. But neither section can be ignored in determining the Right of Pre-emption claimed by owners of contiguous properties. The drafting is extremely unsatisfactory and the apparent conflict arising from the language of the two sections, has to be obviated by a reasonable construction of the two sections. It seems to the board that the decisive question is whether the definition of "urban immovable property" should be imported in the fifteenth section.

Now the 3rd Section of the Act which defines various terms employed in the Act expressly provides that "unless there is anything repugnant in the subject or context" the words defined have to be taken to mean in terms of the definitions. In other words, where the subject or context in any part of the Act would give rise to a conflict between two provisions thereof, the definition is to be disregarded. As already shown a serious conflict arises between the fourteenth and the fifteenth sections if the expression "urban immovable property" occurring in the latter be taken in the extended sense according to the definition. On the other hand, reading the two sections together it is clear that property has been classified into three categories namely; (1) agricultural land which means land which is not occupied as the site of any building in a town or village and is occupied as lent for agricultural purposes or for purposes sub-

servient to agriculture or pasture. (Cf definition of land in Jammu and Kashmir Alienation of Land Act, 1995 in Section 2 adopted by Section 3 of the Right of Prior Purchase Act) wherever situated whether in a city or in a village, (2) village immovable property and (3) urban immovable property. This classification clearly indicated that the words "immovable property" in Sections 14 and 15 were not intended by the framer of the Act to include agricultural land. Having provided by the fourteenth section that agricultural land, regardless of its situation, can be the subject of pre-emption of the four classes of persons therein mentioned it could not have intended that such land should be again provided for in the fifteenth section and the right of prior purchase given to quite a different set of persons. The construction of the fourteenth Section, which found favour with the lower Courts, would insert the words "in a village" after the words "agricultural land" or the word "village" before them which is not permissible. The words "agricultural land" in section fourteen are unqualified and there is no justification for adding the word "village" before them or the words "in a village" after them.

Accordingly the Board are of opinion that the fifteenth section of the Act is not applicable to the case and that the right of prior purchase is to be determined according to the fourteenth section which does not entitle owners of property contiguous to the property sold." I have, therefore, no hesitation in holding that the expression "urban immovable property" as conceived by the Right of Prior Purchase Act does not embrace within its ambit agricultural land situate in a town.

14. There is also no force in the contention of the learned counsel for the appellant that since the land in question was purchased for raising construction thereon, it cannot be held to be an agricultural land. Whether subject matter of a pre-emption suit is agricultural land and comes within the meaning of Section 3(1) of the Jammu and Kashmir Right of Prior Purchase Act read with Section 2(2) of the Jammu and Kashmir Alienation of Land Act, or not has to be determined with reference to the point of time when the sale takes place and not with reference to the date on which the suit is instituted or with reference to the purpose for which it is purchased. Reference in this connection may be made to a decision of the Punjab Chief Court reported in 26 Pun Re 1912 where it was held as under:—

"If the land in suit has been occupied for agricultural purposes for no less than fifteen years before the suit, and if at the date of sale it was still occupied for the

same purpose, it is incorrect to say that for the purposes of the present litigation it is "urban immovable property" simply because at one time it was *ghair mumkin* and is not now assessed to land revenue, or because it lies in the direction of the recent extensions of the town of Jagraon and on the main road connecting the town and the railway station. The fact that since the date of sale it has been built upon by the vendee is not sufficient to alter its character so as to affect the plaintiff's right of pre-emption, for in a case of this kind in determining whether the subject matter of the suit is agricultural land or not the time to be looked at is the time when the sale was made and not when the suit was instituted. Unless and until it is shown that at the date of sale the land in question had ceased to be agricultural land as defined by Section 3(1) of the Pre-emption Act, the plaintiff must be held to have a right of pre-emption in respect of it, though obviously he can only exercise it subject to the provisions and limitation contained in the said Act."

15. From the evidence led in the case specially from the statement of Padam Nabh D.W. it is proved that the land in question was used for agricultural purpose at the time when the sale took place. The fact that it was purchased for the purpose of putting up a construction as mentioned in the sale deed is not a material consideration and cannot destroy its character as an agricultural land.

16. I am also not at all impressed by the contention of the learned counsel for the appellant that the judgment of the Board of Judicial Advisors in 10 J & K LR 168—(AIR 1952 J & K 20) has ceased to have a binding effect from the 14th May 1954. The judgment of the Board of Judicial Advisors having been accepted by His Highness and a command order in accordance therewith having been issued the same is law for the State unless it is altered or repealed by an Act of the legislature.

17. This would be clear from a reference to Section 4 (1) (b) of Sri Partap Consolidation Act, Section 157 of the State Constitution and Articles 366 (10) and 372 of the Constitution of India as applied to the State.

18. It is also well to remember at this stage that the Board of Judicial Advisors was set up by the erstwhile Ruler pursuant to Section 71 of the Constitution Act, 1996, to advise him in the disposal of civil and criminal appeals as under the law lay to him from the decisions of the High Court of the State and by Section 17 of the Appeals to His Highness Act, 1996, a duty was cast on the High Court, all the subordinate Courts and all the authorities functioning in the State to carry

out the final orders passed by His Highness on a civil or criminal appeal which according to Section 4 (1) (b) of Sri Partap Consolidation Act had the force of law. Now the orders passed on any advice tendered by the Advisory Board being existing law according to Article 366(10) and 372 of the Constitution of India as applied to the State until altered or repealed by the appropriate legislature or overruled by the Supreme Court after considering the relevant law of the State and the effect of His Highness' Command Order on any advice tendered to him by the Advisory Board, have to be scrupulously followed and administered by the Courts in the State. The fact that the jurisdiction of the authority functioning as the Privy Council of the State i.e., of the Advisory Board constituted under Section 71 of the Constitution Act, 1996, was abolished with effect from 14th of May, 1954, as a result of the Constitution (Application of Jammu and Kashmir) Order, 1954, and all appeals and other proceedings pending before the Advisory Board were transferred for disposal to the Supreme Court whose jurisdiction was extended to the State from the aforesaid date does not mean that the binding effect of the judgment of the Advisory Board which according to Section 4 of the Sri Partap Consolidation Act acquired the force of law was destroyed.

On the other hand, the judgment having been accepted by His Highness and he having declared the law regarding a particular matter it continued, as already stated, to have the imprimatur of law and a binding effect by virtue of the provisions contained in Section 157 of the State Constitution and Articles 366 (10) and 372 of the Constitution of India as applied to the State just as notwithstanding the abolition of jurisdiction of the Privy Council as a result of the Abolition of Privy Council Jurisdiction Act, 1949, the view of any law expounded by the Privy Council continued to have a binding effect until it was overruled by the Supreme Court. Reference in this connection may be made to the following observations made in *Santoo v. Sohan Lal*, AIR 1951 Pepsu 33 (FB) (Para 9):—

"If in a certain matter the Judicial Committee has laid down the law but that matter has not gone before the Supreme Court and consequently no occasion has arisen for that court to lay down the law on the same point, Section 5 of the Judicature Ordinance must be deemed and given effect to and the law laid down by the Judicial Committee must be followed by all the courts in the Union including the High Courts. It is only when the law laid down by the Supreme Court on a certain point is different from that laid down by the Judicial Committee that Article 241 will come into operation and

the former will be preferred to the latter. Again in *State of Bombay v. Chhaganlal Gangaram Lavar*, AIR 1955 Bom 1, it was held:—

"So long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are still binding upon High Courts. What is binding is not merely the point actually decided but an opinion expressed by the Privy Council which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given."

In *Punjabai v. Shamrao*, AIR 1955 Nag 293, it was held as follows:—

"Section 212 Government of India Act, 1935 invested the Privy Council decisions with binding authority. Article 225 of the Constitution lays down that the law administered in any existing High Court remains the same as immediately before the commencement of the Constitution. Therefore, the law laid down by the Privy Council, which does not conflict with any decision of the Supreme Court would be binding on the Courts in India."

19. Again in *Smt. Radharani Das v. Sisir Kumar*, AIR 1953 Cal 524, it was held as under:—

"A decision of the Judicial Committee is binding upon a High Court until the Supreme Court rules otherwise."

20. In *M/s. Air Carrying Corporation v. Shibendra Nath Bhattacharya*, AIR 1964 Cal 396, it was held as:—

"A decision of the Privy Council is binding on all courts in India, as the existing law, under Article 372(1) of the Constitution, except the Supreme Court, which alone is not bound by precedents and is competent to override it."

In *Kishan Chand v. Ram Babu*, AIR 1965 All 65 it was held:—

"The decision of the Privy Council was a declaration of the law within the meaning of S. 212 of the Government of India Act and was binding upon all courts in India. It was the law when the Constitution came into force, with effect from 26-1-1950. Under Art. 372 the law in force continued to be in force until altered or repealed. Even after Constitution the law declared by the Judicial Committee continues to be the law by virtue of Article 372 so long as the Supreme Court does not lay down a different law."

Thus from the above rulings it follows that even after the Constitution the rulings of the Privy Council are binding on the Indian courts until the Supreme Court takes a contrary view of the law expounded by the former or the law thus expounded is altered or repealed Moreover, the reason why the judgments of the Privy Council rendered after 1950 have only persuasive value is because of the fact

that the jurisdiction of the Privy Council so far as India is concerned ceased in consequence of the Abolition of Privy Council Jurisdiction Act, 1949 and according to principles of international law a judgment delivered even by the highest court of one country cannot in the absence of international agreement *proprio vigore* operate in the other.

21. The decision of the Andhra Pradesh High Court reported in AIR 1955 Andh. Pra. 491, cannot be held to lay down a sound law in view of the overwhelming judicial opinion to the contrary as reproduced above.

22. That apart the erstwhile ruler of the State being an absolute sovereign his order could not but be regarded as law. This view receives support from the decisions of the Supreme Court in *Ammer Unnisa Begum v. Mehboob Begum*, AIR 1955 SC 352, *Director of Endowment Government of Hyderabad v. Akramali*, AIR 1956 SC 60, and *Sarwarlal v. State of Hyderabad*, AIR 1960 SC 862. In AIR 1956 SC 60, their Lordships of the Supreme Court held as follows:—

"Now the Nizam was an absolute sovereign regarding all domestic matters at that time and his word was law; it does not matter whether this be called legislation or an executive act or a judicial determination because there is in fact no clear-cut dividing line between the various functions of an absolute ruler whose will is law. Whatever he proclaimed through his *Farmans* had the combined effect of law and the decree of a court."

I am, therefore, of the view that the judgments rendered by the Board of Judicial Advisors and accepted by the erstwhile ruler continue to have a binding force even after the coming into force of the Constitution (Application to Jammu and Kashmir) Order, 1954. For the foregoing reasons, I do not find any merit in this appeal which is dismissed but in the circumstances of the case without any order as to costs.

23. BHAT, J.:— I have had the privilege of going through the judgment written by my learned brother Jaswant Singh J. I would like to add the following few words. I entirely agree with my learned brother that a right of prior purchase in agricultural land shall be governed by the provisions of Section 14 of the Right of Prior Purchase Act and not by Section 15 of that Act, whether this agricultural land is situated in a village or a town, as held by their Lordships of the Board of Judicial Advisors in 10 J & K LR 168= (AIR 1952 J & K 20). The wording of Sections 14 and 15 is very unhappy and the drafting is extremely unsatisfactory. There is an apparent conflict in the two sections because in Section 14 the words are "in respect of agricultural land and village immovable property". In

Section 15 again the words 'in respect of urban immovable property' apparently include all sorts of property within the limits of a town whether it is agricultural, commercial or used for building purposes or otherwise.

This unsatisfactory drafting is made all the more conspicuous by comparing the corresponding words in the definition clause in the Punjab Pre-emption Act, upon which our Right of Prior Purchase Act is primarily based. In that Act while defining urban immovable property it is clearly stated that urban immovable property shall mean immovable property within the limits of a town other than agricultural land. The words 'other than agricultural land' have been dropped in our definition, which has resulted in the present confusion. But as has been elaborately discussed by my learned brother as well as by the Board of Judicial Advisers agricultural land has been held to have the same meaning as land defined in the J & K Alienation of Land Act, which definition has been reproduced by my learned brother in extenso. That definition indicates and connotes that land is agricultural land which is occupied or let for agricultural purpose or for purpose subservient to agriculture or for pasture. The intention of our legislature has been that agricultural land should be clearly differentiated from urban immovable property i.e., property which is situated in a town and apparently is not used for agricultural purposes. If this definition is not accepted it would lead to certain anomalies and strange results. Agricultural land is a special kind of land which has its own incidents.

The incidents are with respect to its tenancy, transfer, etc., and even with respect to right to pre-empt sales of such lands. Under Section 14 of the Right of Prior Purchase Act a different class of persons is mentioned who can pre-empt the sales of agricultural land and under Section 15 an entirely different class of persons have a right to pre-empt the sale of urban immovable property. Under the first of these sections, an attempt has been made to keep the land with the occupancy tenants, co-sharers, lineal descendants, owners of the Mahal etc. etc., which indicates that the legislature was anxious to see that the character of the land is not changed and only those persons who can be said to have any interest in agricultural pursuits should have the right to pre-empt such sales. On the other hand in the case of urban immovable property the right is vested not in any one of the persons mentioned in Section 14 except the co-sharers but those people who have a common stair-case, or have a common entrance to the properties or where the sale is of a servient property, in the owners of the dominant property, and

vice versa. It would create difficulties if the same class of land whether situate in a town or in a village were subject to different incidents. For this interpretation, as already remarked by my learned brother, recourse has to be taken to certain well-recognized rules relating to interpretation of Statutes. In Maxwell's Interpretation of Statutes, (Eleventh Edition) page 228 it is said:—

"Notwithstanding the general rule that full effect must be given to every word, yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may or rather it should be, eliminated. The words of a statute must be construed so as to give a sensible meaning to them if possible. They ought to be construed ut res magis valeat quam pereat."

See Yorkshire Fire & Life Insurance Co. v. Clayton, (1881) 8 QBD 421; Lyde v. Barnard, (1836) 1 M & W 101 at p. 115; Curtis v. Stovin, (1889) 22 QBD 513.

24. In Halsbury's Laws of England, (Third Edition) Volume 36, on page 388 it says:

"If the words of a statute are ambiguous, then the intention of Parliament must be sought first in the statute itself, then in other legislation, and contemporaneous circumstances, and finally in the general rules laid down long ago....."

At page 395 of the same book, it is laid down that:—

"It is sometimes said that where there is an irreconcilable inconsistency between two provisions in the same statute, the latter prevails, but this is doubtful, and the better view appears to be that the Courts must determine which is the leading provision and which the subordinate provision and which must give way to the other."

See Institute of Patent Agents v. Lockwood, (1894) 4 AC 347.

25. It is well established that whenever the language of the Legislature admits of two constructions and if construed in one way, would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words. See R. v. Skeen, (1859) 23 LJMC 91 and AIR 1959 Cal 176. Lord Denning in Birch v. Wigan Corporation, (1953) 1 QBD 136 observed that:—

"Where there is a fair choice between a literal interpretation and a reasonable one — and there usually is — we should always choose the reasonable one."

Another rule of interpretation of a section is not to interpret it in such a way that inconvenience and lawlessness may be caused unless it is absolutely necessary to do so. See AIR 1958 All 168. When the language is not clear and ambiguous and when more than one interpreta-

tion is possible, the interpretation which appears to be most 'in accord with reason, convenience and justice' is to be preferred. See AIR 1939 Lah 81 (FB). Again it has been held in AIR 1959 SC 422 that: "But when on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is our duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies." See also *Newman v. Lipman*, (1950) 2 All ER 832.

26. Applying these tests to the two Sections 14 and 15 of the Right of Prior Purchase Act, in my opinion, it would be only fair, reasonable and proper and to save anomalies and fantastic results that we understand from the expression 'agricultural land' land as defined in the Alienation of Land Act, whether that land is situate in a village or a town, and therefore, urban immovable property should be understood to mean all immovable property in a town except agricultural land. This disposes of one of the points of controversy in the case.

27. The next point is as to what is the effect of the decision of the Board of Judicial Advisers whose advice has been accepted by His Highness the Maharaja Bahadur in 10 J & K LR 168=(AIR 1952 J & K 20). I do not agree with the view that the decision of the Board of Judicial Advisers or in the technical term the advice then tendered to the then Ruler of the State and accepted by him would be law in the sense as an enactment of legislature and would remain in force till it is repealed by another law passed by the legislature. In my opinion, this decision is only a judicial interpretation of some of the provisions of the law, in this case of Sections 14 and 15 of the Right of Prior Purchase Act which interpretation if not accepted or adopted by the Supreme Court would be of no consequence after the Supreme Court holds to the contrary. The decision may be expressly overruled by the Supreme Court in the same case or may be overruled even by implication and not necessarily in express words in a different case raising the same point.

28. The opinion of the Board is not to be deemed to be a piece of legislation duly passed and has not to be construed as a special enactment passed and promulgated in the State which has to be accepted as such and for all time to come till it is expressly repealed by another piece of legislation. In order to appreciate this point of mine, I would like to dilate upon this problem. It is argued that the Maharaja was the fountain head of all power, legislative, executive, and judicial and anything that emanated from him would have the force of statutory

law. Law as understood in its constitutional sense means adherence to some uniform principle under certain specified conditions and any violation of the law is punishable or otherwise actionable. Even monarchs and sovereigns with all powers concentrated in them, had different powers in them in different capacities and their commands and orders would have different potentialities and force. It is not correct that anything they ordered would have the force of law and a violation of all their orders would be punishable as an offence or contravention of a statutory law. Let us take the case of this very Maharaja. If the Maharaja had issued a command that all polo ponies should be made to have two rounds in the Polo-ground every day or that before any dinner was served, chicken soup should be served, and if in any case these commands and orders were not obeyed, it would be funny to say that any violation of these commands would be punishable as an offence or would be the subject matter of prosecution against the person who disobeyed these orders or would be otherwise actionable in a court of law. Salmond on Jurisprudence (Twelfth Edition) on page 26 says:—

"We must now distinguish commands which are laws from commands which are not. Imagine a State governed by an absolute ruler R. Here the law is what R. commands. But is the converse true? Are all R's commands Law? Suppose he orders his servants to make preparations for a banquet; would this qualify as a law? would we really wish to designate as law his every instruction i.e., to close the window, to turn up the heating and so on even though R. being an absolute ruler could have his servants executed for disobedience."

He further goes on to say that:—

"Austin distinguishes laws from other commands by their generality, laws being general commands; and indeed laws seem much less like the transitory commands barked out on parade grounds and obeyed there and then by the troops, and much more like such things as the standing orders of a military station which remain in force generally and continuously for all persons on the station.....".

We shall now briefly trace the constitutional history in this State to show that all commands of His Highness are not laws in the sense above mentioned. Reference is made to S. 4(b) of the Partap J & K Laws Consolidation Act, of 1977, and it says that:—

"Orders, Hidayats, Ailans, Notifications, Ishtihars, Circulars, Robkars, Irshads, Yaddashts; State Council Resolution, Rules, Proclamations and Ordinances issued, passed, published or made by or under the authority of His Highness or

by any other competent authority empowered to make and promulgate laws for the time being"

would be the laws to be administered by the Civil and Criminal Courts of the State.

29. A reasonable interpretation of this provision also would show that it would apply only to such orders, Hidayats, Ailans, Notifications, Ishtihars, Circulars etc., which would have the force of law; otherwise as already indicated an ordinary order or even a Hidayat issued by His Highness would not be construed as law i.e., as a statutory law violation of which would be punishable or actionable. Apart from this interpretation it is to be remembered that this Act was passed in 1977 (1920 A.D.). Till then the Maharaja was the absolute ruler of the State and all power was centred in him. But in the year 1991 Regulation 1 was passed and His Highness the Maharaja Bahadur ordained that:—

"Whereas it is my declared intention to provide for the association of my subjects in the matter of legislation and administration of the State, I hereby promulgate the following regulation."

It was for the first time in the State that responsible Government was given by His Highness to his subjects. A Praja Sabha was created and a Council of Ministers was also brought into existence constitutionally. Some subjects were reserved; it was not lawful for the Council or the Praja Sabha to consider or deal with or enact any measure relating to or affecting them (Section 7) otherwise in the Praja Sabha bills would be introduced and after receiving the assent of His Highness they would become law in the State. (vide Section 13). Section 3 of Regulation 1 of 1991 laid down that "all powers, legislative, executive, and judicial in relation to the State and its Government are hereby declared to be and have been always inherent in and possessed and retained by His Highness the Maharaja of Jammu and Kashmir....." It is clear that even in 1991 the three limbs of the State so called i.e., Legislative, Executive, and Judicial were contemplated by His Highness the Maharaja Bahadur. In the year 1996 the Constitution Act of 1996 was passed. In between 1991 and 1996 there was another Regulation No. 13 of 1995 which had introduced certain amendments in the original Regulation 1 of 1991 but in the Constitution Act of 1996 a complete constitution of the State was laid down. Section 5 of this Act stated that:—

"Notwithstanding anything contained in this or any other Act, all powers, legislative, executive and judicial, in relation to the State and its government are hereby declared to be and to have always

been inherent in and possessed and retained by His Highness and nothing contained in this or any other Act shall affect or be deemed to have affected the right and prerogative of His Highness to make laws, and issue proclamations, orders and ordinances by virtue of his inherent authority."

The Praja Sabha was given full powers to pass laws and U/S. 31 of this Act after receiving assent of His Highness they would become Acts and have the force of law. This Act was later on replaced by the Constitution of Jammu and Kashmir, which was passed in the year 1956 reference to which will be made later. So after the promulgation of Regulation 1 or coming into force of the Constitution Act of 1996, it is very clear that three kinds of power very well defined were held by His Highness i.e., executive, legislative and judicial. The legislature would pass laws, to enforce which was the duty of the executive and it was the function of judiciary to apply and interpret the law. Therefore after enacting such laws, His Highness's powers would be divided into these three channels. He was no doubt the fountain head of all powers and retained with himself the power to issue ordinances, proclamations, orders etc. We have to see in what context was the Board of Judicial Advisers (hereinafter referred to as 'the Board' for brevity) created U/S. 71 of the same Act. His Highness had the power to appoint a Board of Judicial Advisers to advise him for the disposal of such civil and criminal appeal as may, under the law for the time being in force lie to His Highness from the decisions of the High Court and on such other matters as His Highness may choose to refer to such Board for advice. The language of this section itself clearly shows that the Board could be appointed for the disposal of civil and criminal appeals or His Highness would get the advice of the members of this Board on other matters which His Highness thought fit. In pursuance of this provision another Act known as Appeals to His Highness Act (Act No. XVI of 1961) was enacted and the preamble of the Act itself clearly lays down that:—

"Whereas provision has been made in the Jammu & Kashmir Constitution Act of 1996 for the establishment of a Board of Judicial Advisers to advise His Highness in such civil and criminal appeal as shall lie to His Highness....."

About criminal cases it is laid down in Section 10 of the Act that an appeal shall lie to His Highness from an order of the High Court in a criminal case in which a sentence of death or imprisonment for life is passed or upheld by the High Court and which is certified by the High Court to be a fit case for appeal to His Highness.

only proprietary or possessory interest or will include even pecuniary interests. But whatever may be the nature of the "interests" the question is whether they should be present prior to the sale. The decision in AIR 1939 Nag 179 which supports the auction purchaser took the view that the auction purchaser has got interests even prior to the sale. It was observed:

"In ILR 51 Cal 495 = (AIR 1924 Cal 786) Dhirendra Nath Roy v. Kamini Kumar Pal, the expression 'any person whose interests are affected by the sale' was held not restricted to proprietary or possessory title so as to exclude pecuniary interest. On that wide interpretation, a decree-holder who has lost his right to rateable distribution was held to have such interest as would entitle him to apply under this Rule to set aside a sale held at the instance of another creditor. Can it be said that the auction-purchaser has no pecuniary interest that is affected by the sale? It is obvious that an execution sale primarily affects the interests of three parties although their interests may be different and conflicting, namely the decree-holder, the judgment-debtor and the auction-purchaser. Any person who comes forward to bid at the auction does so manifestly because he has some interest in the purchase of the property. The bidders are persons who are interested in converting their cash into the property which is offered for sale. The interest of the purchaser at the time of the sale appears pecuniary but by necessary implication it comprises an inchoate interest in the property. It cannot therefore be gainsaid that the auction-purchaser has an interest to be protected just as the decree-holder or the judgment-debtor has."

8. In ILR 47 All 479=(AIR 1925 All 459), the word "interests" was interpreted by Walsh, J. in the following manner:

"I find myself compelled to hold as a matter of law that a person who is the highest bidder, whose bid is accepted, who is compelled by law to pay a deposit, and unless something intervenes, is compelled by law to complete his purchase, is a person 'whose interests are affected by the sale'. It is impossible to use a wider term than 'a person's interest.' In the ordinary use of the word in the English language it is a term covering every sort of interest recognised by law, such as, in the case of an auction purchaser, liability to pay the money, liability to complete and take a transfer of the property, and from his own point of view the necessity of finding the necessary funds, and also the necessity of carrying through to fruition the provisional contract into which he has entered. If the expression

were 'interests in the property', it would of course be confined to an interest in the property sold, antecedent to the sale. If the word were merely 'interest' without the plural and without the words 'in the property' it might be possible to hold that the word 'interest' was confined to interest in the thing itself at the time of the sale. But that is not the expression, and to my mind the actual expression in the rule is free from ambiguity of difficulty of any kind and ought to be construed as meaning what it says."

9. We find it difficult to agree with the reasoning in the above two decisions and to hold that the auction purchaser has got sufficient pecuniary interest prior to the sale to see that the sale is conducted in conformity with the provisions of the Civil Procedure Code. A logical extension of the reasoning in AIR 1939 Nag 179 and ILR 47 All 479=(AIR 1925 All 459) will be to hold that even unsuccessful bidders taking part in the auction are entitled to the benefit of Order 21, Rule 90, C. P. C. Suppose a non-existing encumbrance is disclosed in the proclamation of sale by the decree-holder. It may be that unsuccessful bidders would have been prepared to purchase the property at higher price if the wrong disclosure was not in the mere proclamation. But if immediately after the sale they came to know that the statement regarding the encumbrance is wrong it may be possible in a wider sense to say that they are persons whose interests will be affected by the sale and therefore competent to file applications under Order 21, Rule 90, C. P. C. We are sure that such could not be the intentment of Order 21, Rule 90 C. P. C. We cannot therefore, accept the very wide interpretation of the term 'interests' in the several decisions including those in AIR 1939 Nag 179 and ILR 47 All 479=(AIR 1925 All 459).

10. It is also not possible to follow the reasoning in these decisions because of the decision of the Supreme Court in AIR 1954 SC 349. According to their Lordships of the Supreme Court, if there is no compliance of Order 21, Rules 84 and 85 there would be no sale at all. Even if an auction-purchaser were to file an application before the payment of the purchase money under Order 21, Rule 85 it is obligatory for him to deposit the 3/4th of the sale amount. Otherwise the sale proceedings will be wiped out and the application be filed under Order 21, Rule 90, C. P. C. will be infructuous. In the light of the Supreme Court's decision, it is even possible to hold that there will be no completed sale before the payment of the amount under Order 21, Rule 85, C. P. C. The view which will be consistent with the decision of the Supreme Court is to hold that an auction

purchaser cannot maintain an application under Order 21, Rule 90, C. P. C. We also think it necessary to point out that our view gains strength because of O. 21, Rule 91, C. P. C. which enables the purchaser at an execution to have the sale set aside only on the ground that the judgment-debtor had no saleable interest in the property sold.

11. If Order 21, Rule 90 comprehends the filing of an application by an auction purchaser that rule will be sufficient to cover cases where the judgment-debtor had no saleable interest in the property. Order 21, Rule 91, C. P. C. will then be unnecessary. It is well known that a Court sale carries with it no guarantee that the property sold in auction is that of the judgment-debtor or that it is free from any defect of title and the principle of caveat emptor applies to such sales. Sale in execution of the decree is not void for the reason that the property sold in court auction does not belong to the judgment-debtor. Probably that is the reason why the legislature wanted to specifically give a remedy to the auction-purchaser only in cases where there is total absence of title and not in cases of defect of title. We therefore hold that the appellant cannot maintain a petition under Order 21, Rule 90, C. P. C.

12. Order 21, Rule 91 C. P. C. cannot have an application at all as it enables the auction purchaser to set aside the execution sale only on the ground that the judgment-debtor had no interest in the property sold. It is not the appellant's case that the judgment-debtor had no interest in the property sold in auction.

13. The learned counsel for the appellant then submitted that he is entitled to claim the relief under Section 151, C. P. C. In the view we have taken, there is no scope for applying Section 151 in the case before me. Probably in appropriate cases it may be necessary to prevent abuse of process of Court to interfere under S. 151 and set aside the sale. After hearing counsel we see no reason at all for interference under S. 151, C. P. C. The learned counsel for the respondent pointed out that in view of the subsequent conduct of the appellant in depositing the balance of the auction amount and the stamp duty for getting the sale banned he must be deemed to have waived his objection to the sale. There is considerable force in the submission, but in the view we have taken regarding the claim of the appellant for setting aside the Court sale it is unnecessary to decide this point. We are therefore of the view that the appeal is without substance. We therefore dismiss the same, but we make no order as to costs.

Appeal dismissed.

AIR 1970 KERALA 98 (V 57 C 20)

P. T. RAMAN NAYAR, AG. C. J.,

AND V. P. GOPALAN
NAMBIYAR, J.

Sanku Sreedharan Kottukallil Veetil
Konathadi Kara, Accused, Appellant v.
State of Kerala, Complainant, Respondent.

Criminal Appeal No. 326 of 1968 and
Criminal Revn. No. 12 of 1968, D/- 3-4-1969.

(A) Penal Code (1860), Sections 307, 40, 88 — Offence under Section 307 — Intention and knowledge, required — Mental element described in any of the four Clauses of Section 300 I. P. C. is sufficient — Maxim that every man is presumed to intend the natural and probable consequences of his act, discussed — 1967 Ker LT 223 & 1967 Ker LT 689 & 1968 Ker LT 929, Overruled.

The offence under Section 307 is complete although the harmful consequences of death do not ensue, indeed even if no harm ensues. But the words, "if he by that act caused death" used in the section necessarily imply that the act, namely the bare physical act, must be capable of causing death. An act intrinsically incapable of causing death like witchcraft or the pulling of the trigger of an unloaded gun cannot constitute the offence, whatever may be the actor's belief and intention. The mental element or mens rea required is the intention or knowledge necessary for the offence of murder. The mental element described in any of the four clauses of Section 300 is sufficient. It is not necessary that the act should have been done with the specific intention of causing death. 1967 Ker LT 223 and 1967 Ker LT 689 & 1968 Ker LT 929, Overruled. Case law discussed. (Paras 10, 14, 23)

The word "intention" is capable of different shades of meaning. In the Penal Code it is used in relation to the consequences of an act, the effect caused thereby, not in relation to the act itself — the voluntariness required to constitute an act is implied by that very word. Thus, in the case of murder, the intention required is (omitting clause secondly of Section 300 which rarely comes into play) the intention of causing death or the intention of causing bodily injury sufficient in the ordinary course of nature to cause more, or less the malice aforethought of the English law. The Code uses the word 'intention', as is clear from the illustrations to Ss. 88, 89 and 92 in the sense that something is intentionally done deliberately or purposely, in other

JM/KM/E932/69/LGC/M

words, is a willed though not necessarily a desired result or a result which is the purpose of the deed. (Para 16)

An inference drawn from the character and circumstances of the act is sufficient proof of intention. Intention and knowledge are a man's state of mind; direct evidence thereof except through his own confession cannot be had; and apart from a confession they can be proved only by circumstantial evidence. In other words, they are matters for inference from all the circumstances of the case such as the motive, the preparations made, the declarations of the offender, and, in the case of homicide, the weapon used, the persistence of the assault, and the nature of the injuries actually inflicted as also their location. In the case of what are generally described as unpremeditated offences or as offences committed on the spur of the moment, intention may be contemporaneous with the physical act, at best of just an instant before, and is generally to be gathered from the nature and consequences of the act and the attendant circumstances. It is here that the much criticised maxim that every man is presumed to intend the natural and probable consequences of his act comes into play. Perhaps, in Indian Law the objective test of the maxim would cover every degree of mens rea from negligence to intention, depending on the degree of probability of the consequences. (Paras 15, 20)

The natural and probable consequences of a man's act is only one of the factors from which his intention as to the result may be gathered. It is no doubt a very important factor and might sometimes be the only available factor from which the inference of intention is to be drawn. Still, there is no "must" about it, only "may" and the court is not bound in law to infer that a man intended the result of his actions by reason only of its being a natural and probable consequence of those actions. The intention is to be gathered from all the circumstances appearing in the evidence. 1961 A. C. 290 Rel. on.

(Para 22)

Where the assault by accused on an unarmed person was not merely without lawful excuse but was unprovoked and the accused used the knife, a deadly weapon, on a vital part of the victim with such force as to pierce the abdominal wall and cut and bring out the intestines, and there was no case of the accused that the stab fell elsewhere than where he directed it;

Held having regard to all the circumstances that there could be no doubt that the accused must have intended to cause death, or at any rate, to cause such bodily injury sufficient in the ordinary course

of nature to cause death. The offence committed by him was one under Section 307. (Paras 25, 27)

(B) Criminal P. C. (1898), Section 439 (1) and (4) — Accused charged under Section 307, I. P. C. but convicted under Section 326 — No appeal against acquittal under Section 307 — High Court in revision cannot convert acquittal into a conviction but may enhance sentence in respect of offence under Section 326 — Having regard to all circumstances of case and nature of injury inflicted by accused sentence of 18 months enhanced to five years. (Paras 36, 37)

Cases Referred: Chronological Paras

- (1968) 1968 Ker LT 929 = ILR
(1968) 1 Ker 681, Krishnan v. Abdulla 1, 31, 40
(1967) 1967 Ker LT 223 = 1967 Ker LR 219, Moidu v. State of Kerala 1, 29, 35
(1967) 1967 Ker LT 689, Isaac v. State of Kerala 1, 30, 35
(1962) 1962-3 All ER 285 = 1962-2 QB 621, R. v. Grimwood 41
(1961) 1961 AC 290 = 1960-3 WLR 546, Director of Public Prosecutions v. Smith 18, 21, 22, 41
(1955) 1955 AC 402 = 1954-3 WLR 762, Lang v. Lang 16, 22
(1951) 35 Cri App 141 = 95 SJ 745, R. v. Whybrow 41
(1950) 66 TLR 735 = 1950 WN 218, Hosegood v. Hosegood 16, 22
(1947) 1947 KB 997 = 1947-1 All ER 813, Rex v. Steane 16
(1932) AIR 1932 Bom 279 (V 19) = 33 Cri LJ 613, Wasudeo v. Emperor 11, 34
(1918) AIR 1918 Mad 136 (2) (V 5) = ILR 41 Mad 156 = 19 Cri LJ 162 (FB), Vullappa v. Bheema Row 18
(1891) 1891-2 Ch D 441, Angus v. Callifford 19
(1867) 4 Bom HCR Cri 17, Reg v. Cassidy 10, 12, 34
(1838) 8 C. & P. 541 = 2 Mood CC 53, R. v. Cruse 31, 40, 41
S. Easwara Iyer and Thomas John, for Appellant; State Prosecutor, for Respondent.

RAMAN NAYAR AG. C. J.: The accused person in this case, Sreedharan aged 42 was tried by the Additional Assistant Sessions Judge, Kottayam, on charges under Sections 307 and 324 of the Indian Penal Code. The charge under S. 307 related to an assault with a knife on one Balakrishnan, who has been examined as Pw. 1 at the trial, and that under section 324 to an assault on Balakrishnan's brother, Karunakaran, who has been examined as Pw. 2. The learned Judge came to the conclusion that the mens rea necessary for an offence under S. 307 had not been made out — he seems to have thought that a clear intention to cause

death was necessary and, in doing so, he relied on two decisions by a Single Judge of this court in Moidu v. State of Kerala, 1967 Ker LT 223 and Isaac v. State of Kerala, 1967 Ker LT 689, a third more or less on the same lines Krishnan v. Abdulla, 1968 Ker LT 929 has been brought to our notice in the course of the hearing. He found the accused guilty under section 326 I. P. C. for the assault on Pw. 1—even so he had to rely on Pw. 1's detention in hospital for over 20 days for holding that the injury, a disembowelling incised wound, was grievous—and under section 324 I. P. C. for the assault on Pw. 2; and be sentenced the accused to suffer rigorous imprisonment for 18 months for the former offence and for four months for the latter, the sentences to run concurrently.

In Calendar revision it was observed that the offence seemed to be really one under section 307 I. P. C.; but obviously in view of the prohibition in sub-section (4) of Sec. 439 of the Criminal Procedure Code against the conversion of an acquittal into a conviction and the fact that it was possible to impose an adequate sentence for the offence without altering the finding of the Court below, notice was issued to the accused only to show cause against enhancement of his sentence; however, at the hearing the propriety of the acquittal of the charge under section 307 I. P. C. and of the conviction actually recorded has been fully canvassed by both sides. The revision case came on for hearing before a Single Judge of this Court. He was of the view that the decisions relied upon by the court below required reconsideration, and in that view, he referred the case to a Division Bench. That is, how the case is now before us. Meanwhile the accused had appealed against his conviction to the Court of Session. That appeal has been withdrawn to this Court and has been heard along with the revision case.

2. The case is really a very simple case. At about 7 P. M. on the 23rd March 1967, when the accused was in the tea-shop of one Kochu Mohamed with his newly married daughter and son-in-law, a verbal altercation arose between the accused on the one side and Pw. 2, who was also in the shop, on the other. According to the accused, but not according to Pw. 2, the latter used very abusive language. However that might be, the accused was so incensed that he beat Pw. 2. The shop-keeper, Kochu Mohammed, and Pws. 3 and 4, who were also there, intervened and sent the accused and Pw. 2 away in different directions. Pw. 2 had not gone far when he met his brother, Pw. 1 and complained to him of what the accused had done. Pw. 1 tried to pacify Pw. 2 saying that they could question the ac-

cused about it the next day. The accused apparently overheard this and he rushed up to Pws. 1 and 2, pushing aside Pw. 4 who tried to stop him, shouting that there was no need to put off the matter. Then ignoring Pw. 1's expostulations, the accused drew the knife, M. O. 1. (a sharp, pointed knife with a blade five inches from his waist and stabbed Pws. 1 and 2 with it one after the other. The stab on Pw. 1 was in the abdomen, and, as the medical evidence shows, it penetrated the abdominal cavity, cut the small intestines in as many as four places, and brought out the small intestine and mesentery, an injury doubtless sufficient to cause death in the ordinary course of nature but from which Pw. 1 luckily recovered after 25 days in hospital. The stab on Pw. 2 was in the back, and it caused a punctured wound $1'' \times 1/3'' \times 11/2''$ deep with a skin laceration $3''$ long according to the medical evidence a simple injury. Then the accused ran away while Pws. 1 and 2 fell down on the road.

3. Apart from the victims, Pws. 1 and 2, two other persons, Pws. 4 and 5 who were near-by saw the stabbing while another person, Pw. 3 saw the accused rushing towards Pws. 1 and 2, and, after the stabbing was over, running away from the scene.

4. Pws. 1 and 2 were removed to the Moovattupuzha hospital where, at 2.30 A. M. on the 24th, Pw. 1 made the statement, Ex. P.1, to the Head Constable Pw. 7, on which the case was registered and investigated. The accused appeared at the police station at 9.15 P. M. on 28-3-1967 with the knife M. O. 1. He was arrested by the Head Constable Pw. 8, and the knife was seized from him.

5. When questioned at the preliminary enquiry the accused was content with a bare denial. But, at the trial, he put forward a case of private defence. After the incident in Kochu Mohammed's tea-shop, where he had beaten Pw. 2 for insulting him in the presence of his daughter and son-in-law by using abusive language he was proceeding to another shop near-by when Pws. 1 and 2 suddenly came there and assaulted him. To save his life he drew his knife and stabbed them.

6. The accused examined no witness in his defence.

7. On the evidence, and on the very statement of the accused, there can be no doubt that the accused voluntarily stabbed Pws. 1 and 2 inflicting injuries on them. The belated plea of private defence put forward by him is obviously an after-thought, and there is nothing whatsoever in the evidence that gives the least support to that plea. The accused himself suffered no injury—not that an actual injury is necessary to give rise to the

right of private defence; reasonable apprehension is enough and he said nothing whatsoever regarding the nature of the alleged assault on him by Pws. 1 and 2. (vernacular omitted) is the word used by him; but what Pws. 1 and 2 actually did, he did not choose to say. The prosecution evidence, which there is no reason whatsoever to discredit, clearly shows that there was no such assault on the accused, and that the assault by the accused, on Pws. 1 and 2 was not merely without lawful excuse but was unprovoked, such provocation as the accused had, being a thing of the past, in any event, not something that could be described as grave and sudden.

8. The question then is, what is the offence committed by the accused? Is it only the voluntary causing of hurt or does it amount to attempt to murder?

9. Generally speaking, an actor who is a person, an offence consists of three elements or ingredients. First, the act, using the word, "act" as we think that word is used in the Indian Penal Code as restricted to the bare physical act, namely, the muscular change and what might be called the concomitant circumstances such as, for example, the instrument employed, and as including no part of its consequences, not even the target of the act or, as Kocourek * puts it (in relation to tort) as denoting the external manifestation of the actor's will and as not including any of its result not even the most direct, immediate and intended; secondly, the mens rea or the mental element accompanying the act; and, thirdly, the harmful social consequences of the act which is why the law makes it culpable. The definitions in the Indian Penal Code take note of these elements although in some, the first and the third element together constituting what is generally understood by the terms "actus reus" in English law, are combined in one expression. This analysis of an offence into its three component elements is well exemplified by the definition of, "culpable homicide" in Section 299.

"299. Culpable homicide:— Whoever, causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide".

Here the word, "whoever" supplies the act or; the word, "act" denotes the bare physical act (including such concomitant circumstances as the means employed) done by him; the mental element required is the intention of causing death or bodily injury likely to cause death, or

knowledge that the act is likely to cause death; while the injurious social consequences which the law seeks to punish is the resultant death. In some cases, however, of which abetment and attempt are instances, the act is made punishable even if the injurious consequences do not follow provided the necessary mental element is present; in other words, the third of the three elements is dispensed with.

10. This is how the offence of attempt to murder is defined and made punishable by section 307:

"307. Attempt to murder.— Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act, caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as is hereinbefore mentioned. Attempts by life convicts. — When any person offending under this section is under sentence of imprisonment for life he may, if hurt is caused, be punished with death".

Here the offence is complete although the harmful consequence of death does not ensue, indeed even if no harm ensues. But, it seems to us clear that the words, "if he by that act caused death" necessarily imply that the act must be capable of causing death. An act intrinsically incapable of causing death like witchcraft or the pulling of the trigger of an unloaded gun cannot constitute the offence, whatever may be the actor's belief and intention. This is how Couch C. J. put this aspect of the matter in *Reg. v. Cassidy* (1867) 4 Bom HCR Cr 17 at p. 21.

"The first two heads are framed under section 307. The words of that section are:— "Whoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death he would be guilty of murder, shall be punished. Now it appears to me, looking at the terms of this section, as well as at the illustrations to it, that it is necessary, in order to constitute an offence under it, that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things; and if the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this section".

11. This decision was criticised by Beaumont C. J. in *Wasudeo v. Emperor*, AIR 1932 Bom 279 but his Lordship's conclusion expressed in the following words seems to us much the same:

*See Paton's Jurisprudence Third Edition, Foot-note 1 at page 275.

"But if you have an act done with a sufficiently guilty intention and knowledge and in circumstances which do not from their nature afford a defence to a charge of murder, and if the act is of such a nature as would have caused death in the usual course of events but for something beyond the accused's control which prevented that result, then it seems to me that the case falls within Section 307".

12. It seems to us clear that the act, namely, the bare physical act, must be an act capable of causing death, at any rate, not one intrinsically incapable of causing death. This, as we have already observed, would rule out such acts as the firing of an uncapped gun as in *Cassidy's Case*, (1867) 4 Bom HCR Cr 17 or of a gun loaded with a blank cartridge even though the actor's intention is to kill and his belief is that the gun is duly loaded. At the same time it would take in instances like those mentioned in the illustrations to section 511 where the failure of the injurious consequences is not due to any inherent defect in the offender's act but due to the absence of something which is in no sense part of that act. And if it would rope in also the case of a man who, intending to kill his enemy fires at what he thinks is his enemy but happens to be only an animal, that, in our view, is not a consequence to be regretted any more than the case of a failure of the intended result by reason of the actor being a bad shot; in both cases, the act, namely, the bare physical act of discharging a loaded gun in matter where, is capable of causing death of course it need not be of the person intended to be killed and the matter is well past the stage of mere thought or preparation, the intention having unequivocally manifested itself in an external act beyond the actor's recall, although, in a practical sense and what the courts administer is practical law it might be possible to say with Rowlatt J. that, in the former case, the man is "not on the job at all though he thinks he is" he would be very much on the job if, though unknown to him, there was some other person present near enough to be hit while in the latter he is on the job. For, unlike as in the latter case, or in the case of a man who attempts to pick an empty pocket, it would, in practice, be difficult to establish the necessary *mens rea* and therefore well nigh impossible to secure a conviction.

But, in the circumstances of the present case, there can be no question of the accused's offence falling within section 511 if it does not fall within section 307, there being no question of impossibility whether absolute or relative. Indeed the learned Public Prosecutor has

expressly stated that he stands or falls by Section 307 and is not inviting recourse to Section 511. Therefore, we are not called upon to decide whether Section 307 only prescribes a special punishment, for an offence under Section 511 in relation to the offence of murder as Sections 121 and 393, for example, do in relating to the offence of waging war against the Government and the offence of robbery (in which case it might be said that it need not have gone to the trouble of specially defining the offence of attempt to murder) or whether, as held in *Cassidy's case*, (1867) 4 Bom HCR Cr 17 it postulates a higher degree of attempt than Section 511 does so that there can be an attempt to murder which does not come within section 307 but nevertheless comes within section 511, not being excluded therefrom by the words "where no express provision is made by this Code for the punishment of such attempt."

13. So much for the physical act necessary for an offence under S. 307. What else is necessary is indicated by the words, "with such intention or knowledge, and under such circumstances that if he by that act caused death, he would be guilty of murder". The words, "such circumstances" like the same words in section 308 would seem to refer not so much to circumstances pointing to the possibility of death as to the circumstances which would attract any of exceptions to section 300, perhaps also the general exceptions in Chapter IV, although section 6 seems to be a sufficient safeguard so far as the latter are concerned.

14. The mental element or *mens rea* required is the intention or knowledge necessary for the offence of murder for which we have to go to section 300:

"300. Murder.—Except in the case hereinafter excepted, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or—

Secondly—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person, to whom the harm is caused, or—

Thirdly—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Fourthly—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid".

15. Intention and knowledge are a man's state of mind; direct evidence thereof except through his own confession cannot be had; and apart from a confession they can be proved only by circumstantial evidence. In other words, they are matters for inference from all the circumstances of the case such as the motive, the preparations made, the declarations of the offender, and, in the case of homicide, the weapon used, the persistence of the assault, and the nature of the injuries actually inflicted as also their location. In the case of what are generally described as unpremeditated offences or as offences committed on the spur of the moment, intention may be contemporaneous with the physical act, at best of just an instant before, and is generally to be gathered from the nature and consequences of the act and the attendant circumstances. It is here that the much criticised maxim that every man is presumed to intend the natural and probable consequences of his act comes into play.

16. Like most words, the word "intention" is capable of different shades of meaning. In the Indian Penal Code it is used in relation to the consequences of an act, the effect caused thereby, not in relation to the act itself—the voluntariness required to constitute an act is implied by that very word. Thus, in the case of murder, the intention required is (omitting clause secondly of Section 300 which rarely comes into play) the intention of causing death or the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, more or less the malice aforethought of the English law, the former being generally described as specific intent or malice and the latter as implied malice or some times as constructive malice, though the use of the latter term seems open to criticism. It seems to us clear from the illustrations to Sections 88, 89 and 92, that the Code uses the word "intention", in the sense that something is intentionally done if it is done deliberately or purposely, in other words, is a willed though not necessarily a desired result or a result which is the purpose of the deed. The surgeon of the illustrations certainly does not desire the harm that may be caused; nor is that his purpose. Nevertheless, the provisions of the sections show that he could have intended the harm, and is saved from being a criminal only by those provisions. Likewise a man who shoots another in the heart and kills him in self-defence might not desire, on the contrary might very much dislike, causing the latter's death. His purpose is

not to cause death but to save himself. Yet his case falls squarely within the first clause of Section 300 — he has undoubtedly caused death by doing an act with the intention of causing death—and is saved from being a murderer only by Section 100.

Lang v. Lang 1955 AC 402 rather than Rex v. Steane 1947 KB 997 at p. 1004 or Hosegood v. Hosegood, (1950) 66 TLR 735 illustrates the sense in which the word, intention is used in Section 300 of the Indian Penal Code of course none of these cases was construing that statute. And, once you dispense with desire or purpose, it follows that foresight of the consequences of an act gains the upper hand in determining whether the consequences were intended or not. And the foresight of a particular person is *prima facie* to be gauged by the foresight of an ordinary, reasonable man, in other words, by what is sometimes disparagingly referred to as the objective test or external stand—as if that were enough to condemn it—of the reasonable and probable consequences of the act.

17. Illustration (a) to Section 106 of the Evidence Act shows that the intention with which a person does an act is generally to be gathered from the character and circumstances of the act. It says that:

"When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him".

An inference drawn from the character and circumstances of the act is sufficient proof of intention. Thus, if a man uses a knife on another so as to pierce the latter's heart and kill him, the character and circumstances of his act would suggest that he intended to kill him, for, death is the natural and probable, nay, the well-nigh certain, result of such an act. But a surgeon doing this could readily rebut this inference by showing that he did this not with the intention of causing death but with the intention of curing the man of a dangerous disease. Nevertheless the surgeon would still have intentionally caused 'hurt, and can even be said to have intentionally caused bodily injury sufficient in the ordinary course of nature to cause death, and as we have already said, is saved from penal consequences only by reason of the exception in Section 88 of the Code.

18. The maxim to which we have referred, namely, that every person is presumed to intend the natural and probable consequences of his act, is sometimes expressed as if it embodied some-

thing more than a permissible inference, something more than the "may presume" of Sections 4 and 114 of the Evidence Act, or at the worst the "shall presume" of Section 4, and created an irrebuttable presumption, the "conclusive proof" of Section 4. A form in which it is thus expressed is that every person must be presumed to intend the natural, reasonable, and probable consequences of his acts whether in fact he intended them or not. In this form it is certainly objectionable and it is the belief, some would have it in the mistaken belief, that it was countenanced in this form by the House of Lords in *Director of Public Prosecutions v. Smith*, 1961 AC 290 as if the mens rea for murder were not the intention in the mind of the alleged offender, but were the foresight of a reasonable man of the likelihood of death, that that decision has come in for so much adverse criticism from quarters both academic and professional. And it is to the maxim in this objectionable form, "must be taken to intend" that Wallis C. J. took exception when, basing himself on paragraph 100 of the first report on the Penal Code by the Indian Law Commissioners; he observed in *Vullappa v. Bheema Row*, ILR 41 Mad 156 at p. 162 = (AIR 1918 Mad 136 (2) at p. 139) (FB) that Macaulay and the other Indian Law Commissioners regarded the maxim as a fiction which should not be recognised in the Penal Code. But surely that the Code draws a clear distinction between "intent" and "knowledge of likelihood" is no impediment to the latter leading to an inference regarding the former, or to same circumstance leading to an inference regarding both.

19. But properly viewed, namely as a mere objective test enabling a rebuttable inference to be drawn regarding the mental element attending an act, we think that the maxim is not merely unexceptionable but indispensable. The whole difficulty it seems to us arises from, to borrow the words of Bowen L. J. in *Angus v. Clifford*, 1821-2 Ch D 441, confusing the evidence from which an inference may be drawn with the inference itself which has to be drawn after you have weighed all the evidence. In this connection the following classic statement by Sir William Holdsworth in the *History of the English Law*, Vol. III, page 374 is worth quoting:

"The general rule of the common law is that crime cannot be imputed to a man without mens rea. It is, of course, quite another question how the existence of that mens rea is to be established. The thought of man is not triable by direct evidence; but if the

law grounds liability upon intent, it must endeavour to establish it by circumstantial evidence. Much of that circumstantial evidence will be directed to showing that a man of ordinary ability, situated as the accused was situated, and having his means of knowledge, would not have acted as he acted without having that mens rea which it is sought to impute to him. In other words, we must adopt an external standard in adjudicating upon the weight of evidence adduced to prove or disprove mens rea. That of course, does not mean that the law bases criminal liability upon an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence".

20. Perhaps, in Indian Law, the objective test of the maxim would cover every degree of mens rea from negligence to intention, depending on the degree of probability of the consequences. If the effect caused by an act is the natural and probable consequence of that act it would, we think, be right to infer that the actor caused that effect voluntarily as that word is defined in Section 39 of the Code. If the degree of probability is so low so that the effect cannot be described as a natural and probable consequence, the inference to be drawn might only be of negligence or rashness; little higher it might be that the actor had reason to believe that he was likely to cause the effect; still higher it would be reasonable to infer that he knew that he was likely to cause it; and if the degree of probability is so high that the effect may be described not merely as a probable but as a natural, natural in the sense ordinary result of the act it would be reasonable to infer that he intended to cause it. It might be noted that it is on the high degree of probability of the effect of death that the intention or knowledge (to be inferred from, among other things, the natural and probable consequences of the act) of clauses secondly, thirdly and fourthly of Section 300 are equated with intention to cause death of the first clause.

21. So far as the English Law is concerned, Section 8 of the Criminal Justice Act of 1967 applies the necessary corrective to the grossness of the rule supposed to have been laid down in 1961 AC 290. This section provides that

"A Court or jury in determining whether a person has committed an offence-

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inference from the evidence as appear, proper in the circumstances”.

That is a statement of the law which we would adopt. The natural and probable consequences of a man's act is only one of the factors from which his intention as to the result may be gathered. It is no doubt a very important factor and might sometimes be the only available factor from which the inference of intention is to be drawn. Still, there is no “must” about it, only “may” and the Court is not bound in law to infer that a man intended the result of his actions by reason only of its being a natural and probable consequence of those actions. The intention is to be gathered from all the circumstances appearing in the evidence.

22. Much the same thing was said by Denning L. J. in 1950-66 TLR 735 with reference to the *animus deserendi*, in other words, the intent to bring the married life to an end, necessary to constitute desertion for the purpose of divorce.

“When people say that a man must be taken to intend the natural consequences of his acts, they fall into error; there is no ‘must’ about it; it is only ‘may’. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee and intend them. But, while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference then it should not be drawn”.

In their book on Criminal Law, Geanville Williams, one of the foremost critics of 1961 AC 290 and Smith and Mogan themselves no admirers of that decision, regard this as a clear exposition of the true place and value of the presumption in the proof of intention. Denning L. J. then thought (as he later, in the light of 1955 AC 402, confessed, mistakenly) that intent in the context of desertion meant that the party must have the desire or purpose to bring the married life to an end. But, as we have seen, neither the desire nor the purpose to bring about the consequences is necessary to constitute intention within the meaning of Section 300 of the Indian Penal Code. With regard to what we might call this lesser intention the presumption to be drawn from the natural and probable consequences of the act is stronger.

23. In English law, in order to constitute the offence of attempt to murder, the specific intent to cause death is necessary though for the completed offence of murder the lesser mens rea of intent to cause grievous bodily harm suffices. What might be called the implied or constructive intent to cause death of clauses secondly, thirdly and fourthly of Section 300 of our Code is not enough. But, in Indian law, Section 307 of the Code makes it quite clear that the mental element described in any of the four clauses of Section 300 is sufficient and that it is not necessary that the act should have been done with the specific intention of causing death. This difference should not be overlooked. We should not have thought it necessary to voice this caution but that we find that in some Indian decisions and in some commentaries on the Code, English cases are cited to make out that the specific intent to kill is necessary without noticing that Section 307 of the Indian Penal Code lays down the law differently.

24. What is the offence committed by the accused in the instant case? We shall first consider the assault on Pw1. The act committed by the accused is the physical movement of stabbing with a sharp pointed knife having a blade five inches long. This is undoubtedly an act intrinsically capable of causing death, or to put it negatively, not intrinsically incapable of causing death. “Death”, of course, means the death of a human being—see Section 46 of the Code—and if the act be done with the mental element described in Section 300 in relation to any human being and if it, in fact, causes the death of that or any other human being Sections 299 and 300 import the doctrine of transferred malice and Section 301 proceeds on the assumption that culpable homicide is none-the-less culpable homicide for the death caused being of a person other than the person whose death was intended—the actor is guilty of murder. The requirement implied by the clause, “if he by that act caused death” in Section 307 is here amply satisfied, and the question is whether the mental element and the circumstances attending the act are such that if death had ensued, the accused would be guilty of murder. In other words, so far as this case is concerned, whether the accused had the mens rea defined in S. 300 of the Code and, if so, whether circumstances attracting any of the exceptions to the section were present of course, by reason of Section 105 of the Evidence Act it would be for the accused to show that they were present.

25. There is here no confession and therefore, no direct evidence of the

accused's state of mind. That has to be inferred from the circumstances, and, taking all the circumstances into consideration, we feel no doubt whatsoever that the accused did the act with at least the mental element described in clause thirdly of Section 300, namely, the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, if not with that in the first clause, namely, the intention of causing death. The offence may well be described as unpremeditated and, not unnaturally, there is no evidence of any strong or adequate motive. But, it must be remembered that the accused was incensed with PW 2's conduct at Kochu Mahommed's tea shop and was apparently still smarting from the insult he had received from PW 2 in the presence of his newly married daughter and son-in-law. He seems to have flared up when he heard PW 1 saying that he could be taken to task the next day for having beaten PW 2. The weapon the accused used was a deadly weapon and he used it on a vital part of PW 1's body with such force as to pierce the abdominal wall and cut and bring out the intestines. The accused has no case that the stab fell elsewhere than where he directed it, and, having regard to all the circumstances, including the nature of the weapon used, the part of the victim's body chosen for the assault, and the injury actually inflicted, an injury which, by its very nature, must necessarily have endangered life, there can be no doubt that the accused must have intended to cause death, or, at any rate, to cause bodily injury sufficient in the ordinary course of nature to cause death.

26. We do not think that, in the circumstances of the case, any of the exceptions to Section 300 of the Code is attracted. The only exceptions that can conceivably apply are exceptions 1, 2 and 4. So far as exception 1 is concerned, PW 1 offered little, if any, provocation; and we might add that even the provocation offered by PW 2 was neither grave enough nor sudden enough to deprive the accused of the power of self control. If we may say so, such provocation as PW 2 offered had already been sufficiently redressed by the beating which the accused gave him. So far as Exception 2 is concerned, as we have already seen, no assault of any kind was threatened on the accused when he acted as he did, and there can therefore, be no question of his having exercised any right of private defence. Nor was there a sudden fight upon a sudden quarrel so that the accused can be said to have acted in the heat of passion in the course of such fight. Moreover in stabbing an unarmed person in the abdomen

with a knife the accused did act in a cruel and unusual manner. Therefore, Exception 4 cannot be attracted.

27. We have no doubt that so far as the assault on PW 1 is concerned, the offence committed by the accused is one falling within the second part of the first paragraph of Section 307 of the Indian Penal Code.

28. So far as the assault on PW 2 is concerned, no doubt the physical act committed by the accused was not incapable of causing death. But in a case where the mental element is to be inferred from the nature and circumstances and the consequences of the physical act, there is a difference between the case of an assault with a weapon like a knife where the actor retains control till the last, i.e., till the termination of the assault, and the case of an assault with a weapon like a gun where the actor loses control the moment the gun is fired and must thereafter willy-nilly let the shot take its course. Although, of course, as Section 307 itself makes it plain, the causing of hurt is not a necessary element of the offence of attempt to murder, yet in a case of an assault with a weapon like a knife retained in the hands of the offender till the end and not used as a missile, unless there is something to show that there was some external impediment in the way of consummation of the offender's intention, it might not be reasonable to infer, merely from the harm inflicted that the offender intended to cause graver harm than he actually did inflict. The injury that the accused did inflict on PW 2 was a simple injury not sufficient in the ordinary course of nature to cause death, and there is nothing to show that he intended anything more. Therefore, so far as the assault on PW 2 is concerned, the conviction recorded against the accused under Section 324 of the Indian Penal Code is proper.

29. Every case has to be decided on its own facts and circumstances; no two cases are in all respects alike; the proper inference to be drawn from proved facts and circumstances is not ordinarily a question of law; and, although the inference drawn by experienced Judges from similar facts and circumstances might be a useful pointer, it must be remembered that not all the facts and circumstances that influence the decision in a particular case appear from the judgment. This is why, in reaching the conclusion we have reached regarding the mental element accompanying the accused's acts, we have made no reference to the numerous authorities cited at the bar. But we must say something about the two decisions that have been

responsible for the present case coming before us and about the third case that has been brought to our notice in the course of the hearing.

In 1967 Ker LT 223, the accused who had been twice thwarted in his attempt to ravish a woman, on the second occasion, after the woman had, as a result of a struggle, succeeded in freeing herself from his grasp, took a gun which he had kept leaning on a tree near-by—the occurrence took place in a forest where the victim was collecting firewood—and shot her with it in the chest. Thirty-six pellets were found lodged in the victim's body over the abdominal area inside the abdominal muscles. Only one was extracted; the rest left where they were since the doctor thought that that would do no harm. The gun was not before Court but the judgment shows that it was said to be "a sort of sporting gun generally used to scare away birds and wild beasts from the cultivation". So far as the judgment discloses, there was nothing to show that a shot with the gun and the ammunition used was incapable of causing death—indeed the medical evidence to the effect that the injury "would have been serious and that it was a fortuitous escape for the injured" would indicate the contrary. The trial Court found the accused guilty under Sections 307 and 326 of the Indian Penal Code (Also under Section 354 but with that we are not concerned). But, on appeal, this Court found that the offence was only one under Section 324 of the Indian Penal Code deserving only a sentence of simple imprisonment for one month.

30. In 1967 Ker LT 689, the accused a squatter on land belonging to a rubber estate took exception to pits being dug in the court-yard of his house by some workmen under the supervision of Pw 5, an Assistant Conductor of the estate. Pw. 5 told the accused firmly that he had come to plant rubber seedlings and that he was determined to do that. The accused after pretending to have submitted to this, and in fact, making a show of helping in the planting, slowly moved backwards towards the verandah of his house, and, picking up an axe, dealt two blows with it on Pw 5's head injuring the right eye with partial protrusion of the eyeball and causing a fracture about 3"x2" of the right parietal bone. The trial Court convicted the accused under Section 307 of the Indian Penal Code but, on appeal, this Court, holding that the blow on the head with the blunt end of an axe could not in the ordinary course of things cause death (a proposition to which we can scarcely subscribe) came to the conclusion that the accused could not have

intended to cause the death of the victim — whether, in the face of the fracture of the skull, it could not be held that the accused intended at least to cause bodily injury sufficient in the ordinary course of nature to cause death was not considered—and that his offence was only one under Section 335 of the Indian Penal Code for which a sentence of two years' rigorous imprisonment was enough.

31. In 1968 Ker LT 929, the accused, in the course of a quarrel, stabbed Pw 1 with a knife in the abdomen inflicting a disembowelling wound which fortunately did not prove fatal but rendered the victim unconscious for three days. It was held that the accused was guilty only of an offence under Section 326 of the Indian Penal Code and not of one under Section 307 of the Indian Penal Code. The reasons for this view were stated thus:

"The first ingredient in the offence of attempt to murder is the intention to kill. In *R. v. Cruse*, (1838) 8 C & P 541, Patterson J. told the jury:—

'Before you can find the prisoner guilty of this felony, (attempt to murder) you must be satisfied that when he inflicted this violence on the child, he had in his mind a positive intention of murdering that child. Even if he did it under the circumstances which would have amounted to murder if death had ensued, that will not be sufficient unless he actually intended to commit murder'. So even if the act committed is sufficient in the natural and ordinary course of things to result in death, the accused cannot be charged with attempt to murder unless he had the intention to kill, from the very beginning. So also the converse, that even if the accused had the intention if the act committed is not capable of causing death or that the act was done with such intention and was not likely in the belief of the accused to cause death he cannot be charged with attempt to murder. Thus we see that the intention is the most important ingredient and when once that is not made out the accused cannot be convicted of attempt to murder, even if the act committed is sufficient to cause death under normal circumstances.

Applying the principles to the facts of present case it has to be held that since the intention to kill was not there, the accused could not be convicted of attempt to murder".

32. We have only this to observe. In each of these cases, unless there were facts and circumstances that do not appear in the judgments, we would have had no hesitation in finding the accused

guilty of attempt to murder. In the last mentioned case, the learned Judge following the English law, deems to have thought that a specific intention to kill was an essential ingredient of the offence of attempt to murder. We have already shown that that is not so under the Indian Penal Code, Section 307, and that any of the forms of mens rea described in the four clauses of Section 300 is enough.

33. The learned Judge also set out as one of the ingredients to be proved by the prosecution in a case of attempt to murder,

"If the act has taken effect the injury is sufficient in the natural and ordinary course of things to cause death".

It is not an essential ingredient of the offence that there should be an injury much less an injury sufficient in the ordinary course of things to cause death.

34. In AIR 1932 Bom 279, Beaumont C. J. criticised what he thought was the view taken in Cassidy's case, 1867-4 Bom HCR Cr 17, namely, that in order to attract Section 307 of the Code it must be possible to say for certain that the offender's act might have caused death. His Lordship demonstrated the absurdity of such a view in the following words:

"If the reasoning of the learned Judges in that case be right as to the construction of Section 307 and if the act committed by the accused must be an act capable of causing death in the ordinary course, it seems to me that logically the section could never have any effect at all. If an act is done which in fact does not cause death it is impossible to say that that precise act might have caused death. There must be some change in the act to produce a different result, and the extent to which the act done must be supposed to be varied to produce the hypothetical death referred to in Section 307 is merely a question of degree".

35. To rely on these observations as was done in 1967 Ker LT 223 and in 1967 Ker LT 689, (only the last two sentences are actually quoted) for holding that "the offence contemplated in Section 307 of the Indian Penal Code is of a hypothetical nature" and was therefore not made out is, it seems to us, to subscribe to the logical conclusion reached in the process of disproof by *reductio ad absurdum*.

36. In the instant case the accused was acquitted of the charge under Section 307 of the Indian Penal Code. There was no appeal against that acquittal, and, having regard to sub-section (4) of Section 439 of the Criminal Procedure Code, we cannot in revision convert the acquittal into a conviction.

We can, of course, set aside the accused's conviction under Section 326, Indian Penal Code, and direct a retrial but, had we thought of adopting such a course, we would not have expressed ourselves so categorically on the merits of the case. Fortunately, the ends of justice do not require an alteration of the conviction, for, it is possible to impose an adequate sentence for the accused's crime even under Section 326 of the Indian Penal Code which permits of as severe a sentence as Section 307 does. Having regard to all the circumstances of the case, and the nature of the injury inflicted by the accused, we think that a sentence of five years' rigorous imprisonment would be proper.

37. In the result we confirm the accused's conviction under Sections 326 and 324 of the Indian Penal Code as also the sentence awarded to him for the latter offence and dismiss his appeal. We enhance the sentence awarded to him for the offence under Section 326 of the Indian Penal Code from rigorous imprisonment for 18 months to rigorous imprisonment for five years.

38. GOPALAN NAMBIYAR J.:— Except a few observations I have nothing useful to add to the judgment delivered on behalf of the Bench by My Lord the Chief Justice.

39. It is perhaps difficult to reduce to the form of any statable legal principle the cases of attempts to commit an offence which is impossible of commission in the nature of things and the attendant circumstances. Such are the cases of an attempt to kill with an unloaded gun which the offender believes to be loaded; attempt to shoot at a wax model figure believing it to be a living person in flesh and blood; attempt to cause miscarriage to a woman believed to be pregnant, who in fact is not, or by administering some thing believed to be deleterious which in fact is innocuous, attempt to pick a pocket that is empty, attempt to steal from a club an umbrella, which ultimately turns out to be one's own. These and similar conundrums which are fruitful enough sources for discussion in the academic atmosphere of the lecture hall hardly present the same difficulties for solution in the practical realities of the Court room. The test propounded in the judgment just pronounced, that the bare physical act of the accused should have been capable of producing the consequence before a person can be convicted of an attempt, seems on the whole, to be safe and satisfactory.

40. In 1968 Ker LT 929, a learned Judge of this Court relied on Patterson J.'s charge to the jury in (1838) 8 C & P 541. The said charge to the jury was as follows:

"Before you can find the prisoner, guilty of this felony (attempt to murder) you must be satisfied that when he inflicted this violence on the child, he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient, unless he actually intended to commit murder".

It is necessary to emphasise that in English law for the offence of murder it is enough to show that the killing was with 'malice aforethought' comprehending all the different types of mens rea comprised in that expression. But, for the crime of an attempt at murder, it is necessary to show that there was a clear intention to kill. Any other type of mens rea covered by the expression 'malice aforethought' will not do. This has been repeatedly laid down in the English decisions, and is clear on the authorities.

41. Patterson J.'s charge to the jury in 1838-8 C & P 541, has already been noticed. In *R. v. Whybrow*, 1951-35 Cri App 141, the accused by a device constructed by him administered electric shocks to his wife while she was in a bath. Parker J. directed the jury that if he did so, intending to kill his wife or to do her grievous bodily harm he would be guilty of attempt at murder. The Court of Appeal held that this was a wrong direction. Observing that if the charge is one of attempt at murder, the intention to kill is the principal ingredient of the crime, Lord Goddard, C. J. expressed himself thus:

"Therefore, if one person attacks another inflicting a wound in such a way that an ordinary reasonable person must know that at least grievous bodily harm will result and death results, there is the malice aforethought sufficient to support the charge of murder. But if the charge is one of attempted murder the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder; but if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought which is supplied in law by proving intent to do grievous bodily harm".

In *R. v. Grimwood*, 1962-3 All ER 285, the prisoner had been convicted by

Paul J. at the Central Criminal Court of attempt to strangle his wife with intent to murder her. No verdict was taken from the jury on two other counts, namely, attempt to suffocate his wife with intent to murder and assault occasioning her actual bodily harm. In the course of his direction to the jury, the learned Judge, basing himself on 1961 AC 290, observed:

"He is put before you by his counsel as an ordinary normal minded man and so you should take it in this case that he is an ordinary normal-minded man. The law is that in the case of an ordinary normal man it does not matter what that man contemplates at the moment at all. The test is whether what he did was of a kind where death might well have been the natural and probable result of what he did".

On appeal from the above conviction, Lord Parker C. J. delivering the judgment of the Court of Criminal Appeal observed that the Court was clearly of the opinion that nothing that was said in Smith's case, 1961 AC 290, has any application to the offence of attempted murder. Adverting in particular, to the direction to the jury, extracted supra, the Lord Chief Justice observed:

"One further matter should be mentioned and that is that, certainly in regard to the first passage which I have quoted in the summing up, it might well have led the jury to suppose that, even if they were satisfied that all that the appellant intended to do was to cause grievous bodily harm, yet if death might well result from such grievous bodily harm an intent to murder had been proved. That again, if that impression was conveyed, was quite clearly a wrong direction. In 1951-35 Cri App 141, Lord Goddard C. J. dealt with that very point".

The learned Chief Justice then noticed the decision in *Whybrow's* case, 1951-35 Cri App 141, and cited the passage from the judgment of Lord Chief Justice Goddard quoted earlier.

42. The above decisions make it clear that the requirement of a higher degree of mens rea, namely, an intention to kill, and nothing short of that, is a special feature of English law in regard to the offence of attempt at murder. The position has been well brought by text-book writers also. (See, for instance, Smith and Hogan's *Criminal Law*, page 146; Kenny: *Outlines of Criminal Law* (16th Edition) page 80). Whatever be the position in English law, the provisions of Section 307 of the Indian Penal Code are, as already pointed out, clearly otherwise. English decisions are therefore not safe guides to follow.

43. As for the much discussed and much criticised maxim, that every person is presumed to intend the natural and/or the probable consequence of his act, I think the scope of its application has been correctly delimited by Section 8 of the Criminal Justice Act of 1967, which we have adopted as laying down a safe rule.

Order accordingly.

AIR 1970 KERALA 110 (V 57 C 21)

FULL BENCH

P. T. RAMAN NAYAR, K. K. MATHEW AND V. P. GOPALAN NAMBIYAR, JJ.

G. Appukkuttan Pillai, Petitioner v. Government of India and others Respondents.

O. P. No. 593 of 1965, D/- 6-3-1969.

(A) Constitution of India, Article 226 — Suppression of material facts by applicant — Petitioner, a Government servant not making full and true disclosure of facts — In order to put forward his case of violation of principles of natural justice, he suppressed certain representations made by him and adverse order thereon — On this ground alone, writ petition is liable to be dismissed. (Para 3)

(B) Constitution of India, Articles 4, 73, 162, 309, Sch. 7, List 2, Entry 41 — States Reorganisation Act (1956), Section 115 — Power of integration does not belong exclusively to States — In this regard Central Government has certain controlling, supervisory, concurrent and overriding powers — State Government's powers under Entry 41 of List 2 have to be exercised in subordination to those of Central Government.

Entry 41 of List II stands subordinated to Articles 4, 73 and 162 and cannot avail to give the State, the exclusive power in matter of integration. Nor does Article 309 give it such power. This provision again, is "subject to the provisions of the Constitution", and therefore, to Article 4. The power given by this Article to promulgate rules even retrospectively—regulating the recruitment and conditions of service of members of the State services must be subject to Section 115 (7) of the States Reorganisation Act (read with Article 256 of the Constitution) which recognises the power of the Central Government to determine such conditions as on 31-10-1956 and further guarantees that such conditions shall not be prejudicially varied except with the previous approval of the Central Government. (Para 9)

LM/LM/F719/69/SSG/M'

The power conferred under Clause (a) of Section 115 (5), is not for the purpose of division and integration, but for assisting the Central Government "in regard to" the division and integration. The expression "in regard to" integration is wide enough to cover even preliminary steps prior to actual integration, such as formulation of principles, equation of posts and things of the kind. The word integration itself, in its dictionary sense has the wide meaning of combining parts into a whole. That it means much more than mere "allotment" is connoted by its use in conjunction with the word "division" in Clause (a) of Section 115 (5).

(Paras 8, 17)

Clause (a) of Section 115 defines the occasion for the exercise of the Central Government's responsibility, and clause (b) defines the manner of its exercise. Thus the Central Government has certain controlling, supervisory, concurrent and overriding powers in regard to integration, which do not wipe out the State Government's powers under Entry 41 of List II, and that these latter powers have to be exercised in subordination to those of the Central Government. Observations in AIR 1965 Ker 84 (FB), held to be obiter. AIR 1961 Mys 210, Referred. (Para 9)

(C) Constitution of India, Articles 245, 246 — Relative scope.

While Article 245 confers Legislative Powers on Parliament and on the State Legislatures and determines what might be called their territorial jurisdiction Article 246 only specifies the matters in respect of which Parliament and the Legislatures of the States may exercise the power conferred by Article 245. In respect of some matters Parliament has exclusive power; in respect of some the State Legislatures have exclusive power and in respect of some the two have concurrent powers. The very power to legislate being conferred by Article 245, It necessarily follows that the exercise of that power, whether in the exclusive or in the concurrent field, can only be subject to the limitation imposed by Art. 245, namely, subject to the other provisions of the Constitution. In other words, the words, "subject to the provisions of the Constitution" must be read into Article 246 as well. (Para 19)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 850 (V 55) =
(1968) 2 SCR 186, Union of India
v. P. K. Roy 8, 9
(1968) AIR 1968 Andh Pra 5 (V 55)
= 1967-1 Andh WR 102, Dr. N.
Desai v. Govt. of Andhra Pradesh 8

- (1967) AIR 1967 SC 944 (V 54) =
 (1967) 2 SCR 109, Mangal Singh
 v. Union of India 6
 (1965) AIR 1965 Guj 23 (V 52) =
 ILR (1963) Guj 1204 (FB), A. J.
 Patel v. State of Gujarat 8, 9
 (1965) AIR 1965 Ker 84 (V 52) =
 1964 Ker LT 704 (FB), Kunhi
 Krishnan Nambiyar v. State of
 Kerala 1, 10, 15, 16, 21
 (1965) W. A. Nos. 136 and 149 of
 1965 (Ker) 17
 (1964) AIR 1964 Madh Pra 307
 (V 51) = 1964 Jab LJ 591, P. K.
 Roy v. State of Madhya Pra-
 desh 8
 (1961) AIR 1961 Mys 210 (V 48),
 M. A. Jaleel v. State of
 Mysore 1, 8, 9

K. Velayudhan Nair and M. C. Sen,
 for Petitioner, C. Sankaran Nair
 (C. G. P.), (for No. 1); Advocate General
 (for No. 2); K. Raghavan Nair, (for
 No. 3); C. M. Kuruvilla, C. George and
 A. Jacob Oommen, (for No. 4), for Res-
 pondents.

GOPALAN NAMBIYAR J.:— This writ petition has been ordered to be placed before a Full Bench as it raises an important question as to the nature of the power exercised by the Central Government in the matter of integration of services in the States. In *M. A. Jaleel v. State of Mysore*, AIR 1961 Mys 210, a Division Bench of the Mysore High Court took the view that the power of the Central Government in the matter of integration of services was an exclusive original power. There were observations in a different strain made by one of us (Raman Nayar J.) in *Kunhi Krishnan Nambiyar v. State of Kerala*, 1964 Ker LT 704 = AIR 1965 Ker 84 (FB). In this latter case the Mysore decision was not noticed, nor were the provisions of Article 4 of the Constitution. In view of all this our learned brother Mathew J. felt that the question should be decided by a Full Bench.

2. The petitioner was appointed Municipal Commissioner in the Travancore State in the year 1945 for a term of three years, renewed in 1948, and again in 1951, for a further term of three years on each occasion. By the time of the last renewal the Travancore-Cochin State had been formed by the integration of the States of Travancore and Cochin. There were no rules governing the appointment of Municipal Commissioners in the Travancore-State. The Travancore-Cochin Government framed rules dated 8-6-1953 relating to the conditions of services of Municipal Commissioners. Rule 1 constituted a cadre of Municipal Commissioners consisting of 25 officers divided into five

grades, the 1st Grade on a scale of pay of Rs. 350-20-450 and the 11nd Grade on a scale of pay of Rs. 275-10-325. It is unnecessary to notice the scales of the remaining grades. Rule 2 provided that ordinarily a first Grade Officer should be posted as Commissioner of the Corporation of Trivandrum and Officers on higher scales of pay as Commissioners of Municipalities having larger revenue receipts.

Rule 3 provided that the Municipal Commissioners shall be in service of the Government, shall belong to a separate cadre, and shall not be ordinarily entitled to transfer or to interchangeability with other services under the Government. Rule 5 provided for making appointments by direct recruitment and by promotion or transfer of persons already in Municipal Service, and further provided that the then Municipal Commissioners (like the petitioner) recruited to the cadre otherwise from Government service, may be treated to be substantive in their respective posts from the dates of their appointments as such. According to Rule 4 appointment to the cadre of Municipal Commissioners shall ordinarily be in the last grade, promotion to the higher posts being made from the next lower grade on considerations of past records and not merely on seniority. The petitioner was selected for appointment to the 1st Grade on 25-4-1956 and posted as Commissioner of the Corporation of Trivandrum, for a period of one year. The Trivandrum City Municipal Act specifies the post of the Municipal Commissioner of the Corporation of Trivandrum as a tenure post. The salary scale of the 1st Grade Municipal Commissioners in the Travancore-Cochin area was revised on 23-11-1956 (after the reorganisation of States) with effect from 1-4-1955 fixing the salary scale of 1st Grade Commissioner as Rs. 450-600.

The necessary legislative amendments to the Trivandrum City Municipal Act and the District Municipalities Act, removing the provision imposing a ceiling on the salary of Municipal Commissioners were passed only on 30-10-1956 and the revised scale was implemented from 23-11-1956, though with effect from 1-4-1955. The petitioner was confirmed in the post of Commissioner, Corporation of Trivandrum with effect from 25-4-1956 by Ext. P8 order dated 12-8-1960. Ext. P9 G. O. No. 1837/LA, dated 27-12-1955 of the Government of Madras will show the constitution of two separate services for Municipal Commissioners, viz., the Madras Municipal Commissioners' Service, and the Municipal Commissioners' Subordinate Service. The former was to consist of one special

grade post at Madurai on Rs. 800-50-900, three selection grade posts at Salem, Coimbatore and Thiruchirappalli, fifteen 1st Grade posts on Rs. 300-25-500, and eighteen second grade posts on Rs. 200-10-300. The latter service was to consist of 24 IIrd Grade Commissioners on Rs. 150-5-200.

3. The reorganisation of States took place, on 1-11-1956 and certain Madras personnel (among them Respondents 3 and 4) were allotted and stood transferred to the Kerala State. By Ext. P3 G. O. dated 30-10-1957, the cadre strength of Municipal Commissioners in the Kerala State as on 1-11-1956 was fixed at 27, of which one was to be in the 1st grade on Rs. 400-600. This was revised by Ext. P3 G. O., dated 22-4-1958, by which, while maintaining the cadre strength at 27, one selection post on Rs. 450-600 and eight 1st grade posts on Rs. 300-500 were sanctioned as on 1-11-1956. Ext. P1 dated 18-4-1958 is a copy of the integration order of the Government of Kerala equating the posts

of Municipal Commissioners, in the Travancore-Cochin area with the posts in Madras. Municipal Commissioners on Rs. 300-500 in Travancore-Cochin were equated with Municipal Commissioners on the same scale in Madras.

According to the then prevailing scales of pay this meant that the IInd Grade Commissioners of Travancore-Cochin were equated with the 1st Grade Commissioners of Madras, with the result that the petitioner as the only 1st Grade Commissioner of Travancore-Cochin, stood outside the equation and above his compeer in Madras. Respondents 3 and 4 and other allottees from Madras filed "appeal petitions" against Ext. P1 G. O. These were considered by the Advisory committee constituted by the Government of India under Section 115 of the States Reorganisation Act, and the Government of India passed final orders directing that the posts of Municipal Commissioners of Travancore-Cochin and Madras in the various grades, should be equated as below:

Travancore-Cochin

1st Grade	Rs. 350-450.
IInd Grade	Rs. 275-325.
IIrd Grade	Rs. 225-275.
IVth Grade	Rs. 175-275.
Vth Grade	Rs. 150-175.

Madras

1st Grade	Rs. 300-500.
IInd Grade	Rs. 200-300.
IIrd Grade	Rs. 150-200.

(Vide Ext. P 4.)

This meant that the post of 1st Grade Municipal Commissioner, Travancore-Cochin held by the petitioner on the relevant date was equated with that of the 1st Grade Municipal Commissioner Madras, held by Respondents 3 and 4, and since seniority was to be determined by length of continuous service in the equated posts, Respondents 3 and 4 who had longer continuous service got seniority over the petitioner. Accordingly a preliminary gradation list, (Ext. P5), was prepared and published in the Kerala Gazette dated 17th April 1962, showing 3rd and 4th respondents as seniors to the petitioner. This writ petition proceeds on the footing that petitioner was, at the time of Ext. P5, in England on deputation for training and that after his return, he filed Ext. P6 representation against the list which was rejected—as he was informed by Ext. P7 memo.

It is on this basis namely, that the favourable equation made by the State Government was upset to his prejudice, without giving him an opportunity of being heard, and that his representation Ext. P6, was not considered on the merits, that the petitioner has sought to quash Ext. P4 order and Ext. P5 list. But it was pointed out—though at a somewhat late stage of the arguments—that Ext. P4 order was published in the Kerala Gazette dated 15-12-1959, and

objections invited, that the petitioner filed a representation dated 8-2-1960, against Ext. P4 order which was rejected after due consideration of the points raised, by the Central Government's order dated 8-7-1960, communicated to the petitioner by memo dated 25-11-1960. These were read out from the files by the Government Pleader. (See also paras 22, 29 and 30 of the 2nd respondent's counter-affidavit). It is apparent that the petitioner has not made a full and true disclosure of the facts but has, in order to put forward his case of a violation of the principles of natural justice chosen to suppress his representation against Ext. P4 and the adverse order thereon. On that one ground alone this writ petition is liable to be dismissed.

4. We may also notice the cases stated in the counter-affidavit of the State that the petitioner's confirmation itself by Ext. P8 order as Commissioner, Corporation of Trivandrum, a tenure post, was not quite in order, and the question of clarifying the intention of Ext. P8 G. O. was engaging the attention of the Government, the same having been delayed only by reason of the petitioner's representations to the Government of India against Exts. P4 and P5 and the pendency of this writ peti-

tion (vide paragraphs 32 to 34 of 2nd Respondent's counter-affidavit). Whatever that be, as the matter has now been placed before a Full Bench, we shall proceed to consider all the points raised. The petitioner's counsel contended that the power of integration of services is one exclusively in the State Government and that any interference with that power by the Central Government whether by issuance of directions or otherwise, would be unconstitutional. Secondly it was contended that assuming the Central Government had any power in the matter, there was violation of the rules of natural justice in exercising the same.

5. Entry 41 of List II of Schedule VII of the Constitution vests the power of legislation in regard to the State Public Service in the States. By Article 245 (1) the power of the legislature of a State to make laws for the whole or any part of the State is "subject to the provisions of the Constitution". Article 246 (3) confers exclusive power in the legislature of a State to make laws with respect to the matters in List II of the VIIth Schedule, subject to Clauses (1) and (2) of the Article. (Clause (1) confers such exclusive power on Parliament in respect of matters in List I, and Clause (2) confers such power on Parliament, and, subject to Clause (1), on the State Legislature with respect to matters in List III). Article 162 and Article 73 of the Constitution which define the executive power of the State and the Union respectively, may be read:

Article 162: "Subject to the provisions of the Constitution, the executive power of a State shall extend to the matters, with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or Authorities thereof".

Article 73: "(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a)

shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State specified in Part A or Part B of the First Schedule to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this Article continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or Officer or authority thereof could exercise immediately before the commencement of this Constitution".

6. We may next refer to Arts. 2, 3 and 4 of the Constitution. Article 2 provides for the Parliament by law admitting into the Union, or establishing new States; and Article 3 to the Parliament by law, forming a new State, whether by separation of territory from any State or by Union of two or more States, or otherwise. Article 4 reads:

"Article 4: — "(1) Any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of Article 368".

A conspectus of the above Articles leaves us in no doubt about the supremacy of Parliament's powers. Article 245 deals with the territorial jurisdiction of the State Legislature and of Parliament and Article 246 deals with the subject-matter of Legislation. The absence in Article 246 (3), of the words "subject to the provisions of the Constitution", which occur in Article 245 (1), appears to us to be of no consequence and does not detract from the supremacy of Parliament's power of Legislation under Article 4. For, the very power to legislate being expressly subject to the provisions of the Constitution, the exclusive power to legislate in respect of the matters in List II must necessarily be so

subject; in other words, it is subject to the powers conferred on Parliament by Article 4. The executive power, by reason of Articles 73 and 162 is co-terminous with the legislative power, and the proviso to Article 162 brings out again, the supremacy of the executive power of the Union. Article 256 which enables the Union to give directions to the State to ensure compliance with laws made by Parliament, further emphasises this aspect. Article 4 enjoins that any law made under Article 2 or 3 shall contain provisions for amendment of the 1st and IVth Schedule of the Constitution, and further enables such "supplemental, incidental and consequential provisions" as Parliament may deem necessary.

We are unable to read any limitation, as Counsel for the petitioner would have us read, that these latter provisions themselves cannot have the effect of amending the Constitution. The "incidental, supplemental and consequential" provisions are such in relation to the law made under Article 3 (or Article 2 as the case may be) and not in relation to the amendment of Schedules I and IV which are inevitable in such law. Indeed, such a limited construction of Article 4 seems to have been rejected by the Supreme Court in *Mangal Singh v. Union of India*, AIR 1967 SC 944. Even assuming that these supplemental etc., provisions cannot amend the Constitution, but do have that effect, we have the categorical deeming provision in Clause 2 of Article 4 which should be an effective answer to the contention of Counsel for the petitioner.

7. The States Reorganisation Act, 1956 was passed in pursuance of Articles 3 and 4 of the Constitution. We may notice the provisions of Section 115 of the said Act:

"115 (1) — Every person who immediately before the appointed day is serving in connection with the affairs of the Union under the administrative control of Lieutenant-Governor or Chief Commissioner in any of the existing States of Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh, or is serving in connection with the affairs of any of the existing States of Mysore, Punjab, Patiala and East Punjab States Union and Saurashtra shall, as from that day, be deemed to have been allotted to serve in connection with the affairs of the successor State to that existing State.

(2) Every person who immediately before the appointed day is serving in connection with the affairs of an existing State part of whose territories is transferred to another State by the provisions of Part II shall, as from that day, provisionally continue to serve in connection with the affairs of the principal successor

State to that existing State, unless he is required by general or special order of the Central Government to serve provisionally in connection with the affairs of any other successor State.

(3) As soon as may be after the appointed day, the Central Government shall by general or special order determine the successor State to which every person referred to in sub-section (2) shall be finally allotted for service and the date with effect from which such allotment shall take effect or be deemed to have taken effect.

(4) Every person who is finally allotted under the provisions of sub-section (3) to a Successor State shall, if he is not already serving therein be made available for serving in that Successor State from such date as may be agreed upon between the Governments concerned, and in default of such agreement, as may be determined by the Central Government.

(5) The Central Government may by order establish one or more Advisory Committees for the purpose of assisting it in regard to —

(a) the division and integration of the services among the new States and the States of Andhra Pradesh and Madras; and

(b) the ensuring of fair and equitable treatment to all persons affected by the provisions of this section and the proper consideration of any representations made by such persons.

(6) The foregoing provisions of this section shall not apply in relation to any person to whom the provisions of Section 114 apply.

(7) Nothing in this section shall be deemed to affect after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to the determination of the conditions of service of persons serving in connection with the affairs of the Union or any State:

Provided that the conditions of service applicable immediately before the appointed day to the case of any person referred to in sub-section (1) or sub-section (2) shall not be varied to his disadvantage except with the previous approval of the Central Government."

8. In regard to the above section, judicial opinion is conflicting as to whether the power of integration is an exclusive original power of the Central Government or a Supervisory power. In AIR 1961 Mys 210 the Mysore High Court took the view that the power of the Central Government in the matter of integration of services was an exclusive original power. In *P. K. Roy v. State of Madhya Pradesh*, AIR 1964 Madh Pra

307, a Division Bench of the Madhya Pradesh High Court while holding that the task of division and integration was the special responsibility of the Central Government, ruled that the formulation of principles of integration and the preparation of provisional lists cannot be regarded as capable of being validly delegated by the Central Government. While leaving open the question as to the nature of the power, this latter part of the decision was reversed on appeal by the Supreme Court (vide *Union of India v. P. K. Roy*, AIR 1968 SC 850). It was ruled that there was no delegation by the Central Government of any of its essential functions as the ultimate responsibility was retained by the Central Government.

In *A. J. Patel v. State of Gujarat*, AIR 1965 Guj 23, a Full Bench of the Gujarat High Court took the view that the Central Government does not have the exclusive authority and the power in the matter of integration of services but that it does possess certain essential powers of a supervisory nature, and that the power of the State Government under Entry 41 of List II is not completely taken away. Dr. N. Desai v. Government of Andhra Pradesh, AIR 1968 Andhra Pradesh 5, was more concerned with the violation of the principles of natural justice and the opportunity to be afforded in the matter of hearing representations, regarding integration of services. These were the decisions brought to our notice.

9. In the face of Articles 4, 73 and 162 of the Constitution and Section 115 of the States Re-organisation Act (read with Article 256 of the Constitution), we have no hesitation in rejecting the extreme contention advanced on behalf of the petitioner's counsel that the power of integration belongs exclusively to the States. It is not without significance that such an extreme contention was not advanced before the Supreme Court in AIR 1968 SC 850. Entry 41 of List II stands subordinated to the other provisions referred to supra, and cannot avail to give the State, the exclusive power claimed for it by the petitioner. Nor does Article 309 give it such power. This provision again, is "subject to the provisions of the Constitution", and therefore to Article 4. The power given by this article to promulgate rules — even retrospectively — regulating the recruitment and conditions of service of members of the State services must be subject to Section 115 (7) of the States Reorganisation Act (read with Article 256 of the Constitution) which recognises the power of the Central Government to determine such conditions as on 31-10-1956 and further guarantees that such conditions shall not be prejudicially vari-

ed except with the previous approval of the Central Government.

We are not unaware of the somewhat shifting positions taken up by the Government of India in the reported cases brought to our notice. In AIR 1965 Guj 23 the learned Attorney-General contended that the Central Government had been constituted the sole and exclusive authority to integrate the services. The correspondence and the instructions of the Central Government referred to in that case indicate that the Central Government itself had not pitched its tent so high, prior to the Mysore decision in *Jaleel's case*, AIR 1961 Mys 210. In AIR 1968 SC 850, the Solicitor-General did not claim exclusive powers for the Government of India, but only that the powers of the State Government under Entry 41 of List II remain unaffected except to the extent of the obligation to carry out the directions of the Central Government issued under Section 115 of the States Reorganisation Act. Before us the stand taken by the Government Pleader appearing for the State and by the Central Government Pleader was that the power belonged exclusively to the Central Government.

Holding as we do, that the power of integration does not belong exclusively to the States, the question whether it is an exclusive original power on the part of the Central Government, or only one of supervision and control (with the right of issuing directions) over the States, whose power under Entry 41 of List II is not completely taken away, is quite academic, as, even if it be the former, it can still be exercised through a delegate, so long as the ultimate responsibility and control are retained by the Central Government. Having heard full arguments we may however indicate our view. We feel that the State Government's power under Entry 41 of List II read with Article 162 of the Constitution is not completely taken away, but is certainly subordinated to the Central Government's power under Article 4 read with Article 73 of the Constitution and Section 115 of the States Reorganisation Act. It was argued that the Central Government's power is only to effect the "division and integration" of services "among the new States".

This power conferred under Clause (a) of Section 115 (5), is not for the purpose of division and integration, but for assisting the Central Government "in regard to" the division and integration. The expression "in regard to" integration is wide enough to cover even preliminary steps prior to actual integration, such as formulation of principles, equation of posts and things of the kind. The word

integration itself, in its dictionary sense has the wide meaning of combining parts into a whole. That it means much more than mere "allotment" is connoted by its use in conjunction with the word 'division' in clause (a) of Section 115 (5). In P. K. Roy's case, AIR 1968 SC 850, the Supreme Court observed:

"Generally speaking, the work of integration requires the formulation of principles on which the work has to be carried out, the actual preparation of preliminary gradation lists in accordance with the principles so settled, the publication of the lists together with the principles upon which they have been compiled, the invitation of representations by the persons affected thereby, the consideration of representations, and the publication of the final gradation list incorporating the decisions of the Central Government on the representations submitted". Such was also the view taken in AIR 1965 Guj 23 at p. 38. We are in agreement with the learned Chief Justice in that case that the inappropriateness — if such it be — of the preposition "among" used in relation to "integration" in Section 115 (5) (a), cannot limit the content of the latter expression so as to cover only allotment. We feel that clause (b) of Section 115 (5) which speaks of the ensuring of fair and equitable treatment to persons affected by the section is a further pointer to the wide connotation of the term "integration" in the context. We are not prepared to confine the fair and equitable treatment ensured by clause (b) only to the matter of allotment of personnel referred to in clauses (3) and (4) of Section 115. Clause (a) of Section 115 defines the occasion for the exercise of the Central Government's responsibility, and clause (b) defines the manner of its exercise. For these reasons, we are inclined to think that the Central Government has certain controlling, supervisory, concurrent and overriding powers in regard to integration, which do not wipe out the State Government's powers under Entry 41 of List II and that these latter powers have to be exercised in subordination to those of the Central Government.

10. We may now notice the decision in Kunhikrishnan Nambiyar's Case, 1964 Ker LT 704 = AIR 1965 Ker 84 (FB). One of us Raman Nayar J, observed:

"36. — In the first place I think it necessary to emphasise that Part X of the States Reorganisation Act charges the Central Government with the duty of sitting in judgment over the State Government in matters like the present. The Central Government's powers in this regard are both appellate and revisional — in theory they are even wider since

the Central Government can give directions beforehand and need not wait for the State Government to err, though in practice it would appear there has been no occasion for such an exercise. Under Section 117 of the Act, it is for the Central Government to make the final allotment of persons serving in an existing State for service in a successor State, to see to the division and integration of the services among the new States (of which Kerala is one) and the States of Andhra Pradesh and Madras, to ensure fair and equitable treatment to all persons whose services have been transferred from one State to another, and to consider any representations made by such persons. Such representations, when directed against decisions of the State Governments are really appeals and indeed have been rightly called so, and, on such appeals or otherwise, the Central Government can, under Section 117, give directions to the State Governments which the latter are bound to obey. Therefore anything that the Central Government ask the State Governments to do in relation to the division and integration of the service is really a statutory direction and, when it has the effect of altering a decision of the State Government to the disadvantage of any person, especially when it is in consequence of an appeal, it is a quasi-judicial decision. That being so, persons adversely affected have a right to be heard before a final decision is taken; they have a right to know what that decision is; and the decision itself must, apart from being supported by reasons, give clear directions (not presenting the State Governments with choices attracting further representations against the choice made), and must be attended with a certain degree of formality (not informal or secret)."

11. The nature of the power of integration did not pointedly arise for consideration in the above case, and the observations quoted supra, were only obiter as far as the question now considered by us is concerned. They were made in the context of emphasising that any alteration of a decision of the State Government to the disadvantages of a member of the service, especially when made in appeal, is quasi-judicial, and an opportunity to be heard must be afforded before the decision is rendered.

12. The petitioner's counsel challenged Ext. P4, decision as being vitiated by misconception as to the number of grades of Municipal Commissioners in Madras and Travancore-Cochin, and as affording no reasons. Apart from the petitioner having precluded himself on the ground of delay and laches to quash Ext. P-4, we find no substance on the merits, in the

petitioner's complaint. The petitioner's representation dated 8-2-1960 against Ext. P-4 met with an adverse order communicated to him by memo dated 25-11-1960, and this writ petition has been filed only in 1965. The counter-affidavit of the Central Government has extracted in paragraph 6, the reasons for the equation of posts, namely, that the actual pay scales, duties, responsibilities etc. of Municipal Councillors of Madras and Travancore-Cochin as on 31-10-1956 were reflected in the income ranges of the Municipalities in which they functioned, and that for the purpose of equation the revised pay-scales promulgated by the Kerala Government on 23-11-1956, after the States Reorganisation, in the erstwhile Travancore-Cochin area, cannot be taken into account.

The basis of the equation made by the Central Government was, after all, in accordance with Rule 2 of the Travancore-Cochin Rules 1953, the substance of which we have set out earlier, and according to which, also, the revenue receipts of the Municipalities determined the grades of the Commissioners posted to them. We find no warrant to interfere with the Government of India's decision in this respect. Nor do we find any misconception as to the number of Grades of Municipal Commissioners prevailing in the two areas, which are relevant to the question. Ext. P5 list is only consequential on Ext. P4, and Ext. P4 being outside the pale of attack, the challenge to Ext. P5 list must also fail. We would only like to record that the representations made by the petitioner seems to echo some of the departmental notings made on them in the Secretariat, which were read out to us by the Central Government Pleader. In the face of this, the petitioner's efforts to make out in his petition, that at the time of Ext. P5 list he was in England on deputation and apparently knew nothing, seems to us to come with ill grace, not to say anything more.

13. Regarding the second ground of the petitioner's argument, we need not consider the abstract question whether the function of integration is administrative or quasi-judicial. Section 115 (5) of the States Reorganisation Act itself statutorily provides the need to consider representations made by the persons affected and sufficiently enshrines the rules of natural justice. These have been more than amply satisfied in the present case. The petitioner had two opportunities of making his representations, one against the equation of posts evidenced by Ext. P4, and the other against the list evidenced by Ext. P5. These were duly considered and rejected.

There was no infringement of the principles of natural justice.

14. We dismiss this writ petition with costs.

15. RAMAN NAYAR J.:— I concur with my learned brethren (whose judgment I have read and with which I am in agreement) in dismissing this petition with costs. But certain observations I made in 1964 Ker LT 704 = AIR 1965 Ker 84, — they have been quoted by my learned brethren — are charged with having brought this case before a Full Bench; and that is my principal excuse for saying a few words of my own.

16. In that case, namely, 1964 Ker LT 704 = AIR 1965 Ker 84, it was assumed on all hands that, having regard to Entry 41 of the State List read with Arts. 245, 246 and 162 of the Constitution and to Art. 309, the power to integrate the service personnel allotted to a State from other States under the provisions of the States Reorganisation Act so as to constitute the unified services of the State resided in the State subject to the control vested in the Central Government by Section 115 of the Act. The vires of that section was not questioned; it was assumed that Parliament had the power to make such a law; no attempt was made, at any rate not overtly, to trace the source of that power in the face of the constitutional provisions just referred to; and no reference was made to Article 4 of the Constitution. Now, after having heard arguments at great length and considered Section 115 of the States Reorganisation Act and the relevant constitutional provisions in the light of the decided cases, I find myself, albeit quite fortuitously, in the happy position of not having to recall a word of what I said.

17. Two years later, W. A. Nos. 136 and 149 of 1965 (Ker) two of us had occasion to consider the scope of Section 115 of the States Reorganisation Act in the light of the relevant constitutional provisions and to trace the source of its authority to Article 4. This is what we then said:

"Articles 246 and 162 of the Constitution read with Entry 41 of the State List give the State full legislative and executive powers in respect of its public services. ***** And subject to any law on the matter, the executive power extends to everything concerned with the public services. *****"

Ordinarily, everything relating to the public services of a State would be within the exclusive competence, legislative and executive, of the State. But Part X of the States Reorganisation Act is a

law made by Parliament in exercise of the powers conferred on it by Article 4 of the Constitution and enlrenches on what is ordinarily within the exclusive competence of the States. That law contains provisions relating to the State Public Services which are supplemental, incidental and consequential to the provisions of the States Reorganisation Act, which is a law made under Article 3. The division of the services of the States then existing, the allotment of the members of these services as between the States as constituted by the Act, and the integration of the services of these States are all matters incidental and consequential to the provisions of the Act. Thus Section 115 of the Act makes provision for these matters with regard to services other than All India Services. With regard to certain States, sub-section (1) of the section itself makes the allotment to the successor States while with regard to certain other States sub-sections (2) to (4) empower the Central Government to make provisional as well as final allotments, although admission of members to the State public services is ordinarily a matter entirely for the State concerned. Sub-section (5) by necessary implication charges the Central Government with the responsibility of effecting the division and integration of the services among the new States (of which Kerala is one) and the States of Andhra Pradesh and Madras and with the ensuring of fair and equitable treatment to all persons affected by the provisions of the section (in other words persons allotted from one State to another, whether a new or an existing State) and the proper consideration of any representations made by such persons. Provision could well have been made, having regard to Article 4 of the Constitution, for these persons being made the special responsibility of the Centre for the rest of their service, but that would have been not merely impracticable but was probably regarded as an unnecessary and unwarranted interference with the rights of the States in respect of their public services. Therefore, by sub-section (7), the States were left free to exercise their powers under Chapter I of Part XIV of the Constitution after the appointed day, namely, the 1st November 1956, so as to determine the conditions of service of members of their public services, so long as the conditions of service applicable immediately before the appointed day to any person referred to in sub-section (1) or (2) were not varied to his disadvantage except with the previous approval of the Central Government. This is the protection afforded by the proviso".

All that I would add with reference to sub-section (5) of Section 115 is that, while under sub-sections (2) and (3) of the Section the division of the services between the several States mentioned in sub-section (5) is to be done by the Central Government itself, so far as the integration of the services is concerned, the implication of sub-section (5) does not necessarily extend to this also having to be done by the Central Government itself. What sub-section (5) says is that the Central Government may establish one or more advisory committees for assisting it in regard to—

"(a) the division and integration of the services among the new States and the States of Andhra Pradesh and Madras; and

(b) the ensuring of fair and equitable treatment to all persons affected by the provisions of this section and the proper consideration of any representations made by such persons".

The obvious and necessary implication is that the Central Government must necessarily have something to do in regard to the division and integration of the services and the ensuring of fair and equitable treatment to the affected persons. But the phrase, "in regard to" is of wide import and does not necessarily imply that these things must be done by the Central Government itself. It seems to me that all that is necessarily implied is that the Central Government must have the final voice in the matter and that it must ensure fair and equitable treatment to the affected persons.

18. While on the wording of sub-section (5) and the use of the preposition, "among" in Clause (a) thereof, I might observe that there can be little doubt that this clause should be read as if it said, "the division of the services among, and the integration of the services within the new States and the States of Andhra Pradesh and Madras" and that the rather inept use of the preposition, "among" to do service both with regard to the word, "division" and the word, "integration" cannot lend the least substance to the contention that the words, "division" and, "integration" are used only to indicate the two processes involved in the allotment which is to be made by the Central Government under sub-sections (2) and (3) of the section. The division of the services is effected by the allotment as between the several States; the two are but one process; and the word, "integration" can only mean the fusion of the personnel allotted to one State from several States to form the unified services of that State. The allotment effects the division, and the integration is something to come

after that. The mere allotment to one State of personnel from other States involves no integration.

19. The States Reorganisation Act is a law made under Articles 2 and 3 of the Constitution, and what Section 115 of the Act does is to make the necessary supplemental, incidental and consequential provisions in relation to the public services of the States affected thereby. The power to make such provision is expressly conferred on Parliament by Article 4. Article 245 which confers the law-making power on the States opens with the words, "subject to the provisions of the Constitution"; and so does Article 309. It follows that the powers thus conferred on the States are subject to the provisions of Article 4 and therefore subject to the law-making power conferred on Parliament by Article 4. That Article 246 does not in terms contain the limitation, "subject to the provisions of the Constitution" makes no difference, for, that Article is ancillary to Article 245 and must be read as part and parcel thereof.

While Article 245 confers legislative powers on Parliament and on the State Legislatures and determines what might be called their territorial jurisdiction, Article 246 only specifies the matters in respect of which Parliament and the Legislatures of the States may exercise the power conferred by Article 245. In respect of some matters Parliament has exclusive power; in respect of some the State Legislatures have exclusive power; and in respect of some the two have concurrent powers. The very power to legislate being conferred by Article 245, it necessarily follows that the exercise of that power, whether in the exclusive or in the concurrent field, can only be subject to the limitation imposed by Article 245, namely, subject to the other provisions of the Constitution. In other words, the words, "subject to the provisions of the Constitution" must be read into Article 246 as well.

20. The power under Articles 245 and 246 is thus subject to Article 4, in other words, subject to any law which Parliament may make under that Article in making a law under Article 2 or Article 3. And, in so far as such a law makes supplemental, incidental and consequential provisions in relation to matters in the State List, that is authorised by Article 4; Articles 73 and 162 are attracted; and it is as if those matters were in the concurrent list. The supplemental, incidental and consequential provisions regarding the public services of the States contained in Section 115 of the States Re-organisation Act are thus completely in accord with Articles 4, 245, 246 and 309 of the Consti-

tution. No amendment to the Constitution is, in fact, involved and it seems to me that there is no occasion to call in aid Clause (2) of Article 4.

21. As I have already observed, so far as the integration of the services is concerned, the implication of sub-section (5) of Section 115 of the States Reorganisation Act is only that the ultimate control and responsibility vest in the Central Government, and needless to say, must be so exercised as to ensure fair and equitable treatment to all the affected persons. How exactly this control is to be exercised and the responsibility discharged is left to the Central Government to decide. The Central Government may, if it thinks fit, do all the work itself. But that, of course, would be impracticable. It may lay down the general principles and ask the State Government to make all the necessary investigations and hold the necessary inquiries but pass the final orders itself.

It may leave the State Government to effect the integration in exercise of the latter's own powers under the Constitution, giving the State Government such directions or advice as it may deem expedient, and set itself up as an appellate or revisional authority to hear and decide representations from persons affected by the orders of the State Government. Or it may adopt a combination of all these methods. But, when it exercises its power of control to set aside or modify orders made by the State Government, whether of its own motion or on representations made to it, it should observe the principles of natural justice. It should not set aside or modify such orders to the detriment of any person without giving that person an opportunity of being heard. This is all I said in 1964 Ker LT 704 = AIR 1965 Ker 84.

22. Turning now to the case on hand, it is clear that the petitioner's grievance is against the order, Ext. P4, embodying the Central Government's decision that that post of Municipal Commissioner, Grade I, of Madras should be equated with that of Municipal Commissioner, Grade I, of Travancore-Cochin. This varied to his disadvantage, the order, Ext. P1, of the State Government which, in effect, integrated the Municipal Commissioner, Grade I, of Madras with the Municipal Commissioner, Grade II, of Travancore-Cochin, and, by implication, placed the Municipal Commissioner, Grade I, of Travancore-Cochin, the post held by the petitioner, above the Municipal Commissioner, Grade I, of Madras. Ext. P5 only implemented Ext. P4 just as a final decree implements a preliminary decree, and the petitioner has no

case that the implementation was wrongly effected. It is no doubt the final result as set out in the final decree, Ext. P5, that actually affects the petitioner's career. But he can succeed only if he can successfully assail the preliminary decree, Ext. P4.

23. Now, the decision of the Central Government embodied in Ext. P4 was really only in the nature of a provisional decision. In accordance with the general directions given by the Central Government it was duly published in the Kerala Gazette of the 15th December 1959 for the information of the affected persons, and objections and representations were invited. The petitioner did, in fact, make the representation, Ext. R6, dated 8-2-1960, setting out his case in full and praying that the equation made by Ext. P1 be restored. This representation was forwarded to the Central Government which, after considering the matter, passed the order, Ex. R7 dated 16-8-1960, rejecting the representation and pointing out that the equation made in Ext. P4 was in accord with the principles of integration laid down by the State Government by its order dated 29th December, 1956. (This order is generally known as the Integration G. O., and a copy of it has been marked as Ext. R2). This rejection was duly communicated to the petitioner by Ext. R8, dated 25-11-1960, and it was on the 15th March 1965, more than five years later, that the petitioner came to this Court under Article 226 of the Constitution complaining against Ext. P4 on the ground that it was made in violation of the principles of natural justice and saying nothing about the representation Ext. R6 he had made against it and the rejection of that representation by the Central Government after due consideration by its order, Ext. R7 dated 16-8-1960.

The pretence in the petition is that it was the publication of the provisional gradation list, Ext. P5 dated 23-3-1962, prepared in pursuance of Ext. P4, in the Gazette of the 17th April 1962 that for the first time gave the petitioner an opportunity of making a representation, that the first representation he made was Ext. P6 dated 20-12-1962, and that it was the communication of the rejection of that representation by Ext. P7 dated 5-2-1965 (a single line, non-speaking communication which nevertheless rightly described the petitioner's representation as a renewed representation) that gave him a cause of action to move this Court. Actually, as we have seen, it was Ext. R7 dated 16-8-1960 which gave the petitioner a cause of action. That order which confirmed the equation provisionally made by Ext. P4 was made

after due consideration of the petitioner's representation, Ext. R6, and in accordance with the principles of natural justice.

24. The well-settled principles of integration embodied in Ex. R2 dated 29-12-1956, principles laid down by the State Government on the advice of the Central Government based on the conclusions reached at a conference of the Chief Secretaries of the several States held in May 1956, require that the equation of posts should be effected on the basis of functional responsibility. The affidavit filed on behalf of the Central Government discloses that it assessed the functional responsibility of the several Grades of the Municipal Commissioners of Madras and Travancore-Cochin on such relevant considerations as the income and population of the Municipalities they were designed to serve and ordinarily served—not necessarily of the particular Municipality that they were for the time being serving, since exigencies might require the posting of a higher grade Commissioner to a lower grade Municipality or vice versa—considerations recognised by the very rules under which the service to which the Petitioner was appointed was constituted.

Petition dismissed.

AIR 1970 KERALA 120 (V 57 C 22)

V. P. GOPALAN NAMBIYAR AND
V. BALAKRISHNA ERADI, JJ.

K. Nagendra Prabhu and others, Appellants v. Popular Bank Ltd. and others, Respondents.

Appeals Suits Nos. 137, 139, 140, 105, 124, 125, 133 and 134 of 1963 and 426 of 1964, D/- 29-10-1968.

(A) Companies Act (1956), Section 542
(1) — Scope — Retrospective operation — Section introduced for the first time in the Act — Making facts and circumstances prior to that date, foundation of proceeding or order does not amount to giving retrospective operation to section.

In order to attract sub-clause (1) of Section 542 it is enough, if, as stated therein, it "appears" that any business of the Company "has been" carried on with the requisite intent of and for the requisite purpose mentioned in the sub-section. Once it is so made to "appear" in the course of winding up of a Company subsequent to 1-4-1956 (when the Act came into force), to make the facts and circumstances prior to that date the foundation of the proceeding or order, does not amount to giving retrospective operation to the section. Conduct in the

GM/LM/C855/69/VGW/D

past, can be made the cause or the reason for the action subsequent to 1-4-1956. The expression "has been" used in relation to carrying on of the business of the Company in sub-section (1) of Section 542 may be contrasted with the expression "is" occurring in sub-section (3) thereof. (Para 8)

(B) Companies Act (1956), Section 542 — Liability for debts etc. — Extent of — Section seems to postulate some nexus between fraudulent trading or purpose and extent of liability of directors or other persons. 1932-2 Ch 71 and 1933 Ch 786 and 105 Com-WLR 451, Rel. on. (Para 10)

(C) Companies Act (1956), Sections 542, 543 and 483 — Proceedings under Section 542 — Proceeding under Section 542 terminating into order — Subsequent death of delinquent party — No abatement of proceeding already terminating into order — Provisions of Order 22, Rule 6 of Civil P. C. apply to proceedings by reason of Section 483 read with Rule 6 of Companies (Court) Rules, 1959 and R. 44 of Rules framed by T. C. High Court under Banking Regulation Act, 1949 — (Civil P. C. (1908), O. 22, R. 6) — (Companies (Court) Rules (1959), R. 6) — (Banking Regulation Act (1949), Section 45-U, Rules under, Rules made by T. C. High Court Rule 44).

Once the proceedings under Sec. 542 crystallise into an order or decree against the delinquent party and the delinquent party dies thereafter, his liability under the decree or order cannot stand automatically vacated. Abatement, if at all, in such circumstances, can only be of the proceedings by way of appeal, but not, of the original proceedings, which have merged in the decree or order. AIR 1958 Mad 583, Disting. (Para 12)

The provisions of Order 22, Rule 6 are applicable to proceedings under Section 542 by reason of Section 483 of the Companies Act read with Rule 6 of the Companies (Court) Rules 1959, and R. 44 of the Rules framed by the Travancore-Cochin High Court under the Banking Regulation Act, 1949. The result is that the judgment has the same force and effect as if it had been pronounced before the death of the party. (Para 13)

(D) Companies Act (1956), Sec. 542 — Scope and applicability — 'Primary' intention to defraud on the part of person sought to be proceeded against, is not requirement of section.

It cannot be said that unless the persons sought to be proceeded against under Section 542 of the Act had the 'primary' intention to defraud creditors, liability under Section 542 would not be attracted. The section speaks of the

business of the company have been carried on "with intent to defraud creditors of the Company, or for any fraudulent purpose". If, on an assessment of all the facts and circumstances, the fraudulent intent or the fraudulent purpose is made out, liability must follow, as much as, a contrary conclusion should result, if neither the intent nor the purpose could be said to be fraudulent. (Para 16)

(E) Companies Act (1956), Sec. 542 — Liability of Director—Liability of Director cannot be rested merely on his adoption at subsequent meeting of proceedings of previous meeting of Board of Directors. 1908-2 Ch 240, Rel. on. (Para 37)

(F) Companies Act (1956), Sec. 542 — Carrying on business with fraudulent intent or purpose — Directors knowing that affairs of Banking company did not justify canvassing for or making of deposits — Such Directors themselves canvassing and requesting others to canvass for deposits—Held, their action amounted to carrying on business of Bank with requisite fraudulent intent or purpose under S. 542. 1932-2 Ch 71, Rel. on. (Para 48)

(G) Companies Act (1956), Sec. 542 — Liability of Directors — Held on facts that trust and confidence reposed in some respondents and members of Executive Committee was no defence.

It cannot be said that irrespective of the size and standing of the Bank, the volume of business transacted therein and the efficiency and trustworthiness of the persons to whom responsibilities are entrusted, a delegation of functions would per se carry with it a denudation of responsibility. 1901 AC 477, Disting.

Held on the facts and the circumstances of the case that the defence of the Directors that they should be excused from liability by reason of the trust and confidence reposed in some of the respondents by all of them, and in the members of the Executive Committee of the Board by the rest of the Directors, was not acceptable. (Para 54)

(H) Companies Act (1956), Sec. 542 — Scope — Court must decide extent of all debts or liabilities and if directors are to be made liable, court must decide extent of their liability. (Paras 59, 63)

Cases Referred: Chronological Paras
 (1958) AIR 1958 Mad 583 (V 45) =
 ILR (1958) Mad 858, In re,
 Peerdan Juharmal Bank Ltd. 12
 (1933) 1933 Ch. 786 = 102 LJ Ch.
 300, In re, Patrick and Lyon
 Ltd. 10
 (1932) 1932-2 Ch 71 = 101 LJ Ch
 380, In re, William C. Leitch
 Brothers Ltd. 10, 11, 48

(1908) 1908-2 Ch 240 = 77 LJ Ch	
591, Burton v. Bevan	37
(1901) 1901 AC 477 = 70 LJ Ch	
753, Dovey v. Cory	54
105 Com-WLR 451, Hardie v. Hanson	10

K. V. Suryanarayana Iyer, C. M. Devan and N. N. Venkitachalam (in No. 137/63); K. V. Suryanarayana Iyer, C. M. Devan, N. N. Venkitachalam, C. Ravi Namboodiri and C. K. Balan, (in Nos. 139 and 140/63); V. Rama Shenoi and R. Raya Shenoi, (in No. 105/63); S. Narayanan Potti, (in Nos. 124 & 125/63); P. C. Chacko, (in No. 133/63); T. N. Subramonia Iyer, P. C. Chacko and P. Krishnamoorthy (in No. 134/63); C. K. Sivasankara Panicker, P. G. P. Panicker and K. S. Parameswara Iyer, (in No. 426/64); for Appellants: Mani J. Meenattoor, (in A. S. Nos. 137, 139, 140, 105, 124, 125, 133 & 134 of 63) and P. C. Chacko, for No. 2; (in A. S. No. 426/64), for Respondents.

JUDGMENT: The Popular Bank Ltd., now in liquidation was incorporated in 1944 with head-office in Allenpey. It established three branch offices at Vaikom, Shertalai and Kuthiathode respectively. The Bank suspended business on the 16th August 1956. A petition for winding up the Bank was presented in this Court and was ordered on the 19th December 1956. Thereafter, two applications were made by the Official Liquidator of the Bank. Application No. 1 of 1959 from which these appeals arise, was under Section 542 (1) of the Companies Act 1956, read with Rr. 260 to 262 of the Companies Court Rules 1959. Application 2 of 1959 from which the connected appeals heard along with these arise, was under section 543 of the Companies Act, read with section 45H of the Banking Companies Act 1949. These were disposed of by our learned brother Raghavan J.

2. Except where expressly indicated, reference hereinafter would be to the ranks of the parties as in application No. 1 of 1959 which appears to have been treated as the main application by the learned Judge, and a copy of the judgment in which, was ordered to be appended to the judgment in Application No. 2 of 1959. Respondents 1 to 8 and the deceased Damodara Pai were the Directors of the Popular Bank Ltd. Of these, respondents 1 and 2 were in Trivandrum and the rest were in Alleppey. The first respondent was the Chairman of the Board of Directors. The 9th Respondent was appointed General Manager of the Bank on 21-11-1955 in pursuance of a resolution dated 10-11-1955. The 10th respondent was the Manager of the Bank from its inception till the appointment of the 9th respondent, after which

he was made to work as Secretary, under the 9th Respondent. The 11th Respondent was a clerk under the 10th respondent. The 8th respondent is the son-in-law of the 1st respondent, the 5th respondent is the brother-in-law of the 1st respondent being the 1st respondent's wife's brother.

3. The learned trial Judge, Raghavan found that the business of the Bank was carried on with intent to defraud the creditors of the Banking Company, and, at any rate, for other fraudulent purposes as contemplated by section 542 (1) of the Companies Act, that respondents Nos. 1 to 8 and 10 and 11, were knowingly parties to the carrying on of the said business in the manner aforesaid, and that the 9th respondent was not knowing party to such carrying on of the business. He further held that Respondents 1 to 8 and 10 were personally liable without any limitation of liability for the debts of the Company. The learned Judge found that the Popular Bank is an insolvent company and the deficiency in its assets to pay the creditors in full is Rs. 6,50,000/-. He directed that the Liquidator may sell by public auction or otherwise the assets belonging to the Company which are considered unrealisable and that the amounts realised will be applied in reduction of the decree amount and in proportionate reduction of the liability of the Directors as settled by the decree. Subject as above the learned Judge found respondents 10 and 11 jointly and severally liable for the entire amount of Rs. 6,50,000/-. This was apportioned between the various respondents as follows: The 3rd respondent was found liable for a sum of Rs. 2,00,000/-; Respondents 1, 4, 5 and 7 were made liable for a sum of Rs. 75,000/- each, and Respondents 2, 6 and 8 were held liable for a sum of Rs. 50,000/- each. The Liquidator was held entitled to his costs from the Respondents in proportion to their liabilities.

4. Respondents 1, 6 and 8 through a common counsel have preferred A. S. Nos. 149 of 1963, 137 of 1963 and 139 of 1963 respectively, against the order, A. S. No. 105 of 1963 is by the 7th Respondent; A. S. No. 125 of 1963 and A. S. No. 124 of 1963 are respectively by Respondents 4 and 5; A. S. No. 133 of 1963 is by the 2nd Respondent; and A. S. No. 134 of 1963 is by the 3rd Respondent. A. S. No. 426 of 1964 is by the present Joint Commercial Tax Officer, Tirunelveli who is not a party to Application No. 1 of 1959, but who feels aggrieved by certain directions made by the learned Judge, and who has filed the appeal with the leave of Court. A. S. No. 426 of 1964 is dealt with separately at the end

of this judgment, and all the other appeals by the Directors are treated together.

5. No appeals were preferred by Respondents 10 and 11. The 10th Respondent did not file any defence and was examined as PW 22, on the side of the Liquidator. The whereabouts of the 11th Respondent were unknown and substituted service was ordered and effected on him.

6. The Official Liquidator has accepted the order of the learned Judge and has not filed any appeal, nor any memorandum of cross-objections. In each of the appeals preferred by the various Respondents, the Official Liquidator alone has been made a party. In A. S. No. 426 of 1964, in addition to the Official Liquidator, the 3rd respondent is also a party.

7. The 1st respondent and the 6th respondent died subsequent to the order of the learned Judge and after the filing of the appeal their Legal Representatives have been impleaded. After arguments in these appeals and the connected appeals against Application No. 2 of 1959, were closed on 4-7-1968 and judgment was reserved; the 3rd Respondent died on 10-7-1968. C. M. P. No. 7081 of 1968 was filed on 16-7-1968 to declare the proceedings initiated by the Liquidator as having ended with the death of the 3rd respondent as far as he is concerned, and to record that the claim against him had abated. On this petition the appeals were reposted and arguments on the matter raised by the petition alone were heard on 25-7-1968. At the request of counsel the matter was adjourned to 31-7-1968, and after further submissions and arguments on the C. M. P., orders thereon were reserved.

8. We shall proceed to consider at the outset certain preliminary questions, generally affecting all the appeals, and which do not depend on the facts. It was contended that section 542 of the Indian Companies Act 1956 introduced for the first time on and from 1-4-1956, cannot be given retrospective operation so as to permit of an enquiry into the fraudulent trading of the Company or the fraudulent acts of its Directors during a period prior to the coming into force of the section. The argument seems to us to proceed from a misunderstanding of the provisions of the section and the rule of retrospectivity. Section 542 of the Act reads:

"542 (1). If in the course of the winding up of a Company it appears that any business of the Company has been carried on, with intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the Court, on the application of the Official Liquidator, or the Liquidator or any creditor or contributory of the company, may, if it

thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the Company as the Court may direct.

On the hearing of an application under this sub-section, the Official Liquidator or the Liquidator as the case may be, may himself give evidence or call witnesses.

(2) (a) Where the Court makes any such declaration it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

(b) In particular, the Court may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf.

(c) The Court may, from time to time, make such further order as may be necessary for the purpose of endorsing any charge imposed under this sub-section:

(d) For the purpose of this sub-section the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration (not including consideration by way of marriage), given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.

(4) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made."

We are clear that in order to attract sub-clause (1) of section 542 it is enough, if, as stated therein, it "appears" that any business of the Company "has been"

carried on with the requisite intent of and for the requisite purpose mentioned in the sub-section. Once it is so made to "appear" in the course of winding up of a Company subsequent to 1-4-1956, to make the facts and circumstances prior to that date the foundation of the proceeding or order, does not amount to giving retrospective operation to the section. Conduct in the past, is made the cause or the reason for the action subsequent to 1-4-1956. We may contrast the expression "has been" used in relation to carrying on of the business of the Company in sub-section (1) of Section 542 with the expression "is" occurring in sub-section (3) thereof.

9. The ambit of the liability sketched by the section was next debated before us. The section has been copied from section 275 of the English Companies Act, 1929, corresponding to section 332 of the English Act 1948. It has its parallel in section 281 of the Western Australia Companies Act of 1943. There was no similar provision in the Indian Act of 1913.

10. Our attention was called to the decision in *William C. Leitch Brothers Ltd.* in re. 1932-2 Ch 71 and in re. *Patrick and Lyon Ltd.*, 1933 Ch 786 rendered with respect to the provision of English Act and to *Hardie v. Hanson*, 105 Com-WLR 451, rendered with respect to the Australian Section. The section appears to make the Directors liable in disregard of the principles of limited liability. It leaves the Court with a discretion to make a declaration of liability, in relation to "all or any of the debts or other liabilities of the Company". The English case in 1932-2 Ch 71, itself recognises that the order would, in general, be limited to the amount of the debts of those creditors proved to have been defrauded by the acts of the Directors in question. In the Australian decision *Dixon C. J.* more explicitly stated the position thus:

"To me it seems difficult to suppose that it was intended that the Court should, in exercising this power of direction go outside the debts and liabilities, the existence of which was in some way attributable to the carrying on of the business with the requisite intent to defraud."

[According to the above view the section seems to postulate some nexus between the fraudulent trading or purpose and the extent of the liability of the Directors or other persons.

11. In the English case, 1932-2 Ch 71 *Maugham J.* laid down the dictum that: "If a company continues to carry on business and to incur debts at a time when there is, to the knowledge of the

Directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general a proper inference that the Company is carrying on business, with intent to defraud."

It was argued before us that the proposition in the above terms has been stated too widely, and that it has been dissented from in the Australian case. Neither of these submissions is justified. The proposition in the English case has been put guardedly. It is one of proof or evidence, not of substantive law. Even so, it is one of inference regarded as proper, generally, and not universally. In the Australian case *Dixon C. J.* said nothing against the dictum. *Kitto J.* stated that the generalisation ought not to be sustained as a valid starting point for consideration of the evidence arising under section. But the learned Judge did not proceed to elaborate why it should not, at least generally be so treated. *Menzies J.*, the third learned Judge in the Australian case, with whose reasons *Dixon C. J.* concurred, said nothing about the dictum of *Maugham J.* We see nothing in the Australian case to whittle down the dictum of *Maugham J.* in the English case. As an exposition of the parent section from which our provision has been copied, we feel, it is entitled to respect. We further feel that it lays down a safe working rule to go by, in applying the provisions of the section.

12. We shall here deal with the objection raised by the counsel for the 3rd Respondent—the appellant in A. S. No. 134/1963 that the proceedings initiated by the Official Liquidator under section 542 of the Companies Act, terminate and abate with the death of the 3rd Respondent. It has been recognised in a number of authorities that proceedings under section 235 of the Indian Companies Act 1913 (corresponding to section 543 of the Act of 1956), terminate with the death of the person sought to be proceeded against and cannot be continued against his legal representatives. It is enough to refer to the decision in *Peerdan Juharmal Bank Ltd.*, in re, AIR 1938 Mad 583 where previous decisions have been reviewed. It was accepted before us that the same principle applies to proceedings under section 542. The decisions to which our attention was drawn were all cases where the proceedings had not crystallised into an order or decree against the delinquent party. Once this has happened, as in the present case, and the delinquent party dies thereafter, it appears to us that his liability under the decree or order cannot stand automatically vacated. Abatement, if at all, in such circumstances, can only be of the proceedings by way of appeal, but not, of the original proceedings, which have merged in the decree or

order. The distinction in this respect has been already pointed out by Mulla in his 13th Edition of the Civil Procedure Code (See Vol. 2 page 1231).

13. Besides, the death of the 3rd Respondent occurred on 10-7-1968, after the hearing was concluded and judgment was reserved on 4-7-1968. Such a situation is provided for in Order 22, Rule 6 of the Civil Procedure Code which reads as follows:

"Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death, and shall have the same force and effect as if it had been pronounced before the death took place".

We entertain no doubt that the above provision is applicable to these proceedings by reason of section 483 of the Companies Act read with Rule 6 of the Companies Court Rules 1959, and Rule 44 of the Rules framed by the Travancore-Cochin High Court under the Banking Regulation Act 1949. The result is that our judgment in the appeal preferred by the 3rd respondent, would have the same force and effect as if it had been pronounced before the death of the 3rd Respondent. But to say this, is not to state that, should any re-investigation into the liability of the 3rd Respondent become necessary by reason of any order of remand, the proceedings to the extent remanded would still be open. It was admitted before us that in such a case, the proceedings, to that extent, would lapse as against the deceased respondent.

14. Before leaving this aspect of the case, we wish to record that although respondents 1 and 6 are in the same position as the 3rd Respondent, no arguments were addressed on their behalf at any time, that the proceedings initiated by the Official Liquidator would stand terminated by their death, pending appeal, and after the decree or order passed against them by the learned trial Judge. On the other hand, they were strenuously seeking to get rid of the liability imposed on them by the decree or order under appeal.

15. We may also observe that, as a petition, C. M. P. No. 7081 of 1968 can have no legal existence, as it purports to have been filed by a party who is dead. We have dealt with it as a memo intimating to us the death of the 3rd Respondent.

16. We may then note the argument advanced by some of the counsel that unless the persons sought to be proceeded

against under S. 542 of the Act had the 'primary' intent to defraud creditors, liability under section 542 would not be attracted. We are unable to see any warrant for introducing this refinement into the terms of the section. The section speaks of the business of the company having been carried on 'with intent to defraud creditors of the Company, or for any fraudulent purpose.' If, on an assessment of all the facts and circumstances, the fraudulent intent or the fraudulent purpose is made out, liability must follow, as much as, a contrary conclusion should result, if neither the intent nor the purpose could be said to be fraudulent.

17. We have so far cleared some of the general arguments addressed to us and the particular argument addressed in A. S. No. 133 of 1963. We may now get down to brass tacks and proceed to deal with the concrete facts and details of the various claims against the Respondents. In doing so, we may conveniently refer to a few land-marks in the history and management of the Bank. From the inception of the Bank in 1944 there was in existence an executive committee to sanction loans etc. in the Bank. Some of the powers of the Board of Directors had been delegated to the Committee. In 1951, there was an intimation or advice by the Reserve Bank that the advances of the Bank showed an over extended position. The Directors of the Bank would disclaim knowledge of this directive or advice from the Reserve Bank (except after seeing the latter inspection report of the Reserve Bank in 1954), and there is no clear evidence that they had been apprised of it, although it is highly probable that they were. On 6-9-1953, the Executive Committee was reconstituted with Respondents, 4, 5 and 7 as its members. By proceedings of the Board of Directors of the same date, the Manager was directed to call a meeting of the Committee at least once a month and act only on its orders in all matters of advances and credits. (Vide Ext. P58). Sometime in January 1954 there was an inspection of the Bank by the Reserve Bank and the Inspection Report (Ext. P62) was received in the Bank in May 1954, and placed before the Executive Committee, in July of the same year. One of the points made in the Inspection Report was that the Board of Directors did not appear to have sufficiently interested itself in the working of the Bank, and, although it had constituted committees from time to time for the purpose of sanctioning and reviewing the advances, these Committees did not function properly. Nor did the Board either define the powers of the Manager or review the advances granted at his discre-

tion. The Report also pointed out that the Head-Office did not obtain periodical statements from the Branches regarding full particulars of advances outstanding in the names of individual borrowers such as the nature and value of the securities, the worth of the parties etc. On 20-8-1954 the post of a separate Agent was sanctioned for the Alleppey Office and the 11th respondent was appointed to the post, to enable the Manager to concentrate on the recovery of monies advanced. On 26-12-1954, one of the members of the Executive Committee (4th Respondent) was appointed Supervisory Director and his written consent had to be taken in all urgent cases where it was difficult to get at the members of the Executive Committee. This step was consequent on the discovery of a few transgressions of the directions of the Executive Committee. On 20-8-1955 when the cash position of the Bank became acute, the 10th Respondent reported the same to the Directors. They called for a report from the 10th Respondent, and certain changes in the organisational set up of the Bank followed (consequent on the admission of their irregularities by the 10th and 11th Respondents), resulting in the demotion of the 10th and 11th Respondents and the appointment of the 9th Respondent as General Manager by a resolution of the Board dated 10-11-1955. On the same date, the Executive Committee was re-constituted to consist of Respondents 2, 4 and 5. These will be referred to in detail later.

18. We shall next refer to certain orders passed in the course of these proceedings. By order dated 13-6-1955, public examination of Respondents 10, 11 and another was directed by Raman Nayar J. Exts. P55 and P71 are certified copies of the depositions of Respondents 10 and 11 in public examination. After their examination, on further report of the Official Liquidator for public examination of Respondents 1 to 9, the learned Judge by order on C. M. P. No. 113 of 1958 dated 19-10-1959 directed their public examinations. Appeals against the said judgment were allowed by a Division Bench of this Court, on the ground that the order for public examination, was, in the circumstances, violative of Article 20 (3) of the Constitution. Further appeals — C. A. Nos. 603 to 608 of 1961 — were preferred by the Liquidator and these were allowed by the Supreme Court by its judgment dated 17-8-1964, restoring the order of Raman Nayar J. By that time, Applications 1 and 2 of 1959 had been heard and disposed of on the merits by the learned trial Judge. The Liquidator then filed statements in these applications that the order for public examination restored by the

Supreme Court, would be availed of, if necessary, in the event of any possible remand by any order passed in the appeals preferred.

19. With the background thus sketched, we may proceed to examine the various heads of claim made by the Official Liquidator against the Respondents. After formulating the points for determination, the learned Judge set down nine heads under which counsel for the Liquidator had arranged and presented his case. We shall refer to these heads of claim as noticed by the learned Judge, and with respect to which arguments were advanced before us.

20-36. * * * * *

37. Counsel for the Liquidator sought to fasten knowledge on the 3rd Respondent also from the fact that, although he was not present at the meeting of the Board of Directors on 10-11-1955 when Ext. P. 61 list was ratified, he was present at the next meeting of the Board on 30-3-1956 where the minutes of the previous meeting were read and passed and approved. If the liability of the 3rd Respondent were to be rested merely on his adoption at the subsequent meeting of the proceedings of the Board of Directors dated 10-11-1955, we would have hesitated to endorse the claim of the Liquidator. The decision in *Burton v. Bevan*, 1908-2 Ch. 240 cited by counsel for the 3rd Respondent seems to be against spelling out liability by mere adoption at a subsequent meeting of the proceedings of a previous one. But, for reasons noticed earlier, and from his conduct to be noticed presently, we are of the view that the 3rd Respondent also had the requisite knowledge of the true position of the Bank.

38-47. * * * * *

48. The evidence in regard to the canvassing of deposits is afforded by P. Ws. 2, 12, 19, 20, 22, 23 and D. W. 2 and by Exts. P67 to P70, P85 and P86, Exts. P67 to P70 are circulars issued by the 9th Respondent (D. W. 2), to the branches calling upon the staff-members to canvass deposits. D. W. 2 deposed that while in the employ of the Travancore Bank before he joined the Popular Bank, he used to get such circulars from the head-office of the Travancore Bank and that he followed the practice after joining the Popular Bank. He further deposed that the Directors instructed him to issue such circulars and requested him to canvass deposits. He stated that the Directors were also canvassing deposits to his knowledge. Exts. P85 and P86 written by the 1st respondent to D. W. 2 afford clear indication of the 1st Respondent's eagerness to canvass deposits. Ext. P86 dated 26-4-1956 indicates that the 1st respondent and 5th Respondent wanted

to go over to canvass deposits. D. W. 2 offers evidence about the reference to the 5th Respondent in Ex. P86, and that in pursuance of Ext. P86, 1st Respondent actually canvassed deposits. As far as the Directors are concerned, P. W. 19 implicates the 4th Respondent, and P. W. 23, the 5th respondent in the matter of canvassing deposits. The 1st respondent as D. W. 1 denied having canvassed deposits, or having known other Directors having done so. The first part of his denial cannot be accepted in the face of Exts. P85 and P86. Strangely enough, these documents were not put to the 1st respondent or proved through him when he was in the box, but were proved only through the 9th Respondent as D. W. 2, in the course of his cross-examination by the liquidator. The explanation on behalf of the Liquidator is that these documents were made available only when D. W. 2 stepped into the box. Whatever that be, there is no denial either by cross-examination or by further evidence on behalf of the 1st respondent, of these letters. There is also the fact that when the 1st respondent was examined as D. W. 1 he was asked in cross-examination by the Liquidator whether he had not sent a letter dated 23-3-1956 to the 9th respondent asking him to canvass deposits, and he replied "I do not remember". (the date of Ext. P85 is 24-3-1956 and not 23-3-1956, if the suggestion was about the said letter). In these circumstances, we find no reason to reject the evidence afforded by Exts. P85 and P86. There is no reason also to disbelieve the evidence of D. W. 2 that the circulars Exts. P67 to P70 were issued under the instructions of the Directors and that the Directors requested him to canvass deposits and were doing so to his knowledge. There is no effective cross-examination on these aspects. No reasons have been made out to discredit the evidence of P. Ws. 19 and 23. We hold that in pursuance of the circulars Exts. P67 to P70 issued at the instance of the Directors, there was canvassing for deposits; that, some at least of the Directors namely Respondents, 1, 4 and 5 are shown to have canvassed deposits; and that the Directors requested D. W. 2 to do so all at a time when they knew that the affairs of the Bank did not justify the canvassing for or the making of deposits in it. The action of the Directors here summarized amounts to carrying on the business of the Bank with the requisite fraudulent intent or purpose required by Section 542 of the Companies Act. Such intent or purpose appears to us to be a reasonable inference, in the circumstances, from the financial state of the Bank as known to the Directors. (Vide 1932-2 Ch. 71).

53. From our discussion, of Heads (1) to (6) and (8) we have no hesitation in holding that the business of the Bank was carried on with intent to defraud creditors or other persons, and certainly, with a fraudulent purpose within the meaning of section 542 of the Companies Act. We also have no hesitation to hold that the Directors (Respondents 1 to 8) were knowingly parties to the carrying on of the said business.

54. The defence to these proceedings that has been relied on by all the Directors generally, and by those of them who were not in the Executive Committee at the relevant period, was that they placed implicit trust and confidence in respondents 10 and 11 and in the members of the Executive Committee to whom the power of managing the affairs of the Bank, and of granting and reviewing loans and advances had been delegated, and that they cannot be held responsible if things went wrong. The defence is based on, and inspired by, the decision in *Dovey v. Cory*, 1901 A C 477. We are unable to endorse the broad submission that irrespective of the size and standing of the Bank, the volume of business transacted therein, and the efficiency and trustworthiness of the persons to whom responsibilities were entrusted, a delegation of functions would per se carry with it a denudation of responsibility. In the present case, we have noticed that as early as 1954 the Reserve Bank in Ext. P62 Report commented on the laxity of supervision of the Board of Directors and of the Committees constituted for the purpose of sanctioning and reviewing the advances, and the impropriety of leaving these matters to the uncanalised discretion of the Manager. The resolution of the Board of Directors on 6-9-1953, by which the Manager was directed to call a meeting of the Committee at least once in a month and to act only on its orders in all matters of advances and credits was hardly adhered to especially after 1954. The laxity of supervision and the uncanalised powers of the Manager were allowed to continue. Even after their knowledge on the last Friday in July 1955 that the affairs of the Bank had been brought to a said impasse by reason of the defalcations and malpractices of Respondents 10 and 11 the Directors still continued them in the service of the Bank. They connived at, and were parties to, covering up the misappropriations by manipulation of entries in the accounts of the Bank. Even after the confession of guilt by respondents 10 and 11 in Exts. P59 and P60 the Directors had no hesitation in ratifying Ext. P61 list, without any scrutiny or check-up. There was no effort and no attempt on the part of the Directors at any time to

see that Respondents 10 and 11, or the Executive Committee, functioned properly and discharged their functions satisfactorily. In the circumstances, we cannot accept the defence of the Directors that they should be excused from liability by reason of the trust and confidence reposed in respondents 10 and 11 by all of them, and in the members of the Executive Committee of the Board, by the rest of the Directors.

55. It was argued that the conduct and course of dealing of the Directors coupled with their respectability and status were quite inconsistent with the acts of fraudulent trading and the fraudulent purpose attributed to them, and that they had acted only with the bona fide object of helping the Bank to tide over its difficulties. It was stressed that the majority of the shares and deposits in the Bank were, at the relevant time held by the Directors and their near relations and it was hardly conceivable that they would bring the Bank to grief by the action attributed to them. We need not dwell on these aspects at length, as the improbability of a course of action or conduct seems to us of no avail against the proved facts. As a circumstance it cannot outweigh the proved facts to which we have fully adverted.

56. Some complaint was made before us that the pleadings were not sufficiently clear and specific. The substance of the case was contained in the Points of Claim. Its elaboration in matters of detail was attempted in the evidence. We see no complaint before the learned trial Judge of deficient pleading; nor do we see any case of prejudice by evidence spring unsuspectingly by the Liquidator.

57. We may now sum up our findings regarding the liability of the Directors on the various heads of claim. On the First head we find that amounts were withdrawn by the Bank from its Accounts with other Banks without accounting for them in the books of the Bank, and had been misappropriated by the Officers of the Bank. These withdrawals as listed in Schedule II, range from 3-8-1954 to 9-7-1955. As the Directors had knowledge of the misappropriation only on the last Friday of July 1955, they cannot be said to be "knowingly parties" to these withdrawals and misappropriations when they were made. On the second head of the claim, we find that the Directors cannot be held liable for the Fixed Deposit amount of Rs. 10,000/- by Sri Narayanaswamy, received on 19th June 1955, and not brought into account in the books of the Bank till 2-9-1955. On the Third and Fourth heads we find that misappropriations were covered up by manipulating the Bills purchased and Negotiated Accounts and by false and fictitious entries in the Books of the Bank as advances to different customers, and that these fictitious entries were made by respondents 10 and 11 with the knowledge and approval of respondents 1 to 8. On the Fifth head we find that the Directors ratified Ext. P61 list with knowledge of the fictitious nature of the advances in Schedule I of the Points of Claim. The entries in Schedule I range from 30-8-1955 to 5-9-1955 and total to Rs. 1,99,000/-. The entire period covered is subsequent to the knowledge of the Directors and they are responsible for the entire claim. On the Sixth head of the claim, we hold all the Directors except the 7th respondent, responsible for passing the balance-sheet of 1955, and the declaration of dividend for that year, at a time when the Bank could not to their knowledge have made any profit. We further find that the Directors had issued instructions to D. W. 2 for canvassing deposits and that at least some of them, (viz. respondents 1, 4 and 5) actually canvassed deposits, and that they requested the 9th respondent too do so—all at a time when they knew the affairs of the Bank did not justify their action. On the Eighth head of claim we find that there was fraudulent preference in regard to items 12 and 15 of Schedule VI of the points of claim, amounting in all to a sum of Rs. 10,500/-.

58. The apportionment of liability made by the learned trial Judge between the Directors, as such, was not attacked before us except by the 3rd respondent, who complained against his being debited with the major share of the liability. We do not think that the learned Judge was wrong in debiting the 3rd respondent with the major share of liability. As we are ultimately remanding the matter to the trial Judge further discussion of this aspect is not called for.

59. What then, is the decree or order to be passed? Section 542 of the Companies Act makes the Directors who are knowingly parties to the carrying on of the business of the Company with intent to defraud creditors or any other person or for any fraudulent purpose personally responsible "for all or any of the debts or other liabilities of the Company as the Court may direct". That raises two questions: First: What is the totality of the debts or other liabilities of the Company?; and second: should the Directors be made liable for the totality of such debts or other liabilities, and if not, for what portion of them?

convenience. If he succeeds the other party is given a right to appeal to higher revenue authorities. If he does not, he also can appeal to higher revenue authorities. In other words, whether it is the plaintiff or the defendant who appeals, the decision of the appellate authority will also be based on the same considerations, i.e., custom and convenience. Thus the provisions of Section 131 relate to a right which is of a limited nature and for the limited purposes specified in it, and the decision of the dispute is to be based on the considerations specified in the section, which are not the same as under the Easements Act.

7. That being so, it must be said that sub-section (1) of Section 131 is self-contained as regards the special right and the special remedy provided in it. It follows that by virtue of Section 257 the jurisdiction of the revenue authorities is exclusive and a civil suit is not maintainable to obtain a decision or order on a matter covered by Section 131 (1) of the Code.

8. The contention of Shri Motilal Gupta, is that this suit is maintainable under sub-section (2) of Section 131. The learned Single Judge appears to have taken the view that it is only the plaintiff who having moved the Tehsildar under sub-section (1) is enabled to institute a civil suit under sub-section (2). The learned Judge says:—

"It is somewhat unusual that only the person, whose claim to a right of way or a water-course is refused by an order passed by the Tehsildar under sub-section (1) of Section 131 of the Code, is given by sub-section (2) of that section the right to file a suit to establish such right of easement as he may claim."

We are clearly of the view that sub-section (2) has been enacted by way of abundant caution and for removal of doubt. We have already pointed out the distinction between a right which the revenue authorities may recognise, and decide the dispute before them in favour of one of the parties, and the right of easement under the general law. Now by enacting sub-section (2) room has not been left for doubt whether decision of the revenue authorities under sub-section (1) will be a bar to a civil suit for establishing such rights of easement as could be done in the civil court, otherwise than under sub-section (1) of Section 131 of the Code. In our view, it is not only the plaintiff who moved the Tehsildar under sub-section (1), but also the defendant is not debarred from establishing such right of easement as he may claim by way of a civil suit. The words "any person" in sub-section (2) are of a wide connotation and include all persons who may have been plaintiffs or defendants

in a proceeding under sub-section (1) of Section 131.

9. It must, however, be remembered that the provisions of sub-section (2) speak of the rights of easement under the general law. To put it differently, sub-section (2) does not enable any person to bring a civil suit for establishing his right provided in Section 131(1) (access to his field, or to waste or pasture land of the village) on the basis of custom and convenience. Sub-section (2) does not enable a civil suit to be instituted for a decision on a right provided in sub-section (1), nor for setting aside a decision given under that sub-section.

10. For these reasons the contention that by virtue of sub-section (2) of Section 131 of the Code the present suit was maintainable must be rejected.

11. It must now at once be said that we do not agree with the learned Single Judge in his observations that the subject-matter of sub-section (1) of the Code is a right which is not a creature of a special statute and is a common law right.

12. For the reasons already stated we are of the view that the rights contained in Section 131 are special and have been created by special statute. They are not common law rights to enforce which, cognizance of a suit could be taken under Sec. 9 of the Civil Procedure Code. As was said in *Kamla Mills Ltd. v. State of Bombay*, AIR 1965 SC 1942 the normal rule prescribed by Section 9 of the Code of Civil Procedure is that the Courts shall (subject to the provisions contained in the Code) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Gajendragadkar C. J., speaking for the Court, succinctly made the following observations:—

"Whether it is urged before a Civil Court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In cases where the exclusion of the Civil Courts' jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and

liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not."

Again in *K. S. Venkataraman & Co. (P) Ltd. v. State of Madras*, AIR 1966 S.C. 1089, the legal position was summarised thus:—

"If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, by necessary implication, bar the maintainability of a civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of a Civil Court in that regard."

Further in *State of Kerala v. N. Ramaswami Iyer and Sons*, AIR 1966 SC 1738, after referring to earlier cases, the view was reiterated that where the legislature sets up a special tribunal to determine questions relating to rights or liabilities which are the creation of a statute, the jurisdiction of the Civil Court would be deemed excluded by implication.

13. It is wrong to think that sub-section (2) enables a plaintiff, who has not succeeded before the Tehsildar and the revenue authorities, in proceedings under sub-section (2) to bring a civil suit and make the same claim which he could or did under sub-section (1). Irrespective of whether recourse had been or had not been taken to the remedy provided in sub-sec. (1), no civil suit will lie for a right of way or water course on the ground of convenience as provided in sub-section (1). However, if the Revenue authorities decide a dispute before them under Section 131(1) not on the considerations laid down in that Section but on other considerations, for instance, on the provisions contained in the Easements Act, a civil suit will lie, to question the validity of such judgment of the Revenue authorities.

14. The present suit is not for establishing any right of easement. The plaintiff's suit is essentially and specifically for setting aside and avoiding the decisions of Revenue authorities given against him in proceedings under Section 131(1) of the Code on the ground that those decisions are wrong on merits. It is averred in the plaint that the plaintiff might have occasionally passed through the Medh of his field Khasra No. 490 and it is further stated that in the Panchayat the defendant agreed to pass through only two and a half cubits of the plaintiff's land as he occasionally did and the plain-

tiff gave permission to that effect. But that did not create any right in his favour. He further alleged in the plaint that the order of the Tehsildar was erroneous. Such a suit is barred by the provisions of Section 257 of the Code. If the suit had been for establishing a right under the general law of easement under the Easements Act, it would not have been barred. The present suit is not such. The second contention is also rejected.

15. The appellant has also contended that this suit is maintainable because the revenue authorities had no jurisdiction to order removal of the appellant's Bandhiya. But this contention must be rejected in view of the specific powers conferred on the Tehsildar under Section 133 of the Code.

16. This appeal is dismissed. The parties are left to bear their own costs in this appeal.

Appeal dismissed.

AIR 1970 MADHYA PRADESH 82
(V 57 C 20)

P. V. DIXIT C. J. AND A. P. SEN, J.

M. L. Jinesh, Petitioner v. The Union of India, New Delhi through the Secretary to the Govt. of India, States Services Integration Department, Ministry of Home Affairs, New Delhi and another, Respondents.

Misc. Petn. No. 488 of 1966, D/- 2-4-1968.

Constitution of India, Arts. 226, 227 — Administrative orders — States Reorganisation Act (1956), S. 115 — Matter of equation of posts is purely administrative function — Decision of Central Government after consultation with Advisory Committee — Decision not liable to be challenged.

The matter of equation of posts is purely an administrative function under S. 115 of the States Reorganisation Act. It has been left entirely to the Central Government as to how it has to deal with these questions. The Central Government has established an Advisory Committee for purposes of assisting in proper consideration of the representations made to it. Where the representation made by the officer concerned has received its due consideration by the Central Advisory Committee, the decision reached by the Central Government after consulting that Committee is strictly in conformity with the principles regulating equation of posts. That decision cannot be challenged before High Court so long as it is not without jurisdiction. AIR 1968 SC 850 &

DM/JM/D894/69/SSG/M

Misc. Petn. No. 567 of 1965, D/- 18-1-1967 (MP), Foll. (Paras 8, 9)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 850 (V 55)=
Civil Appeal No. 618 of 1966,
D/- 9-11-1967, Union of India v.
P. K. Roy 5

(1967) Misc. Petn. No. 567 of 1965,
D/- 18-1-1967 (M.P.), P. B. Muker-
jee v. State of M.P. 9

Y. S. Dharmadhikari, for Petitioner;
K. K. Dubey, Govt. Advocate, for Respon-
dents.

A. P. SEN, J.:— The petitioner, M. L. Jinesh, an Assistant Superintendent in the Printing and Stationery Department of the Government of Madhya Pradesh, has filed this petition under Articles 226 and 227 of the Constitution, for an appropriate writ, direction or order, including writs of certiorari for quashing the Madhya Pradesh General Administration (Integration) Department Notification No. 1946-500-Integ., dated 26th May 1960 publishing the Final Gradation List of the establishment of Printing and Stationery Department, and Notification No. 9525-4817-VII-Estt-64 dated 8th September 1964, integrating Assistant Superintendents of Bhopal Region in an Isolated category, below in the list of Assistant Superintendents, for a writ of mandamus directing the Government to revise its list by equating him with other Assistant Superintendents drawn from other units and placing him at his appropriate place in the said list, keeping in view of the length of his service.

2. The material facts are that the petitioner and one R. P. Beri were serving as Assistant Superintendents in Bhopal region, on the appointed date, and they were allocated to the new State of Madhya Pradesh, under Section 115(1) of the States Reorganisation Act, 1956 (Act No. XXXVII of 1956), w. e. f. 1st November 1956. The post of Assistant Superintendents of Bhopal unit was a non-gazetted post in a scale of Rs. 175-300. There was a similarly constituted cadre of Assistant Superintendents in old Mahakoshal region, i.e., non-gazetted with a similar scale, but no officers from that region opted for service to the new State of Madhya Pradesh, and, therefore, the cadre of Assistant Superintendents in Mahakoshal region could not be taken as a norm for preparation of the combined gradation list. The post of Assistant Superintendent in Madhya Bharat region was a gazetted post in a higher scale of Rs. 250-450, while that of Assistant Superintendent in Vindhya Pradesh although non-gazetted, was also carried in a higher scale of Rs. 225-500. After formation of the new State of Madhya Pra-

desh, the work of integration of services of officers drawn from all the four integrating units, was undertaken. By General Administration (Integ.) Deptt. Notification No. 3221-578-VII (Integ.) dated 27th August 1958, the Government published a provisional gradation list of the Printing and Stationery establishment of the Revenue Department. The Assistant Superintendents of M. B. unit were shown in an isolated category and their inter se seniority was provisionally determined. The Assistant Superintendents from Bhopal unit were not shown in this list. The petitioner, accordingly, made a representation dated 24th September 1958 to the Central Government, against the omission of his name from the provisional gradation list seeking equation of his post with the gazetted officers of the establishment. In the meanwhile, the Government of Madhya Pradesh by General Administration (Integ.) Deptt. Memo No. 1946-500-Integ. dated 26th May 1960, published a final gradation list of the gazetted Government servants of the Revenue Department, in which apart from officers from Vindhya Pradesh unit (officers from M. B. Unit—sic) were also included, but the Assistant Superintendents from Bhopal region were left out. The petitioner's representation dated 24th September 1958 was rejected by the Government of India, in consultation with the Central Advisory Committee, and their decision was conveyed to him by GAD (Integ.) Memo No. 1694/219/I-Integ., dated 19th May 1961. Thereafter the Government in the Revenue Department by Notification No. 4866-1929-VII-Estt./Integ., dated 1st July 1961, provisionally decided to place the Assistant Superintendents from Bhopal unit in an isolated category below the gazetted officers, and determined their inter se seniority, inviting representations under Section 115(5) of the States Reorganisation Act. The petitioner, accordingly, made a representation dated 7th September 1961, but the same was rejected by the Government of India in consultation with the Central Advisory Committee vide Rev. (Estt.) Deptt. Memo No. 23379/VII/Estt.64, dated 10th July 1964. Thereafter, the Government by the Rev. Deptt. Notification No. 9525-4817-VII-Estt-64, dated 8th September 1964, published a Final (Supplementary) Gradation List of Class III (Executive) Service of the Printing and Stationery establishment, relating to Assistant Superintendents from Bhopal unit treating them under an isolated category and determining their inter se seniority. This was in accordance with the provisional Combined Gradation List I previously published. The petitioner appears to have made a representation against the Final gradation list, but the same was withheld by the State Government as nothing new was brought out.

It would thus appear that Assistant Superintendents of Bhopal unit were treated as belonging to a category of their own, being carried in scale of Rs. 175-300, which was lower than the scale of pay drawn by Assistant Superintendents of Madhya Bharat and Vindhya Pradesh regions before the appointed date. The Government, however, tried to soften the rigour by creating 2 supernumerary posts of two Assistant Superintendents (Non-gazetted), for the period from 1st November 1956 onwards, and prescribed a revised scale of Rs. 190-315 for them. Although, the petitioner was not eligible for absorption on the higher post of Assistant Superintendents (Gazetted) of the new set up, nevertheless, he was first absorbed in the post of Assistant Superintendent (Non-gazetted) in the new State of Madhya Pradesh and thereafter, he was promoted to the post of Assistant Superintendent (Gazetted) in the new State. The petitioner is now holding an equivalent post as the officers allocated from other regions, although his appointment for the present, is in an officiating capacity.

3. The only grievance that is now made is that the petitioner should have been equated with Assistant Superintendents drawn from Madhya Bharat unit and that he should have been placed above Shri W. D. Sawant in the Final gradation list. It is said that in other Departments as well, certain categories of posts were classified as Class III (Executive) in some constituent units and the same or similar categories of the post were classified as 'Non-gazetted' or 'class IV' services in other units. In order that the claim of Government servants holding the same or similar posts in all units should be dealt with fairly and equitably, irrespective of designation and classifications of posts in different units, the Government had decided that classification as in vogue in old Madhya Pradesh, immediately before the appointed date, should be adopted as the norm for the purpose of preparation of Combined Gradation List. This practice was followed elsewhere, i.e., to prepare a common gradation list for each cadre/sub-cadres of old Madhya Pradesh and for cadres/sub-cadres which were the same or fairly comparable thereto in other units, and, if in any unit there were no regularly constituted cadres to apply the principles in para 1(ii) of the General Principles set out below. It was, therefore, urged that since posts of Assistant Superintendents were classified as Class III (Executive) in the old Madhya Pradesh, immediately before the appointed date, a Combined Gradation List of Assistant Superintendents in all the units should have been prepared accordingly, and there was no basis for any departure from this

practice, in the case of Printing and Stationery establishment of the Revenue Department. It was also urged that, if the cadre of Assistant Superintendents in the old Madhya Pradesh could not be adopted as the norm for preparation of combined gradation list, there was no justification for not adhering to the principles laid down in para 1(ii) below. We are not impressed with any of these contentions for reasons which we shall presently state.

4. The following principles had been formulated for being observed, as far as may be, in the integration of Government servants allotted to the service to the new State of Madhya Pradesh:

"1. In the matter of equation of posts:

(i) Where there were regularly constituted similar cadres in the different integrating units the cadres will ordinarily be integrated on that basis; but

(ii) Where, however, there were no such similar cadres the following factors will be taken into consideration in determining the equation of posts—

(a) nature and duties of a post;

(b) Powers exercised by the officers holding a post, the extent of territorial or other charge held or responsibilities discharged;

(c) the minimum qualifications, if any, prescribed for recruitment to the post and;

(d) the salary of the post."

5. Although, there was a regularly constituted cadre of Assistant Superintendent (Non-gazetted) in the scale of Rs. 175-300 in the old Madhya Pradesh, none of the officers from that unit had been allocated for service to the new State of Madhya Pradesh and, therefore, that could not be adopted as the basis or norm for preparation of a combined gradation list of the establishment to which the petitioner belongs. The result was that Assistant Superintendents of Bhopal unit had to be placed in an isolated category of their own. That left out the first set of principles mentioned in part 1(i), i.e., dealing with equation of posts, "where there are regularly constituted similar cadres in different integrating units". The cadres of Assistant Superintendents of Bhopal could not, therefore, be integrated on that basis. The Government was then left with the second set of principles laid down in para 1(ii), viz. "where there were no such similar cadres in existence", and we are satisfied that the principles were strictly adhered to.

6. The nature and duties attached to the post of Assistant Superintendents in all the four integrating units were not one and the same. The powers exercised by officers holding the post in different integrating units, the extent of their terri-

torial or other charge, or the responsibility discharged by them, were different. The qualifications for recruitment to the post in different regions were also different. The post of Assistant Superintendents in Madhya Bharat was Gazetted while in other regions it was Non-gazetted. The salary of the post in Madhya Bharat and Vindhya Pradesh regions was Rs. 250-450 (Gazetted), while in Bhopal was Rs. 175-300 (Non-gazetted). It would, thus, appear that Assistant Superintendents from Bhopal region who were non-gazetted officers drawing a lower scale of pay could not possibly be equated with the Gazetted officers from other regions drawing a higher pay-scale.

7. In accordance with the principles settled at the Chief Secretaries Conference for Integration of Services and Equation of Posts, the Government of Madhya Pradesh rightly prepared the provisional common gradation list of Printing and Stationery establishment of the Revenue Department, leaving out the posts of Assistant Superintendents of Bhopal unit therefrom. The representation made by the petitioner for inclusion of his name in the Final gradation list and for equation of his post with those of Assistant Superintendents of Madhya Bharat and Vindhya Pradesh units was duly considered by the Central Government. In consultation with the Central Advisory Committee, that Government rejected his representation for valid reasons. The reasons for rejection of the representation are to be found in the following Explanatory note of the Central Advisory Committee, dated 26th February 1951, namely:

"Representations of Sarvashri M. L. Jinesh and R. P. Berry of the Printing and Stationery Department, M.P.

The Central Advisory Committee considered the representations relating to the Printing and Stationery Department in September, 1959. The Committee did not consider the representations of Sarvashri M. L. Jinesh and R. P. Berry who held the posts of Assistant Superintendents of Government Press, Bhopal, on the ground that they held non-gazetted posts. The representations have now been forwarded for further consideration in view of the change in the Committee's terms of reference under which representations of non-gazetted officers claiming equation of their posts with gazetted posts are also to be considered by the Committee.

2. The claim of Sarvashri Jinesh and Berry is that the nature and duties attached to the posts of Assistant Superintendents in all the four regions were the same and that the qualifications for recruitment were also similar. It was therefore argued that in spite of the lower scale of pay that the non-gazetted status,

the posts in Bhopal should be equated with the gazetted posts of Assistant Superintendents in Madhya Bharat.

3. The State Government are of the view that the posts held by the applicants were of a lower status and could not be equated with the posts of Assistant Superintendents in Madhya Bharat.

It has been ascertained that the applicants were functioning as Assistant Superintendents in Bhopal, one to assist the Superintendent in regard to the distribution of stationery etc., and the other in the administration of Government Press.

4. The Madhya Bharat Posts of Assistant Superintendents were not of an adequate status to be equated with any of the gazetted posts in the other region but as they carried the scale of Rs. 250-400 and were gazetted they were shown in an isolated category. The posts held by the applicants were non-gazetted and were in the lower scale of Rs. 170-300. The functions and duties also differed somewhat from those of the Madhya Bharat Assistant Superintendents. There is therefore, no justification for equating their posts with the Madhya Bharat Assistant Superintendents or any of the other posts included in the combined gradation list of Gazetted Officers.

5. The representations of Sarvashri Jinesh and Berry may accordingly be rejected."

8. The petition must fail on the short ground that the matter of equation of posts is purely an administrative function under Section 115 of the States Reorganisation Act. It has been left entirely to the Central Government as to how it has to deal with these questions. The Central Government established an Advisory Committee for purposes of assisting in proper consideration of the representations made to it. The representation made by the petitioner had received its due consideration by the Central Advisory Committee. The decision reached by the Central Government after consulting that Committee was strictly in conformity with the principles regulating equation of posts. Their Lordships of the Supreme Court in *Union of India v. P. K. Roy*, Civil Appeal No. 618 of 1966, D/-9-11-1967=(AIR 1968 S.C. 850), have stated that the usual procedure followed by the Central Government in the matter of integration of services generally is in order. That procedure was followed in this case.

9. In *P. B. Mukerjee v. State of M. P.*, Misc. Petn. No. 567 of 1965, D/-18-1-1967 (M. P.), this Court has stated:

"The Central Government has been constituted the final authority in the matter of integration under the States Reorganisation Act. That decision cannot be challenged before this Court so long,

as it is not without jurisdiction."

We find no compelling reasons to depart from that view.

Even otherwise the grievance of the petitioner that he has not been absorbed in an equivalent post of Assistant Superintendents of Madhya Bharat and Vin-dhya Pradesh units, no longer exists since he has already been promoted to the cadre of Assistant Superintendent (Gazetted) in the new State, and is admittedly drawing his salary in the higher scale of this grade in view of this subsequent event, the petition has really become infructuous, and must, accordingly, fail.

10. The result is that the petition fails and is dismissed with costs. Counsel's fee is fixed at Rs. 50/-.

Petition dismissed.

AIR 1970 MADHYA PRADESH 86 (V 57 C 21)

SHIV DAYAL & S. P. BHARGAVA, JJ.
Kumari Swarnalata Kapoor and others,
Appellants v. Jogendrapal Ramrakha
Punjabi and others, Respondents.

Appeal No. 31 of 1965. D/- 25-4-1969,
against decree of Addl. Dist. J., Jagdal-
pur, D/- 11-4-1964.

(A) Fatal Accidents Act (1855), S. 1-A
— Motor accident — Negligence — Acci-
dent taking place on off-side of road —
Presumption — Principle of *res ipsa*
loquitur — Applicability.

Where an omnibus leaves the road and an accident takes place on the off-side and this is proved without more, then the principle of *res ipsa loquitur* is at once attracted. Negligence will be presumed as the cause of the event. Unless the defend-ant rebuts this presumption, the plain-tiff succeeds. To merely point out what the immediate cause of the bus leaving the road was, e.g., there was a tyre burst or that it went into a skid is by itself no rebuttal of the presumption. To displace the presumption, the defendant must prove, or roust show from the evidence, either that the immediate cause was due to a specific cause, which does not con-note negligence on his part but points to its absence as more probable, or he must show that all reasonable care in and about the management of the vehicle was taken. The burden, in the first instance is on the defendant to disprove his liability. AIR 1962 S.C. 1, Foll.

(Para 11)

(B) Fatal Accidents Act (1855), S. 1-A
— Damages — Quantum of — Factors to be considered.

The principles for calculation of quan-tum of damages are: (1) The expectation

of the life of the deceased has to be esti-mated having regard to his age, bodily health and the possibility of premature determination of his life by later acci-dents. (2) Having regard to the amounts which the deceased used to spend on his dependents during his lifetime, and hav-ing regard to other circumstances, the amount which is required for future pro-visions of the dependents is to be esti-mated. (3) The estimated annual sum must be multiplied by the number of years of the estimated span of life of the deceased and that must be balanced by any pecuniary advantage which, from whatever source, comes to the dependants by reason of the death. (4) The burden is on the plaintiffs to establish the extent of their loss. AIR 1962 S.C. 1, Foll.

(Para 24)

(C) Motor Vehicles Act (1939), S. 95
(2) (b) — Liability of Insurance Com-pany — Bus involved in accident insured against third party risks — Both the parents of claimant travelling in bus and meeting death — Insurance Company held liable under S. 95(2) (b) second part to pay Rs. 2,000/- as compensation for each of the two passengers. (Para 29)
Cases Referred: Chronological Paras
(1964) AIR 1964 Madh. Pra. 133
(V 51)=1962 Jab. L. J. 661,
Sushma Mehta v. Central Pro-
vinces Transport Services Ltd. 5
(1963) 1963-1 All. E. R. 705=1963
A.C. 837, Hughes v. Lord Advocate 22
(1962) AIR 1962 SC 1 (V 49)=
1962-1 SCR 929, Gohald Motor
Service v. Veluswamy 12, 23
(1961) 1961-2 All. E. R. 688=1961-
2 Q.B. 205, R. v. Spurge 22
(1948) 1948-2 All. E. R. 460=1949-
1 K.B. 54, Barkway v. South
Wales Transport 12
(1942) 1942-1 K.B. 152=111 L.J. KB
292, Laure v. Raglan Building Co. 12
(1951) 1951 AC 601=1951-2 All.
E. R. 448, Viscount Simon in
Nance v. British Columbia Elec-
tric Railway 24
(1920) 37 T.L.R. 72, Hutchins v.
Maunder 17
(1915) 1915 All. E. R. 426=1916-1
A.C. 719, British Columbia Elec-
tric Rail. Co. Ltd. v. Loach 12

R. K. Pandey, for Appellants; Y. S.
Dharmadhikari, for Respondents Nos. 1
and 2; A. N. Mukerjee, for Respondent
No. 3.

SHIV DAYAL, J.:— This is an appeal under Section 95 of the Code of Civil Procedure from the dismissal of the suit in which the appellants claimed damages from the respondents for the death of their parents, resulting from an accident which occurred on February 16, 1959, (prior to the constitution of Claims Tribunal under Section 110-A of the Motor Vehicles Act),

2. On February 16, 1959, motor bus No. M.P.O. 314, belonging to M/s. Patni Transport Ltd. (respondent No. 2), started from Jagdalpur for Jeypore. It was driven by Jogendrapal (respondent No. 1). Rawelchand Kapoor and his wife, Smt. Rajkumari Kapoor, boarded the bus at Jagdalpur. On its way the bus dashed against a tree by the side of the road. Rawelchand Kapoor and his wife received fatal injuries and died instantaneously on the spot. The bus was insured with respondent No. 3, Insurance Co., against third party risk under the terms of the insurance policy Ex. D. 3. These facts are admitted.

3. The accident occurred at 7 or 8 miles from Jagdalpur. The bus was heavily loaded. It went beyond the control of the driver and dashed against a mango tree. The appellants, through their next friend, instituted a suit for recovery of damages on the allegation that the accident occurred due to rash driving, that is, at a great speed beyond the control of the driver, or, alternatively, due to negligence of the driver in not applying brakes and allowing the bus to run astray. It was the duty of defendants 1 and 2 to see that the bus had no defect and was fit for being put on the road before it left for Jeypore. The plaintiffs alleged that their father was running a hotel and was earning Rs. 5,000/- annually. Keeping aside his personal expenses, he spent Rs. 3,000/- annually on the maintenance of the plaintiffs and could have done so for at least 35 years more. At the time of the accident, their father was only 36 years of age and in a healthy state of body. Due to the accident, the plaintiffs lost the protection and care of their parents. Services of a nurse had to be engaged which cost them Rs. 60/- per month for some time at least. The plaintiffs claimed Rs. 25,000/- as damages.

4. The defence was that the accident did not occur due to any rashness or negligence on the part of the driver. It was further pleaded that the accident occurred owing to sudden breakage of the main spring of the bus; and that the bus had been checked up at Jagdalpur and it was found fit before it left for Jeypore. It was, however, admitted that Rawelchand Kapoor and Smt. Rajkumari Kapoor had boarded the bus at Jagdalpur, that both of them were injured in the accident and that they died instantaneously at the spot. The quantum of damages claimed was also disputed. Bar of limitation was also challenged. The Insurance Co., defendant No. 2 (herein respondent 3) contended that its liability was limited to Rs. 2,000/- only.

5. The learned trial Judge found that the suit was maintainable and was not barred because of the constitution of the

Claims Tribunal under the Motor Vehicles Act. The accident occurred on February 16, 1959, on which date there was no Claims Tribunal constituted. It is true that before the date of the institution of the suit, though after the accident, a Claims Tribunal had been constituted for Raipur, but the right to sue could not be taken away retrospectively by constitution of a Claims Tribunal. That is what was held in *Sushma Mehta v. Central Provinces Transport Services Ltd.*, AIR 1964 Madh. Pra. 133.

6. The learned trial Judge further held that the suit was within limitation inasmuch as the plaintiffs were entitled to the benefit of Section 6 of the Limitation Act, 1908, which was then in force as all the plaintiffs were minors.

7. On the merits of the case, the Tribunal held that there was no rashness or negligence on the part of the driver of the bus and, therefore, neither the driver nor the owner of the vehicle was liable to pay damages. The trial Judge in a half-hearted manner dealt with issues Nos. 7 and 8 relating to the quantum of damages and held that it was not proved that the deceased Rawelchand was earning Rs. 5,000/- annually and was saving Rs. 3,000/- or any other sum per annum. The trial Judge did not arrive at any amount, which could be awarded to the plaintiffs as damages, in case they were found entitled to damages from the defendants. All that he held was that the plaintiffs could not prove the amount that they claimed. As regards the liability of the Insurance Co., the learned trial Judge held that it was liable only to the extent of Rs. 4,000/-

8. The learned trial Judge has decided the question of negligence against the plaintiffs on the findings that: (1) The plaintiffs could succeed on their own strength and not on the weakness of the defendant, though the defendants tried to show that they were in no way rash or negligent. (2) From the evidence on record, it is not established that the driver was driving fast or that he was driving with divided attention. Admittedly, he was not driving on the wrong side. The road was clear and without any obstruction. The driver did not expose himself to any risk, nor did he commit any breach of duty imposed by law. (3) The accident was due to the breakage of the main spring and it was a case of pure accident. (4) No presumption could be drawn that it was due to rashness or negligence of the driver. The learned trial Judge observed: "such a presumption would be ill-founded as great many such occurrences are due to accident beyond the control of the driver." (5) "It also finds place in the evidence of Jogendrapal that before the bus left the Motor Stand,

it was checked by the Booking Clerk and was not overloaded."

9. Thus, in substance, the trial Judge came to the conclusion that the bus was not being driven at an excessive speed, nor with divided attention, nor on the wrong side of the road; the learned trial Judge thinks that rashness or negligence consists only in these things. We shall presently point out that the evidence produced by the defendants was unreliable and the defendants could not prove want of negligence. The learned trial Judge took into consideration the report of the Motor Vehicles Inspector, who was not produced as a witness. He was summoned twice and served, but did not appear, and the defendants then gave him up.

10. Now, the plain facts are these. The bus, while it was running, suddenly, went offside the road and struck against a tree. Almost every passenger in the bus got some injury. Both the parents of the appellants died instantaneously. It is in evidence that one of the legs of Rawelchand was cut off and was hanging. It was not as if there was any obstruction on the road or that there was an imminent danger in front, which the driver had to avert. *Res ipsa loquitur*; the event speaks for itself. It is obvious enough that the bus struck against a tree with a great velocity. Otherwise, two passengers sitting inside the bus could not die instantaneously, apart from the fact that almost every passenger would not have received injury. The presumption is that the bus must have been driven in such a manner that it was not under the control of the driver.

11. The law is clearly this: (1) Where an omnibus leaves the road and an accident takes place on the off-side and this is proved without more, then the principles of *res ipsa loquitur* is at once attracted. Negligence will be presumed as the cause of the event. Unless the defendant rebuts this presumption, the plaintiff succeeds. (2) To merely point out what the immediate cause of the bus leaving the road was, e.g., there was a tyre burst or that it went into a skid is by itself no rebuttal of the presumption. (3) To displace the presumption, the defendant must prove, or must show from the evidence, either that the immediate cause was due to a specific cause, which does not connote negligence on his part but points to its absence as more probable, or he must show that all reasonable care in and about the management of the vehicle was taken. (4) The burden, in the first instance is on the defendant to disprove his liability.

12. Lord Sumner succinctly said in *British Columbia Electric Rail Co. Ltd v. Loach*, (1915) All ER 426:

"The inquiry is a judicial inquiry. It does not always follow the historical method and begins at the beginning. Very

often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a casual agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purpose they are remote."

It must at once be remarked that the learned trial Judge did not bear in mind the principles laid down by their Lordships in *Gobald Motor Service v. Veluswami*, AIR 1962 SC 1. It is necessary to bear in mind the facts of that case and the principles laid down in it, because that decision applies to the present case on all fours. In that case, it was found that the central bolt of the left rear spring suddenly gave way, while the bus was running. The accident took place not on the main road but on the off-side uprooting a stone of the drain and attacking a tamarind tree 25 feet away from the said stone, with such velocity that its bark was peeled off and the bus could stop only after travelling some more distance from the said tree. Their Lordships observed:—

"The said facts give rise to a presumption that the accident was caused by the negligence of the driver."

In *Barkway v. South Wales Transport*, (1948) 2 All ER 460, the immediate cause of the omnibus leaving the road was tyre burst. The following propositions were laid down:—

"(i) If the defendants' omnibus leaves the road and falls down an embankment and this without more is proved, then *res ipsa loquitur*, their is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst per se is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laure v. Raglan Building Co.*, 1942-1 K.B. 152, where not a tyre-burst but a skid was involved. (iii) To displace the presumption, the defendants must go further and prove (or must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as

more probable, or (b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres."

These principles were fully approved and adopted by the Supreme Court in AIR 1962 SC 1 (supra).

13. Their Lordships also quoted 23 Halsbury (Simonds) 671, paragraph 956, which read thus:—

"An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendants' negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res ipsa loquitur* applies. Where the doctrine applies a presumption of fault is raised against the defendants, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part. Where, therefore, there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue the burden is in the first instance on the defendant to disprove his liability. In such a case, if the injurious agency itself and the surrounding circumstances are entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate."

14. In the present case also, these principles directly apply. Here also, the bus went off-side and struck against a tree. It must have been with great velocity, otherwise, it was not possible that two passengers would have died instantaneously on the spot.

15. The defence is that the accident was caused due to the sudden breakage of a main spring. It may first be seen whether the breaking of the spring was the cause of the accident or was its effect. The function of the springs is to support the body of the vehicle to avoid jerks when it is in motion. It has no connection either with the steering wheel or the brakes. Therefore, it is patent enough that the spring broke as a consequence of the vehicle striking against a tree.

16. It is not wholly without significance that the bus was running down a slope (per evidence of Natrajan D.W. 3).

17. But assuming (though not holding) that the spring broke before the im-

pact, the burden was still on the defendants to prove want of negligence. It was for them to prove that reasonable care had been taken in spite of which the spring broke. Neither the driver, nor the mechanic (and this was the only evidence produced by the defendants) gives the cause of the breaking of the spring; for instance, that there was a big boulder or some such other obstruction on the road which struck against the spring and broke it. All that the driver and Sub-Inspector of Police state is that there was a sound like "Thak", but neither of them says that the spring struck against any heavy article or obstacle. If the defence hypothesis were to be accepted, the only possible cause of the breaking of the spring was that it was worn out due to age. This also would mean negligence because the spring was not replaced by a new one even when it had run for 10 years. Neither the mechanic, nor the driver says that the original spring had been replaced by a new one. See also *Hutchins v. Maunder*, (1920) 37 TLR 72.

18. Jogendrapal (D.W. 9), the driver of the bus, says that while the bus was running on the 7th mile, there was a sound like "Thak", and there was a skid. He applied the brakes and tried to bring back the vehicle on the road, but it struck against a tree. He says that the main leaf of the spring had broken so that it was not possible to keep the vehicle under control. He admits that there is no direct connection between the main spring and the brakes. He denied that the defect of the spring caused the vehicle struck against the tree. He even denied that the bus struck against the tree with great force. His evidence is unreliable.

19. S. L. Dubey (D. W. 2) who is a Sub-Inspector of Police stated that he was a passenger in that bus. When it reached the 7th mile from Jagdalpur towards Jeypore, there was a skid all of a sudden and the bus struck against a mango tree. He says that before the skid, there was some sound like "Kat Kat" and from this the witness inferred that some part had broken. He says that almost all the passengers received injuries. He also got an injury below an eye. He filed a challan regarding this accident, although the investigation was done by another Sub-Inspector. This witness says nothing about the speed at which the bus was running. Almost all the passengers received injuries, which itself shows that the bus must be running at a high speed and must have attacked the mango tree with a very great force. He does not say that the main spring broke.

20. Natraji (D. W. 3) was produced by the defendants to show that the bus had

been checked up. He was a Foreman in the employment of defendant No. 2. He says that the bus had left for Jeypore at 2 P. M. and at midday he had checked up the bus. It was in perfect order and there was no defect. But he does not give the details of the checking. He does not specifically say that he had checked the springs. He says that after the accident he went to the spot. He saw that the front main spring of the right side had broken. He says that when the spring breaks, the vehicle skids and goes out of the control of the driver. The bus was of 1949 model and the accident occurred in February 1959. Thus, a thorough check up was every time necessary, as the vehicle was 10 years old. This witness stated that there was a slope where the accident occurred and that the speed of the bus should not have been more than 15 to 20 miles per hour. These things the driver himself did not say. Then this witness says that when brakes are suddenly applied, the vehicle could skid to 8 to 10 feet but according to the driver himself, it had gone at least 15 feet off-side. It is thus clear that the evidence of this witness is useless.

21. On this analysis, it must be said that the defendants did not prove that the vehicle had been thoroughly checked up and all that was necessary to do was done, to ensure that the spring would not break, as was required of them having regard to the fact that it was used for carrying passengers.

22. Shri Dharmadhikari contended that the burden had shifted to the plaintiffs. He relied on *Hughes v. Lord Advocate*, (1963) 1 All ER 705; *R. v. Spurge*, (1961) 2 All ER 688. In our opinion, these decisions do not help the respondents in this case. It is in evidence of the driver and the mechanic, both produced by the defendants, that the danger was foreseeable. The driver was aware of the tendency of the vehicle to skid and to go out of control, if the main spring broke. The facts of the latter case, relied on by Shri Dharmadhikari are not apposite.

23. Recalling the dicta in *Gobald Motor Service*, AIR 1962 SC 1 (supra) it must be said here also that it is evident from the picture of the accident that the bus must have been driven at a high speed. Thus, the defendants are clearly liable and the finding reached by the trial Court must be set aside.

24. Adverting now to the question of quantum of damages, the Supreme Court has restated the principles laid down by Viscount Simon in *Nance v. British Columbia Electric Railway*, 1951 AC 601: which may be summed up thus: (1) The expectation of the life of the deceased has to be estimated having regard to his age, bodily health and the possibility of

premature determination of his life by later accidents, (2) Having regard to the amounts which the deceased used to spend on his dependants during his lifetime, and having regard to other circumstances, the amount which is required for future provision of the dependants is to be estimated, (3) The estimated annual sum must be multiplied by the number of years of the estimated span of life of the deceased and that must be balanced by any pecuniary advantage which, from whatever source, comes to the dependants by reason of the death, (4) The burden is on the plaintiffs to establish the extent of their loss.

25. In the present case, there is positive evidence of Bansilal (P.W. 1), who is the brother of the deceased. He says that the deceased was doing hotel business in partnership with one Shaligram. The income of each of them was Rs. 500/- per month. There was an argument constructed on the language used by the witness: 'DONO KI MASIK AMADANI 500/- THA' and it was argued for the respondents that Rs. 500/- per month was not the income of each of the partners but of both the partners. But this interpretation is not correct when the immediately following sentence is read. The witness says: 'SAL KA DO DHAI HAZAR RUPAYA RAWEL CHAND APANE HISSE MEN SE BACHATA THA'. If the income of both had been Rs. 6000/- a year, calculated at Rs. 500/- per month, then the share of Rawel Chand would have been only Rs. 3,000/- annually and he could not save Rs. 2,500/- out of it. Thus, the correct reading of the deposition will be that the income of each of them was Rs. 500/-. In ordinary parlance the expression "DONON KI AMADANI 1000/- HAI", is sometimes used to mean that the income of each of them is Rs. 1,000/-. The statement of Bansilal, and the manner in which we have read the above statement, is supported by the evidence of Shaligram (P.W. 2). He says that he and Rawel Chand were running the New Punjab Hotel. The share of each was half. They were also carrying on business in bakery within the hotel. From the bakery and the hotel business, both of them were earning Rs. 900/- to Rs. 1,000/- per month. Rawel Chand had a good standard of living. He used to get between Rs. 500/- and Rs. 600/- a month, and from it he used to spend about 250 on his children and himself, and used to save Rs. 250/- per month. They both lived in the same house separately.

26. The age of Rawel Chand was 36 years at the time of the accident. The youngest child Naresh Kumar (appellant No. 4) was in the mother's lap. His age was six months at the time of the accident, and the age of the eldest daughter was about 9 years. In between them is

a boy, whose age was 6 years at that time, and a girl whose age at that time was 4 years.

27. The plaintiffs are thus two brothers and two sisters, their ages being 9 years, 6 years, 4 years, and 6 months respectively. In this accident they lost both their parents. There is evidence of Bansilal that Rawel Chand was in a healthy state of body and that he would have lived at least for 30 to 35 years more. In our opinion, this was a fair estimate of the span of Rawel Chand's life. But we need not go to that extent and it would be sufficient to calculate the loss of the plaintiff owing to the death of their father on the basis that each of them would have had the benefit of financial support from him till each of them completed education and the girls were married. Roughly we will put the age at 22 for this purpose. Now, it will be only a reasonable and modest estimate that having regard to his standard of living, Rawel Chand would have spent and would have continued to spend Rs. 50/- per month on each child. Thus, the loss to plaintiffs was as follows:

- | | |
|---|---------------|
| (1) Plaintiff No. 1 at Rs. 600/- per year for 13 years ... Rs. | 7,800.00 |
| (2) Plaintiff No. 2 for 16 years at Rs. 600/- per year. ... Rs. | 9,600.00 |
| (3) Plaintiff No. 3 for 18 years at Rs. 600/- per year. ... Rs. | 10,800.00 |
| (4) Plaintiff No. 4 for 21 years at Rs. 600/- per year. ... Rs. | 12,600.00 |
| Total | Rs. 40,800.00 |

Calculating this at Rs. 40/- per month per child, it comes to Rs. 32,640/-. In this mode of calculation, we have ignored that the deceased would have spent more on the marriages of the children and that they would have continued to get something from him even after attaining the age of 22 years.

28. In the present appeal, the appellants have claimed Rs. 24,000/- only. Even after taking into consideration the fact that by depositing the lump sum amount, they would get interest, we are of the opinion that the amount claimed is, from every angle, reasonable compensation.

29. As regards the liability of the Insurance Co., since the bus involved in the accident was insured against third party risks and since both the parents of the appellants were travelling in that bus, the insurance company, by virtue of Section 95(2) (b) (second part), is liable to pay Rs. 2,000/- as compensation for each of the two passengers.

30. Shri Dharmadhikari, learned counsel for the Transport Co. (respondent No. 2), urged that the insurer had charged extra premium of Rs. 95/-. This appears to be so from the statement of the premium charged as entered in the

Policy, but that merely shows that it was in respect of limited liability for 38 passengers at Rs. 2/8/- per head. But, Shri Dharmadhikari could not show either from the policy, or from any other evidence, that by charging this additional premium, the liability became unlimited as provided in Section 95(2)(c).

31. The appeal is allowed. The judgment and decree passed by the trial Court are set aside. Instead, a decree for Rs. 24,000/- and costs in both the Courts shall be passed in favour of the appellants against Jogendrapal, the driver, and M/s. Patny Transport Ltd., the owner of the vehicle. (respondents 1 and 2 respectively) jointly and severally. The Insurance Co., (respondent No. 3) shall be liable jointly and severally to the extent of Rs. 4,000/- out of the decretal amount. Order accordingly.

AIR 1970 MADHYA PRADESH 91 (V 57 C 22)

T. P. NAIK AND G. P. SINGH, JJ.

Rao Bhupendra Singh, Appellant v. Smt. Gopal Kunwar Umath and another, Respondents.

First Appeal No. 17 of 1961, D/- 12-9-1969, against order of IInd Addl. Dist. J., Bhopal, D/- 1-11-1960.

(A) Tenancy Laws — Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953), S. 39(1) and (2) — Bar to jurisdiction of Civil Courts — Bar does not apply to orders which are null.

Sub-section (1) of S. 39 bars the jurisdiction of Civil and Revenue Courts "to settle, decide or deal with any question" which is by or under the Act "required to be settled, decided or dealt with by the State Government, etc." This sub-section has the effect of creating exclusive jurisdiction in the State Government and other authorities, including the Jagir Commissioner, on matters which under the Act are to be settled, decided and dealt with by them. Even after such matter is so settled, decided or dealt with, the final order passed by the authorities under the Act remains immune from attack in any Court as provided in the second sub-section of Section 39. However the second sub-section which prevents the calling in question in any Court of an "order of the State Government etc. under this Act" will have no application if the order that is called in question, is really not an order under the Act but a nullity. In other words, if a purported order is no order at all, the immunity conferred by sub-section (2) will not protect such an order from being challenged in a Civil Court. The question whether an order of the State Govern-

ment, Tahsildar etc. is a nullity is also not one which is required to be settled, decided or dealt with by these authorities under the Act and therefore, the bar of sub-section (1) will not prevent such a question being tried by a Civil Court. (Cases when orders become nullity enumerates in Para 5.) (Paras 4 and 5)

(B) Tenancy Laws — Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953), S. 10 — Expression "entitled to receive maintenance allowance" — For claim under section person need not be receiving cash from income of Jagir — Person in possession of certain village in lieu thereof can maintain suit.

Section 10 is not limited to those persons who were receiving maintenance allowance in cash from the Jagirdar. The section speaks of persons "entitled to receive a maintenance allowance out of the income of any Jagir" and not of persons receiving such allowance in cash out of the income. It has, therefore, to be held that Section 10 of the Act is not limited to persons who were paid maintenance allowance in cash from the income of the Jagir but also applies to a person who was entitled to maintenance allowance from the income of the Jagir, but instead of being paid in cash was granted or put in possession of jagir village or villages for realising the maintenance allowance out of the income of the same. (Para 7)

(C) Tenancy Laws — Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953), S. 10 and II. 21 framed under Act — Fixation of maintenance by Jagir Commissioner — Matters to be considered — Allegation that certain matters not taken into consideration — Specific plea in written statement necessary.

The Abolition Act and the Rules nowhere provide that the Jagir Commissioner must mention in his order all the matters that he takes into consideration in fixing maintenance. Out of the matters specified in Section 10 and Rule 21, it is possible that in a particular case some of the matters may have little bearing and may not be even stressed by the parties some may be non-existent or not ascertainable and the Jagir Commissioner may not find it necessary or useful to mention those matters in his order in that case. From the bare omission to say something on each and every matter specified in Section 10 or Rule 21 it cannot be said that the Jagir Commissioner did not take into consideration the matters not referred to by him in the order. Therefore a specific plea in the written statement particularising the matters which according to him, though having an important bearing in his case, were not taken into consideration by the authority was necessary and in the absence of

such a plea it was not open for him to urge that the matters were not taken into account. (Para 9)

(D) Evidence Act (1872), S. 90 — Person claiming to be Guzaredar claiming maintenance allowance under S. 10 Bhopal Abolition of Jagirs and Land Reforms Act — Guzaredar claiming to be in possession of certain village in lieu of maintenance till date of conversion of jagir into Mansab — Documents produced by plaintiff thirty years old and produced from proper custody — Defendant not entering into witness box and not giving any evidence — Held, that the evidence of the plaintiff coupled with the document raising presumption under S. 90 was sufficient to prove that he was a Guzaredar and was in possession of the village in lieu of maintenance. (Para 8)

(E) Limitation Act (1908), Arts. 120 and 131 — Relative scope of Articles. AIR 1914 Mad 377 (FB), Diss.

It is well settled that strict grammatical construction of the words is the only safe guide in interpreting the Limitation Act. Article 131 provides twelve years as the period of limitation for a suit "to establish a periodically recurring right" and this period is to be counted from the date "when the plaintiff is first refused the enjoyment of the right". On a plain grammatical construction the Article is restricted to suits "to establish a periodically recurring right" and does not embrace a suit for recovery of arrears due under that right. The words of Article 131 cannot be extended to cover a relief claiming recovery of arrears that may have fallen due under a periodically recurring right. Even if the same two reliefs, one for establishing the right and the other for recovery of the arrears, are combined together, Article 131 will apply only to the first relief and some other appropriate Article or Article 120 will apply to the relief for recovery of arrears. Case law discussed. AIR 1914 Mad 377 (FB), Diss. (Para 11)

(F) Limitation Act (1908), Art. 62 — Bhopal Abolition of Jagirs and Land Reforms Act (10 of 1953), S. 10 — Suit for arrears of maintenance by Guzaredar — Art. 62 is applicable.

The test for application of Article 62 is not whether the defendant intended to receive the money for the plaintiff's use. If the money is received by the defendant in such circumstances that from the very moment of receipt the plaintiff has a right to claim it, it is money had and received for the plaintiff's use though actually not received with that intention. AIR 1965 S.C. 1773, Foll. (Para 11)

Thus, the amount of maintenance fixed by the Jagir Commissioner in favour of the plaintiff under Section 10 of the Bhopal Abolition of Jagirs and Land Re-

forms Act is payable under the terms of that section out of the Mansab payable to the defendant. The defendant thus, from the very moment of receipt of Mansab, is under a legal obligation to pay the amount of maintenance fixed under Section 10 to the plaintiff and that part of the money received as Mansab by the defendant can be said to be received by him for the plaintiff's use.

(Para 11)

Cases Referred: Chronological Paras

- (1969) 1969-1 All ER 208, Anisminic Ltd. v. Foreign Compensation 5
- (1968) AIR 1968 SC 377 (V 55)=1968 M.P. L.J. 573, Union of India v. Kamla Bai 5
- (1968) AIR 1968 SC 1186 (V 55)=1968 M.P. L.J. 822, State of M.P. v. D. K. Jadav 5
- (1965) AIR 1965 SC 1773 (V 52)=1965-2 SCR 577, Venkat Subbarao v. State of A. P. 11
- (1965) AIR 1965 Orissa 138 (V 52)=ILR (1965) Cut 199, Padmanava Singh v. Rajkishori Devi 11
- (1964) AIR 1964 SC 322 (V 51)=1964-1 SCR 752, Firm I. S. Chetty & Sons v. State of A. P. 5
- (1964) AIR 1964 SC 807 (V 51)=Desika Charyulu v. State of U.P. 5
- (1962) AIR 1962 SC 1621 (V 49)=1963-1 SCR 778, Ujjam Bai v. State of U.P. 5
- (1962) AIR 1962 SC 1716 (V 49)=1963-1 SCR 70, Bootamal v. Union of India 11
- (1959) AIR 1959 Ker. 1 (V 46)=1958 Ker. L. J. 798 (FB), State v. J. Nambooripadu 11
- (1954) AIR 1954 SC 340 (V 41)=1955 SCR 117, Kiran Singh v. Chaman Paswan 5
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- (1940) AIR 1940 P.C. 105 (V 27)=67 Ind. App. 222, Secy. of State v. Mask & Co. 5
- (1937) AIR 1937 All 57 (V 24)=ILR 1937 All 140, Hakim Hidayat Ullah v. Gokul Chand 11
- (1932) AIR 1932 P.C. 165 (V 19)=59 Ind. App. 283, Nagendranath v. Suresh 11
- (1931) AIR 1931 Bom. 189 (V 18)=ILR 55 Bom. 193, Janardan v. Dinkar 11
- (1928) 11 Nag. L. J. 62=109 Ind. Cas. 85, Nawab Mir Nazarali v. Akaji 11
- (1926) AIR 1926 Pat. 205 (V 13)=ILR 5 Pat 249, Baidyanath Jiu v. Har Dutt 11
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- (1901) ILR 25 Bom. 337=27 Ind. App. 216 (PC), Malkarjun v. Narhari 5
- (1888) 21 Q.B.D. 313, Queen v. Commissioner for Spl. Purposes 5
- (1841) 1 Q.B. 66=113 E.R. 1054, R. v. Bolton 5
- C. P. Sen, for Appellant; P. S. Khirwadkar, for Respondents.

SINGH, J.:— This appeal arises out of a suit which was filed by the plaintiff-respondent Thakur Bharatsingh for recovery of Rs. 13,472.50 paise against the defendant-appellant. Bharatsingh died during the pendency of the appeal and his legal representatives have been substituted in his place. The suit was based on the facts that the plaintiff was a Guzaredar of the defendant who held a jagir known as Mangalgarh jagir. The plaintiff was in possession and enjoyment of income of a part of the village Ankia of the jagir in lieu of Guzara until the abolition of the jagir. In order to induce the Jagirdars to voluntarily surrender their jagirs, the Government of the erstwhile State of Bhopal, where the jagir was situated, offered to pay Mansab or cash annuity to a Jagirdar in the event of his voluntarily surrendering the jagir and applying for conversion of the same into Mansab. The defendant took advantage of this offer and surrendered his jagir to the State. By an order of the State Government dated 12th August, 1953 he was granted Mansab or cash annuity of Rs. 21,507/11/- per year payable in two equal six monthly instalments during his life. The plaintiff being a Guzaredar of the jagir, became entitled to receive out of the Mansab payable to the Jagirdar such amount for maintenance as may be fixed by the Jagir Commissioner under Section 10 read with Section 45-A of the Bhopal Abolition of Jagirs and Land Reforms Act, 1953. On an application made by the plaintiff, the Jagir Commissioner by his order dated 8th March, 1954 fixed the maintenance allowance payable under Section 10 at Rs. 2,129/8/- per year in two equal six monthly instalments out of the Mansab received by the defendant from the State. In spite of this order, the defendant did not pay the maintenance allowance, although he had received from 1st April, 1954 upto the date of the suit eleven six monthly instalments of his Mansab. The plaintiff, therefore, claimed that he be granted a decree for recovery of the arrears of maintenance allowance amounting to Rs. 13,472.50 paise. The defendant in answer to the suit denied that the plaintiff was a Guzaredar. He also contended that the order of the Jagir Commissioner fixing the maintenance allow-

ance was without jurisdiction, was not based on any law, had no legal force and was a nullity. A further plea was raised that the suit was barred by limitation. The Second Additional District Judge, Bhopal, who tried the suit, held on all the points in favour of the plaintiff and decreed the entire suit. Aggrieved from that decree the defendant has come up in appeal to this Court.

2. The first contention of the learned counsel for the appellant is that the order of the Jagir Commissioner was a nullity and no suit could be based on it. The learned counsel points out three infirmities in the order of the Jagir Commissioner in support of this contention. It is first submitted that on a true construction, Section 10 of the Act applies only to persons who were receiving maintenance allowance in cash from the income of the Jagirs and the Jagir Commissioner misconstrued the section and applied it to the plaintiff who on his own admission was not receiving any maintenance allowance in cash but was in possession of a jagir village for purposes of his maintenance. The second defect pointed out is that the plaintiff was not in fact a Guzardar or a person entitled to receive maintenance allowance in cash or otherwise under any law, rule or custom and the Jagir Commissioner wrongly found this fact in favour of the plaintiff. Lastly it is said that the Jagir Commissioner did not take into consideration the various matters mentioned in clauses (i) to (iv) of Section 10 and clauses (a) to (g) of Rule 21(1), which he was bound to take into consideration before fixing the maintenance allowance. According to the learned counsel, by reason of these three infirmities the order of the Jagir Commissioner though purporting to be under Section 10 was in reality not an order under that Section and was a nullity. The learned counsel for the respondents in answer submits that the order of the Jagir Commissioner was immune from challenge in the Civil Court and he relies for this submission on Section 39 of the Act. He also disputes the existence of the infirmities pointed out by the learned counsel for the appellant in the order.

3. To appreciate the rival contentions, it is necessary first to advert to the relevant provisions of the Bhopal Abolition of Jagirs and Land Reforms Act, 1953. The Act as originally enacted did not apply to Jagirs converted into Mansab. By Bhopal Act No. 11 of 1954, Sec. 45-A was inserted in the Act had the effect of applying certain provisions of the Act with necessary modifications to Jagirdars whose Jagir lands were converted into Mansab. Section 10 which provides for fixation of maintenance payable out of Mansab to a person who was entitled to receive maintenance allowance from the

income of the Jagir and which is the main section under consideration in this case, reads as follows:

"Section 10. Amount of Maintenance.— Any person who, under any law, rules or any custom having the force of law, is entitled to receive a maintenance allowance out of the income of any Jagir, shall be entitled to receive, out of the Mansab payable to the Jagirdar, such amount for maintenance annually, as the Jagir Commissioner may fix after taking into consideration—

- (i) the amount of maintenance allowance which that person used to receive from the jagirdar before the date of conversion into Mansab;
- (ii) The net income of the jagirdar from the Jagir at the time of fixing the said maintenance allowance;
- (iii) the net amount of Mansab payable to the jagirdar; and
- (iv) such other matters as may be prescribed."

(N.B. The section is quoted as amended by Section 45-A.)

Section 11, which follows Section 10, makes provision for payment to a co-sharer a share out of Mansab payable to a jagirdar in proportion to the share that the co-sharer was receiving from the jagir income before its conversion into Mansab. Provision for allotment of Khud-Kasht land finds place in Chapter IV. Sections 19 to 22 in this Chapter deal with allotment of Khud-Kasht land for personal cultivation of the jagirdar. Section 23, which is also in this Chapter, deals with Khud-Kasht land granted by a jagirdar to a person in lieu of maintenance and such land if in personal cultivation of such person is to be allotted to him. The section reads as follows:

"Section 23. Khud-Kasht allotted in lieu of maintenance allowance.— Any khud-kasht land granted by a jagirdar to a person in lieu of maintenance allowance payable from the jagir lands which is under the personal cultivation of such person on the date immediately preceding the date of conversion into Mansab, shall be deemed to be settled on such person as an occupant on payment of land revenue at the village rate."

(N.B. The section is quoted as amended by Section 45-A.)

Chapter V of the Act deals with miscellaneous matters. Sections 25 to 27 provide for appeals, but an order of the Jagir Commissioner under Section 10 is not made appealable. Section 29 confers upon the officers, holding inquiries under the Act, powers of a Civil Court under the Code of Civil Procedure, 1908 relating to (a) proof of facts by affidavits; (b) enforcing attendance of any person and his

examination on oath; (c) production of documents; and (d) issuing of commissions. As laid down in Section 43, the Jagir Commissioner and other officers holding an inquiry under the Act are required to follow, as far as may be, the procedure applicable to proceedings under the Bhopal State Land Revenue Act, 1932 and have the same powers in relation to proceedings before them which a Revenue Officer has in relation to original proceedings under the said Act. Bar of jurisdiction of Civil Courts is enacted in Section 39, which is as under:

"Section 39. Bar of Jurisdiction of Civil Courts.—

(1) Save as otherwise provided in this Act no Civil or Revenue Court shall have jurisdictions to settle, decide, or deal with any question which is, by or under this Act, required to be settled, decided or dealt with by the State Government, the Tahsildar, the Collector, the Jagir Commissioner or the Revenue Commissioner.

(2) Except as otherwise provided in this Act, no order of the State Government, a Tahsildar, a Collector, the Jagir Commissioner or the Revenue Commissioner under this Act shall be called in question in any Court."

Under the powers conferred by Section 46 and other sections, the State Government has framed Rules known as the Bhopal Abolition of Jagirs and Land Reforms Rules, 1953. Rule 21 of these rules is relatable to Section 10 of the Act and reads as follows:

"21. (1) The Jagir Commissioner in fixing the amount of maintenance under Section 10 of the Act shall, in addition to the matters specified in that section, also take into consideration the following matters, namely:—

- (a) the relationship of the person claiming maintenance allowance, to the Jagirdars;
- (b) the terms and conditions, if any, mentioned in the Sanad or Iqar-nama about the maintenance allowance payable to any person;
- (c) any orders of the Ruler or the Government or a Court of law regarding the payment of maintenance allowance out of the income of the Jagirdar;
- (d) the prevailing prices of essential commodities as defined in Cl. 3(1) of the Bhopal Essential Supplies Temporary Powers Act of 1946;
- (e) the income of the Jagirdar from Khudkasht and other sources;
- (f) area of land in and out of the Jagir held by the person claiming maintenance allowance; and
- (g) the minimum requirements of the person entitled to a maintenance allowance out of the income of the jagir concerned and the minimum

requirements of the Jagirdar and the members of his family.

(2) The amount of maintenance allowance shall be payable out of the instalments of compensation payable to the Jagirdar for such period only as the payment of instalments of compensation continues. Ordinarily the amount of maintenance allowance payable to a person fixed under this rule will bear the same proportion to the annual instalment payable to the Jagirdar, as the amount of maintenance allowance which that person used to receive from the Jagirdar before the date of resumption, bears to the Sanadi income of the jagir."

4. Sub-section (1) of Section 39 of the Act which has been extracted above bars the jurisdiction of Civil and Revenue Courts "to settle, decide or deal with any question" which is by or under the Act "required to be settled, decided or dealt with by the State Government, the Tahsildar, the Collector, the Jagir Commissioner or the Revenue Commissioner". This sub-section has the effect of creating exclusive jurisdiction in the State Government and other authorities, including the Jagir Commissioner, on matters which under the Act are to be settled, decided and dealt with by them. Even after such matter is so settled, decided or dealt with, the final order passed by the authorities under the Act remains immune from attack in any Court as provided in the second sub-section of Section 39. The language employed in Section 39 is thus apparently quite comprehensive. But statutory provisions like Section 39 of the Act, which oust the jurisdiction of the ordinary Courts in spite of their apparent wide language, have certain inherent limitations. Thus the second sub-section which prevents the calling in question in any Court of an "order of the State Government etc. under this Act" will have no application if the order that is called in question, is really not an order under the Act but a nullity. In other words, if a purported order is no order at all, the immunity conferred by sub-section (2) will not protect such an order from being challenged in a Civil Court. The question whether an order of the State Government, Tahsildar etc. is a nullity is also not one which is required to be settled, decided or dealt with by these authorities under the Act and therefore, the bar of sub-section (1) will not prevent such a question being tried by a Civil Court. The learned counsel for the appellant is, therefore, right in contending that the Civil Court can examine the question whether the order of the Jagir Commissioner passed on 8th March, 1954 fixing the maintenance allowance of the plaintiff is a nullity or not.

5. Before proceeding to examine the three grounds on which the said order is

challenged, it is necessary to consider the circumstances when an order passed by a tribunal or authority of limited jurisdiction can be held to be a nullity. It is settled law that an order made without jurisdiction is a nullity; *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 at p. 342. Difficulty, however, arises in applying this rule as the concept of "jurisdiction" which means "authority to decide" (Smith, *Judicial Review of Administrative Action*, 2nd Edition, p. 96; *Ujjam Bal v. State of U.P.*, AIR 1962 SC 1621 at p. 1629, has been changing from time to time and the word jurisdiction is used in more senses than one. According to the original or "pure" theory of jurisdiction, after a tribunal has properly commenced an inquiry, it does not commit any error of jurisdiction by arriving at wrong conclusions of law or fact, for authority to inquire into a question of law or fact includes an authority to decide it rightly as well as wrongly; (*Malkarajun v. Narhari*, (1901) ILR 25 Bom 337 at p. 347 (PC)). According to this "pure" theory, jurisdiction of a tribunal is determinable "at the commencement, not at the conclusion of the inquiry"; (Smith, *Judicial Review of Administrative Action* 2nd Edition; p. 97, *R. v. Bolton*, (1841) 1 Q.B. 66 at p. 74; AIR 1962 SC 1621 (supra)).

Defects of jurisdiction in this restricted sense i.e., limited to the stage of commencement of proceedings may arise when (a) authority is assumed under an ultra vires statute; (b) the tribunal is not properly constituted or is disqualified to act; (c) the subject matter or the parties are such over which the tribunal has no authority to inquire; and (d) there is want of essential preliminaries prescribed by the law for commencement of the inquiry. As already stated, according to the "pure" theory of jurisdiction conclusions of law or fact, when inquiry is properly commenced by a tribunal, are conclusive. This theory which was in vogue in the 19th Century in England was later abandoned as it had the effect of reducing jurisdictional control of the inferior tribunals to vanishing point and making the tribunals Judges of their own jurisdiction giving them authority to usurp powers not intended to be conferred by the Legislature; (See Wade, *Anglo American Administrative Law* (1966) 82 Law Quarterly Review 226, p. 232). The Courts, therefore, devised the formula of making a distinction between jurisdictional questions of fact or law and questions of fact or law which are not jurisdictional. If a question of fact or law is of the former category, the tribunal, though having authority to inquire into that question, cannot decide it conclusively and a wrong determination of such a question results in making its

final decision in excess of jurisdiction. But if a question is of the latter category i.e., non-jurisdictional, the tribunal is free to err in that area. The principle behind this theory, which may be called as the "modified theory of jurisdiction", was well expressed by Farwell, L.J.:

"It is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure — such a tribunal would be autocratic not limited — and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact." (*R. v. Shoreditch Assessment Committee*, (1910) 2 KB 859 at p. 880).

The defect of this theory is that there is no clear cut test for distinguishing between errors within jurisdiction and errors going to (root of?) jurisdiction. Difficulty in this respect is further created by the recognition that the legislature may create a tribunal which is given jurisdiction to decide conclusively even the so-called jurisdictional facts and if that be the case, there ceases to be any distinction between jurisdictional and non-jurisdictional facts, for the tribunal is competent to decide both conclusively and all the facts become non-jurisdictional; (see the oft quoted passage of Lord Esher, M. R. in *Queen v. Commissioner for Special Purposes*, (1888) 21 Q.B.D. 313 at p. 319).

All that can be said is that for distinguishing jurisdictional from non-jurisdictional questions, the true construction of the relevant Act is the only safe guide. Because of these difficulties it is not surprising that this theory has been at times forcefully criticised; [See Gordon, *The Relation of facts to Jurisdiction* (1929) 45 Law Quarterly Review 459; The observance of Law as a condition of jurisdiction (1931) 47 Law Quarterly Review 386, 557; Jurisdictional Fact: An answer, (1966) 82 Law Quarterly Review 515]. In spite of its defects, the theory is still having its sway in England but its existence and development have been justified not on the ground that it is logically consistent but on the ground that due to its "unpredictability" in application it has "the merit of preserving a flexible control, by which the Court can give a sharp check to what it may think a usurpation of power; the most important thing of all is that legal control of power should be preserved"; (H.W.R. Wade, *Anglo American Administrative Law*, (1966) 82 Law Quarterly Review 226, p. 232). "Functus officio" in America and relegated in that country to the status of "a spare wheel" (ibid p. 237). the theory has been accepted in India and has taken strong roots; AIR 1962 SC 1621 at pp. 1629, 1630; *Desika Charyulu v.*

4. The facts are not in dispute. The petitioner was appointed as a Commissioned Officer by the President on 18-2-1967, and was a temporary Commissioned Officer. The Army Act, 1950, is applicable to the persons mentioned in Section 2 of the Act. Section 2 (1) (a) states that Officers, Junior Commissioned Officers and Warrant Officers of the Regular Army are persons subject to the Act. An "Officer" is defined under Section 3 (xviii) as meaning 'a person Commissioned, Gazetted or in pay as an officer in the Regular Army' and includes persons enumerated in clauses (a) to (f) in the definition. Section 10 provides that the President is the authority to grant a Commission to an Officer. It cannot be disputed that the petitioner is an Officer within the definition as he is a person Commissioned and Gazetted as an Officer in the Regular Army. Section 18 of the Act provides that every person subject to the Army Act, shall hold office during the pleasure of the President. Section 19 specifies that subject to the provisions of the Act and Rules and Regulations made thereunder, the Central Government may dismiss, or remove from the service, any person subject to this Act. Section 20 prescribes a procedure by which a person could be dismissed, removed or reduced in rank. The Chief of the Army Staff, may dismiss or remove from service any person other than an Officer. Section 191 enables the Central Government to make rules for the removal, retirement, release or discharge from service of persons subject to this Act. For persons who are subject to this Act, the termination of service will be according to the provisions of the Army Act and the Rules and Regulations framed thereunder. The Act does not specifically provide for the dismissal or removal or reduction of Officers and, therefore such dismissal or removal can only be by the Rules framed or Regulations made under the Act. The rule-making power is under Section 191 (1) (a).

5. Rule 15 of the Army Rules, 1954, prescribes the procedure for termination of service by the Central Government on grounds other than misconduct. The rule provides :

"(1) When the Commander-in-Chief is satisfied that an officer is unfit to be retained in the service due to inefficiency, or physical disability, the officer—

- (a) shall be so informed,
- (b) shall be furnished with the particulars of all matters adverse to him, and
- (c) shall be called upon to urge any reasons he may wish to put forward in favour of his retention in the service.

(2) In the event of the explanation being considered by the Commander-in-Chief unsatisfactory, the matter shall be submitted to the Central Government for orders, together with the Officer's explanation and the recommendation of the Commander-in-Chief as to whether the Officer should be—

- (a) called upon to retire; or

(b) called upon to resign.

(3) The Central Government after considering the reports, the explanations, if any, of the Officer and the recommendation of the Commander-in-Chief, may call upon the Officer to retire or resign, and on his refusing to do so, when called upon, may take action to have him gazetted out of the service on pension or gratuity, if any, admissible to him."

Rule 15, thus contemplates the Officer being informed by the Commander-in-Chief (now the Chief of the Army Staff) along with the particulars of all matters adverse to him, viz., to afford an opportunity to the Officer to urge the reasons in favour of his retention in service. After considering the explanation, the Chief of the Army Staff is required to submit a report to the Central Government and the Central Government after considering all the materials before them should take a decision. It is not in dispute in this case that this procedure was not adopted.

6. The plea of the Central Government is that the petitioner is not an officer contemplated under the Army Act, 1950. In any event it was submitted that the privilege available under the Army Act is only to the permanent Commissioned Officers and not to temporary Commissioned Officers. The plea on behalf of the Central Government is that the petitioner was appointed under Army Instructions and was liable to be removed under paragraph 12 of Army Instructions No. 231.

7. A reading of the Sections cited makes it clear that a temporary Commissioned Officer comes within the definition of Section 3 (xviii) of the Act. The Act does not maintain any distinction between a permanent Officer and a temporary Officer. It would have been open to the Central Government to have framed rules under Section 19 providing for the mode of dismissal or removal of a temporary Commissioned Officer. It has also been admitted that no regulations have been framed for dismissal or removal of a temporary Commissioned Officer. The contention of the learned counsel for the Central Government is that the Act is not applicable to a temporary Commissioned officer. This contention cannot be accepted for it will lead to very dangerous results. On a plain reading of Section 3 (xviii), all Officers who have been Commissioned, whether temporary or permanent, will be subject to the provisions of this Act. If the construction sought to be placed by the learned counsel for the Central Government is accepted, it would mean that temporary Commissioned Officers would not be governed by the Army Act and would not be subject to the discipline under the Army Act. This situation was considered by a Bench of this Court in Chatterjee v. Sub-Area Commander, Head-quarters, Madras, ILR (1952) Mad 153 = (AIR 1951 Mad 777). The Court was dealing with the case of a Short Service Commissioned Officer. The Court held that

a Short Service Commissioned Officer as soon as he takes up the Commission will become subject to the provisions of the Army Act by virtue of Section 2 (2) and he will remain so subject until he is duly discharged. Repelling the contention that the Officer in that case occupied the position of a Reserve Officer and not subject to any Rules and Regulations, the Court observed:

"Any other decision will result in a piquant situation; for example, if a temporary Commissioned Officer, the moment the term of his service expires, runs away with a equipment that is given to him, according to the petitioner, he cannot be subject to the Military law and discipline and cannot be arrested and produced before a Court Martial but the Military authorities should avail themselves of the ordinary remedies before the criminal Courts of the land. We need only refer to the situation so created to show the untenability of the contention."

These observations are applicable to the case of a temporary Commissioned Officer. He cannot say he is not subject to the Army discipline. Therefore, the contention that a temporary Commissioned Officer is not a person subject to the Act will have to be negatived. If a temporary Commissioned Officer is subject to the provisions of the Army Act, he can only be dismissed or removed under the provisions of the Act, the Rules or Regulations. As already pointed out, the Act does not provide for the procedure for such removal. The procedure provided under Rule 15 which relates to the dismissal and removal had not been followed. It is also admitted that there are no Regulations regarding the procedure for dismissal or removal of a temporary Commissioned Officer. The Central Government only relies on paragraph 12 of the Army Instructions. Under Section 19 of the Army Act, the procedure to be followed is according to the provisions of the Act, the Rules and the Regulations, under the Act. Therefore the petitioner cannot be removed by following Army Instructions. Army Instructions are in the nature of administrative directions and they cannot have the effect of modifying the statutory right of the petitioner. The Central Government, if they wanted to treat the temporary Commissioned Officers on a different footing, ought to have framed appropriate Rules or Regulations. That has not been done.

8. Mr. Govindaraj, the learned counsel for the petitioner, submitted that the Army Instructions paragraph 12 only provided that the Commission of a probationary Officer can be terminated at any time during and after the probation period, but it had not prescribed a procedure and therefore the procedure under the Act and the Rules should be followed. On behalf of the Central Government it was submitted that under the Regulations, the Commission of an Officer during the probationary period could be terminated without observing any formalities.

I do not think it is necessary to go into this question as I am of the view that the petitioner cannot be removed by following the Army Instructions. It is contrary to the rights secured to the petitioner under the Army Act.

9. In the result the petition is allowed and the impugned order set aside. I do not express any opinion about the competency or otherwise of the Officer to continue as a Commissioned Officer. The Defence Department will be at liberty to commence fresh proceedings if they so desire. The petition is allowed with costs. Counsel's fee Rs. 250.

Petition allowed.

AIR 1970 MADRAS 178 (V 57 C 45)

SPECIAL BENCH

M. ANANTANARAYANAN, C. J.,
RAMAKRISHNAN AND NATESAN, JJ.

A. B. Manual, Petitioner v. Mrs. Libian Margaret Manual and another, Respondents.

M. C. No. 1 of 1967, D/-11-2-1969.

Divorce Act (1869), Sections 7 and 10 — Proceeding under Act — Nature of — Petition by husband — Wife remaining ex parte — Court cannot act on uncorroborated evidence of petitioner.

The proceeding under the Act is not a mere civil proceeding, where an adjudication of rights as between two parties alone is involved; this is a proceeding relating to the status of matrimony, and it involves the interests of society, as well as the interests of the concerned individuals. For that reason, the Court must never act in a purely formal sense, in such proceedings, and the finding that the Court is satisfied that there is no collusion between the parties should not also be a mere mechanical inference or conclusion. Thus in all such cases, the mere fact that the respondents did not care to contest the proceeding and remained ex parte, is no justification for the Court to treat the proceeding as purely formal and to act upon the evidence of the plaintiff or petitioner, (husband in this case) uncorroborated, as though it were evidence given by the plaintiff in a civil proceeding in which the defendant had remained ex parte. (Para 4)

It is true that, under the Evidence Act, no particular quantum of evidence is legally required for proof of a fact, and the Court can accept and act upon uncorroborated evidence of a witness. Under Section 7 of the Act the practice of Courts, in such matters, has been approximated to the practice of the Matrimonial and Divorce Courts in the United Kingdom, as far as practicable. Thus the evidence of the husband should be corroborated by some other evidence, if this is at all feasible, or at least,

by the circumstantial evidence of surrounding probabilities. (Para 3)

G. Krishnan and K. Sampath, for Petitioner; V. T. Gopalan and M. S. Krishnamachari, for Respondents.

M. ANANTANARAYANAN C. J.: This is a case referred under Sec. 10 and Sec. 17 of the Indian Divorce Act, IV of 1869, by the learned District Judge of South Arcot, for confirmation of the decree nisi dissolving the marriage. The facts are simple. The petitioner and the first respondent were married, according to the rites of the Christian religion, on 8th August 1951, at the Royapettah Purification Church, Madras. They lived together as husband and wife from 1951 till 30th September 1964. The petitioner had taken up employment in the Neiveli Lignite Corporation, and, they were living together at that place. According to the sworn testimony of the petitioner (P. W. 1) on 30th September 1964, his wife informed him that she was no longer willing to live with him in matrimony, and, she left his house and deserted him. Thereafter, according to the petitioner, the first respondent and the second respondent were openly living together as husband and wife in a village near Neiveli. In his evidence, the petitioner gives the actual address, viz., 15/1 Gangaikondan colony.

2. The respondents were ex parte, and did not contest the application at any stage, in spite of summonses taken out several times, and publication in a daily newspaper of Madras. The learned District Judge accepted the evidence of P. W. 1, as proving the fact of adultery between the first respondent and the second respondent, recorded a finding that there was no collusion between the parties, and granted the decree dissolving the marriage subject to our confirmation.

3. We have been exercised by the fact that the evidence of the petitioner (P. W. 1) stands alone, and uncorroborated. It is true that, under the Indian Evidence Act, no particular quantum of evidence is legally required for proof of a fact, and the Court can accept and act upon uncorroborated evidence of a witness. Under Sec. 7 of Act IV of 1869, the practice of our Courts, in such matters, has been approximated to the practice of the Matrimonial and Divorce Courts in the United Kingdom, as far as practicable. There are authorities to the effect that the evidence of the husband should be corroborated by some other evidence, if this is at all feasible, or at least, by the circumstantial evidence of surrounding probabilities.

4. In the present case, the evidence of the husband is not corroborated by that of any other witness, but, it is noteworthy that the husband has given explicit information about the particular address at which the two respondents are jointly living together, in adultery, after the first respondent had deserted the petitioner. That

direct evidence is corroborated by the circumstantial evidence of the returns on the summonses, available in the record. We have scrutinised this aspect, and we find one return made by the second respondent and signed by him, in which he explicitly states that the first respondent was, at the time of the service of the summons, staying with her mother elsewhere, and that she had earlier left him (second respondent). This relates to the address of the second respondent, as given by the petitioner, and, it is powerful corroboration, as circumstantial evidence, of the averment of the petitioner, on oath, that the first and the second respondents had been living together as man and wife at that given address. In this case, we are, therefore, relying both on the evidence of P. W. 1 and on the corroboration by circumstantial evidence, that we have referred to, as an adequate basis for acceptance of the evidence. Nevertheless, we must sound a note of caution that, in all such cases, the mere fact that the respondents did not care to contest the proceeding and remained ex parte, is no justification for the Court to treat the proceeding as purely formal and to act upon the evidence of the plaintiff or petitioner, uncorroborated, as though it were evidence given by the plaintiff in a civil proceeding in which the defendant had remained ex parte. It should be unnecessary for us to point out that this is not a mere civil proceeding, where an adjudication of rights as between two parties alone is involved; this is a proceeding relating to the status of matrimony, and it involves the interests of society, as well as the interests of the concerned individuals. For that reason, the Court must never act in a purely formal sense, in such proceedings, and the finding that the Court is satisfied that there is no collusion between the parties should not also be a mere mechanical inference or conclusion. Having said all this, we may state that, in the present case, we are satisfied that the ground for dissolution was proved by adequate evidence, circumstantial and direct, and that, there has been no collusion between the parties. Accordingly, we accept the reference and confirm the decree for dissolution. No costs.

Reference accepted.

AIR 1970 MADRAS 179 (V 57 C 46)
NATESAN, J.

Kumara Kangaya Goundar, Appellant v. Arumugha Goundar and others, Respondents.

Second Appcal No. 1328 of 1964, D/- 27-9-1968.

(A) Civil P. C. (1908), O. 32, O. 32, Rr. 1 and 3 (7) (Mad) — Discretion of Court in

KM/LM/F770/69/RGC/M

appointing guardian ad litem — Appointment of person other than natural guardian — Order 32 does not prohibit such appointment.

There is nothing in Order 32 making it mandatory on the Court to appoint the natural guardian where he expressed his willingness to be appointed as guardian ad litem and not to exercise its discretion if it so considers and appoint another person as guardian ad litem for the suit. (Para 5)

The rules under Order 32, Civil P. C. clearly contemplate the appointment of a person other than the natural guardian also as guardian ad litem. Order 32, Rule 3 (7) (Mad) is very clear on this point. It is clear from Order 32, Rule 3 (7) (Mad) that Court cannot make any order on the application for appointment of a guardian ad litem except upon notice to the guardian appointed and declared by Court and where there is no such guardian, upon notice to the father or other natural guardian of minor. No doubt, the father would have a preferential right when there is no guardian appointed or declared by competent authority. Objections have to be heard which may be urged on behalf of any person served with notice under the sub-rule (7) of Rule 3 (Mad) of Order 32, Civil Procedure Code and reasons have to be given if a preferential claim is overruled for another. But it does not follow, that every irregularity in the appointment without more will vitiate the appointment. AIR 1934 Cal 474, Rel. on.; AIR 1946 Cal 272, Distinguished.

(B) Civil P. C. (1908), Order 32, R. 3 (1) and (5) (Mad)—Guardian ad litem—Appointment of — Person other than natural guardian appointed as guardian ad litem — Appointment does not result in permanent cessation of power of natural guardian as contemplated under Guardians and Wards Act (1890). AIR 1946 Cal 272, Distinguished. (Para 6)

(C) Civil P. C. (1908), Order 32, Rule 3 (1) and (7) (Mad)—Irregularity in appointment of guardian ad litem — Irregularity cannot render decree against minor nugatory — Minor must prove that he was not effectively represented in suit.

If a guardian ad litem has been appointed for a minor defendant and the minor's interests have been duly looked after in the litigation, mere irregularities in the appointment of the guardian cannot render the decree nugatory against the minor. The minor to avoid the decree must further prove that he was not effectively represented in the suit and that he was prejudiced by the failure of the guardian to take pleas that could have been validly raised on his behalf. (Para 8)

Law insists that the minor's interests in the litigation should be taken care of and the minor represented in the litigation by an adult whose interests are not adverse to that of the minor. The minor's interests

in the litigation should not be neglected or prejudiced, and Courts have to be jealous in observing the requirements of the law in this regard in letter and spirit. All the same when it is found that the guardian who had been acting for the minor in the suit had not let down the interests of the minor and when the minor was in no way prejudiced, the minor cannot later, by another guardian or on becoming a major avoid the decree if it is against him, on the ground of some irregularity in the procedure adopted for appointing the guardian. AIR 1923 Mad 553, Rel. on.

(Para 8)

Cases Referred: Chronological Paras
(1946) AIR 1946 Cal 272 (V 33) =
ILR (1946) 1 Cal 259, Jiban Krishna
v. Sallendra Nath 6
(1934) AIR 1934 Cal 474 (V 21) =
ILR 61 Cal 227, Kalachand Basak
v. Amulyadhan Banerji 7
(1923) AIR 1923 Mad 553 (V 10) =
44 Mad LJ 515, Rarichan v.
Manakkal Raman 8

K. Sarvabhauman and T. R. Mani, for Appellant; S. Mohan, for Respondents.

JUDGMENT: The substantial point in this second appeal is whether the decree in O. S. 386 of 1953 on the file of the Sub Court Coimbatore is vitiated and a nullity as against the plaintiff for want of proper and effective representation therein of the plaintiff who was a minor during its pendency. The plaintiff who seeks to have the decree against him set aside contends that, when his father as his natural guardian was available and in every way interested in his welfare as his only son, his paternal grandfather was appointed as guardian and the gross negligence of this guardian in the conduct of the suit resulted in a decree being passed against him.

2. First the relevant facts of the case may be set out briefly. The properties in dispute in this suit belonged to one Palaniswami Goundan. He settled the suit properties on his grand-daughter, the second defendant in the suit and one Muthuswami who had been proposed as her husband, both of them minors, under the settlement deed dated 13-5-1936, conferring absolute rights in the properties on the second defendant and her proposed husband. The second defendant was represented for the settlement by her mother Valliammal as guardian and the proposed husband Muthuswami was represented by his father Ponnuswami as guardian. Along with the settlement, a maintenance deed came to be executed by the guardians for maintaining the settlor Palaniswami. The marriage of the second defendant with Muthuswami as proposed took place shortly after and the plaintiff is the child born to them on 30-10-1940.

Disputes arose between the two grandsons, the plaintiff's paternal grandfather Ponnuswami and the plaintiff's maternal

grandmother Valliammal, bringing about estrangement between the second defendant and her husband. The plaintiff's mother the second defendant, who had a half share in the properties under the settlement deed, usufructually mortgaged the same to the third defendant in the present suit under the original of Ex. B-8 on 30-6-1943 for Rs. 2,000. The family dispute finally got settled in a way and the second defendant and her husband, as the father and mother of the plaintiff, executed the settlement deed Ex. A-6 on 10-7-1943 in favour of their son, the present plaintiff. But the settlement deed had to be compulsorily registered. For the purpose of this settlement, the present plaintiff who was a minor then was represented by his paternal grandfather Ponnuswami as guardian. The first defendant got an assignment of the mortgage above referred to and filed the suit O.S. No. 386 of 1953 for recovery of the mortgage amount against the present second defendant and her minor son, the plaintiff, the settlee under Ex. A-6. The second defendant remained *ex parte* in that suit and in that mortgage suit the present plaintiff was represented by his paternal grandfather Ponnuswami as guardian *ad litem*.

The suit was hotly contested on behalf of the present plaintiff, the main plea in the mortgage suit on behalf of the plaintiff being that the mortgage was a sham and nominal transaction, not supported by consideration and had been antedated, having been executed after the present second defendant had parted with the title to the property under the settlement deed Ex. A-6 in favour of present plaintiff. The defence in the mortgage suit failed in the trial Court and in appeal, and the second appeal therefrom failed at the admission stage itself. It is seen from the records that senior advocates had been engaged on behalf of the present plaintiff at all stages. At the stage of the second appeal, the grandfather Ponnuswami was dead and the father Muthuswami himself preferred the second appeal as guardian *ad litem* of his minor son. And so the suit to set aside the decree.

3. In this suit for setting aside the mortgage decree by the plaintiff after coming of age on the substantial issue of fact whether there was gross negligence on the part of the guardian *ad litem* of the plaintiff in the conduct of the suit and the appeal therefrom, the learned District Munsif, Dharapuram, in a carefully considered judgment, finds against the plaintiff. He holds that there was no gross negligence on the part of the guardian of the plaintiff in the conduct of the suit and the appeal. This finding has been confirmed by the learned Subordinate Judge in appeal. He remarks that he cannot find anything in the oral evidence adduced in the case to show as to what facts or documents

were omitted to be placed before the Court and as to what acts or omissions on the part of the guardian amounted to gross negligence. He concludes that he was satisfied on the evidence adduced in the case that there was nothing to establish that any prejudice was caused to the appellant by any omission on the part of the guardian *ad litem* appointed in the case. He remarks that the guardian had done everything which he could reasonably be expected to do in the interests of the minor. This issue being a finding of fact, naturally the learned counsel confined his challenge of the judgments of the Courts below to the question whether the minor plaintiff was properly represented in the mortgage suit.

4. The objection to the representation put forward by the plaintiff is that when there was available his father, the natural guardian, he should have been appointed and in his presence the paternal grandfather was incompetent to act as his guardian *ad litem*. It is said that there was no need for the Court to overlook the natural guardian and appoint the paternal grandfather as the guardian. It is urged that the appointment of a proper person as guardian *ad litem* of a minor defendant is imperative, and, in the absence of due representation of the minor, the decree does not bind him and cannot be enforced against him. There can be no doubt and it is not questioned that a decree passed against a minor properly represented is binding upon him as much as a decree passed against an adult, and that when there has been proper representation, the minor, to avoid the decree, may show that his guardian was guilty of gross negligence in the conduct of the suit. The question, therefore, is whether there was proper representation of the minor in the former suit.

5. The rules relating to the appointment of guardian *pendente lite* for a minor defendant are to be found in O. 32, Civil P.C. Under O. 32, R. 3(1), any person who is of sound mind and has attained majority may act as his guardian for the suit, provided that his interest is not adverse to that of the minor. Rule 3(2) which is important in the context of the present contention may be set out:

"Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed as his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be." Rule 3(4) requires that an application for the appointment of a guardian taken out by the plaintiff shall set forth in the order of suitability a list of persons who are

competent and qualified to act as guardian for the suit for the minor defendant, the Court, for reasons to be recorded, being empowered to exempt the applicant from furnishing such a list. Rule 3 (5) sets out the particulars required in the affidavit in support of the application for appointment of guardian. This sub-rule does not indicate that before anybody else is considered, the claims of the guardian appointed or declared by Competent Authority, the natural guardian or the de facto guardian must be considered—see the requirement in Rule 3 (5) (c) for particulars of names and addresses of persons, if any, who in the event of either the natural or de facto guardian or the guardian appointed or declared by competent authority, not being permitted to act, are by reason of relationship or interest or otherwise, suitable persons to act as guardians for the minor in the suit. Rule 3 (7) may also be set out—

"No order shall be made on any application under sub-rule (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. . ."

It is seen from the records that in the mortgage suit the plaintiff therein, while applying for the appointment of a guardian for the minor, proposed the minor's father Muthuswami and his paternal grandfather Ponnuswami for the guardianship. Both the proposed guardians expressed their willingness to act as guardian and thereupon the Court appointed Ponnuswami, that is the paternal grandfather, as guardian, observing that "Ponnuswami alias Subbaraya Goundar is willing to be guardian and is appointed guardian as he is already acting as guardian". One must here bear in mind that Ponnuswami, the paternal grandfather, has been shown as the guardian of the minor in the settlement deed, Exhibit A-6. The father of the plaintiff in the present case in his evidence has stated that for the registration of the settlement deed Ex. A-6 (it was not registered on its execution and it was not compulsorily registered), though he was present, his father conducted the whole proceedings and that he and his wife, viz., the other defendant in the mortgage suit, recognised Ponnuswami as the guardian of his son in the settlement deed Ex. A-6. He went to the extent of stating that till his death he continued to be the guardian.

It is not contended that the procedure prescribed for the appointment of a guardian under Order 32, Civil P.C., was not followed in this case. I find nothing in Order 32 making it mandatory on the Court to

appoint the natural guardian where he expressed his willingness to be appointed as guardian ad litem and not exercise its discretion if it so considers and appoint another person as guardian ad litem for the suit. It is not the case for the plaintiff that any one has been appointed or declared as guardian by Competent Authority for him when he was a minor, to compel the Court to appoint such person as guardian ad litem, unless the Court considered that it was for the minor's welfare that another person should be appointed. Then the Court is enjoined to record its reasons. Rule 3 (7) of Order 32, Civil P.C., provides for notice of the application to be given to the father or other natural guardian of the minor where there is no guardian appointed or declared by Court. In this case notice went both to the father, the natural guardian and to the paternal grandfather and both expressed willingness. The records do not show any claim being pressed by the father against the grandfather or any objection being urged against the appointment of the grandfather as guardian ad litem. The Court has given reasons for its choice.

The circumstances of the case show that there would not have been any objection and it looks as if the father gave place for the grandfather. The essential requirement is that the person who is appointed as the guardian must be (1) a person of sound mind, (2) a major and (3) he must have no interest adverse to that of the minor in the matters in controversy. The Courts below find that no adverse interest has been made out in this case; and the trial Court has even indicated why the paternal grandfather was appointed guardian ad litem. The settlement deed by the father and mother was put in issue in that case as having preceded the mortgage sued upon, and Ponnuswami, the paternal grandfather, who was shown as the guardian of the minor by both father and mother in the settlement deed was chosen to represent the minor. It is one thing if a minor defendant is not represented at all, or a person appointed guardian ad litem whose interests were adverse to the minor. If a minor is not properly represented in the suit, he can contend that he cannot be considered to have been a party to the suit. But that is not the position here.

6. Learned counsel for the appellant referred to *Jivan Krishna v. Sailendranath*, AIR 1948 Cal 272. But this case has absolutely no relevance to the matter under consideration now. That is a case under the Guardians and Wards Act and with reference to that Act it was there pointed out that the appointment of a person as guardian other than natural guardian, under Section 7 (1) of the Guardians and Wards Act, implied under S. 7 (2) of the Act, the removal of the natural guardian and

that such a removal under Section 7(2) resulted in a permanent cessation of his powers under Section 41. Having regard to the provisions of the Guardians and Wards Act it was said that the appointment of a guardian by Court operated as a supersession of the natural or de facto guardian of a minor. Such a result does not follow on the appointment of a guardian ad litem for a minor defendant by the Court under the provisions of the Civil Procedure Code.

The rules under Order 32, Civil P.C., clearly contemplate the appointment of a person other than the natural guardian also as guardian ad litem. Order 32, Rule 7, (Rule 3 (7), (Mad.)) is very clear on this point. It only provides that no order shall be made on any application for the appointment of a guardian ad litem except upon notice to the guardian appointed and declared by Court and where there is no such guardian upon notice to the father or other natural guardian of minor. No doubt, the father would have a preferential right when there is no guardian appointed or declared by Competent Authority. Objections have to be heard which may be urged on behalf of any person served with notice under the sub-rule 3 (7) of Order 32, Civil P. C. and reasons have to be given if a preferential claim is overruled for another. But it does not follow that every irregularity in the appointment without more will vitiate the appointment.

7. A reference to *Kalachand Basak v. Amulyadhan Banerji*, 61 Cal 227 = (AIR 1934 Cal 474), would show that the appointment of a person as guardian ad litem in the presence of the natural guardian does not vitiate the representation of the minor in the proceedings. In that case in an earlier litigation, the defendant in that suit died leaving his wife and three infant children. The attorney for the opposite party intimated the widow that she must get herself appointed as guardian ad litem of her minor sons and that otherwise he would get an officer of the Court appointed as guardian. For the wife intimation was sent that she was in mourning on account of the then recent bereavement and that the matter may stand over for a fortnight. But the defendant in the latter suit was appointed guardian ad litem after the Court was satisfied that he had no interest adverse to the minors. When the defendant wanted instructions from the widow, she intimated that she was herself willing to act as guardian and that the defendant could acquaint the Court of the fact. The defendant did inform the Court of the widow's willingness; but the widow took no further steps to substitute herself as a guardian ad litem, and *Panckridge J.*, in the circumstances, remarked that he cannot see anything irregular in the appointment.

8. If a guardian ad litem has been appointed for a minor defendant and the

minor's interests have been duly looked after in the litigation, mere irregularities in the appointment of the guardian cannot render the decree nugatory against the minor. The minor, to avoid the decree, must further prove that he was not effectively represented in the suit and that he was prejudiced by the failure of the guardian to take pleas that could have been validly raised on his behalf.

Law insists that the minor's interests in the litigation should be taken care of and the minor represented in the litigation by an adult whose interests are not adverse to that of the minor. The minor's interests in the litigation should not be neglected or prejudiced, and Courts have to be jealous in observing the requirements of the law in this regard in letter and spirit. All the same when it is found that the guardian who had been acting for the minor in the suit had not let down the interests of the minor and when the minor was in no way prejudiced, it is immaterial if some irregularity in the appointment is found. If the purpose for which a guardian ad litem is appointed — to put forward pleas properly available for the minor in the case and protect his interest in the litigation by necessary representation — has been achieved, the minor cannot later, by another guardian or on becoming a major avoid the decree if it is against him, on the ground of some irregularity in the procedure adopted for appointing the guardian.

Here no procedural irregularity as such is alleged, but it is said that the father should have been appointed and not the grandfather. Even ignoring the fact that a reason has been given for the choice of the grandfather, on the findings of the Courts below, there has been effective representation of the minor in the suit and there has been no omission on the part of the guardian that has prejudiced the interests of the minor in the present suit. In *Rarichan v. Manakkal Raman*, 44 Mad LJ 515 = (AIR 1923 Mad 553), while a contention was urged that a guardian appointed by a competent authority under the Guardians and Wards Act, had been improperly superseded and a Court guardian appointed without recording proper reasons under Order 32, Rule 4, clause (2), it was observed at p. 519 (of Mad LJ) = (at p. 555 of AIR):

"Now in the first place as I have already said it is not very clear that he was so appointed (appointed by Competent Authority) plaintiff's own case being that he was not so appointed. But even if we take it that he had been so appointed, the failure to record reasons under Rule 4, clause (2), is only an irregularity in my opinion and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court."

"It follows that the view of the Courts below that the plaintiff was properly repre-

sented in the suit, O.S. No. 386 of 1953, on the file of the Sub-Court, Coimbatore, is correct.

9. In the result, the second appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 MADRAS 184 (V 57 C 47)

SRINIVASAN AND SADASIVAM, JJ

The State of Madras, Appellant v. Alameluthayammal and others, Respondents.

Appeals Nos. 388, 387, 389, 391, 393, 407 and 408 of 1962, D/-16-12-1968, from Order of First Addl. Sub. J., Coimbatore, in C.C. No. 147 of 1960.

(A) Land Acquisition Act (1894), S. 23 — Valuation — Site valued as house-site — Trees standing thereon cannot be valued as fruit-bearing trees — Value of trees as timber or fuel may be taken.

If a certain land has been valued as an agricultural land, it is reasonable to ascertain the capitalised income of the fruit-bearing trees in which case the period for computation of value should be taken as only ten years. But if the site is valued as a house site, the trees standing thereon cannot be valued on the basis that it is fruit-yielding tree and at best the value of the tree as timber or fuel alone can be taken into account. Otherwise, the valuation will really result in duplication of values. AIR 1926 Mad 945 (2), Rel. on.

(Para 5)

(B) Land Acquisition Act (1894), Ss. 25, 53 and 18 — Jurisdiction of Court in reference under S. 18 — It cannot award compensation more than claimed before Collector.

The Court has no jurisdiction in a reference under S. 18 to award anything more than what was claimed as compensation before the Collector. (Para 14)

Section 53 of the Act provides that, save in so far as they may be inconsistent with anything contained in the Act, the provisions of the Civil Procedure Code shall apply to all proceedings before the Court under the Act. The Court hearing a reference under S. 18 of the Act has power to allow an amendment of the pleadings in a reference. But the jurisdiction to allow such amendment cannot extend to increasing the claim to a figure beyond that which was claimed before the Collector, as it would be against the provisions of S. 25 (1) of the Act. (Para 13)

Cases Referred: Chronological Paras

(1926) AIR 1926 Mad 945 (2)

(V. 13) = 23 Mad LW 338,

Shanmuga Velayuda v. Collector of Tanjore

(1926) AIR 1926 Bom 365 (V 13) = 23 Bom LR 548, Collector of

Thana v. Chaturbbuj

(1924) AIR 1924 Mad 252 (V 11) =

45 Mad LJ 339, Thareesamma v.

Deputy Collector, Cochin

The Addl. Govt. Pleader, for Appellant; V. P. Raman, N. R. Chandran, S. R. Srinivasan, V. C. Palaniswami and C. Chinna-swami, for Respondents.

SADASIVAM, J.: The State of Madras represented by the Special Tahsildar and Land Acquisition Officer, Town Planning Scheme, Coimbatore, has preferred these appeals against the common order passed by the learned First Additional Subordinate Judge, Coimbatore, on C.C. Nos. 141 to 147 of 1960, on references made under Section 18 of the Land Acquisition Act (hereinafter referred to as 'the Act') by the Special Tahsildar and Land Acquisition Officer, Town Planning Scheme, Coimbatore. The lands concerned in these cases form one continuous block and they are situate in an important, busy and well-developed residential locality in Power House Road and the object of the acquisition was to widen the existing 75-feet broad road into a 100-feet road. There were buildings only in the lands concerned in Appeals Nos. 391 and 386 of 1962. The tenant who had put up a construction on the land concerned in Appeal No. 386 of 1962 has received compensation for the superstructure. The claim of the owner of that land has rightly been considered only on the same footing as the claim of the owners of the other lands on which there were no buildings.

2. The Land Acquisition Officer has treated the sites acquired as building sites for the purpose of valuation. The Notification under S. 4 (1) of the Act was made on 25-8-1959. The Land Acquisition Officer relied on two sale deeds, a registration copy of one of which alone has been marked as Exhibit B-3 in this case and valued the lands as on the date of the notification at 72 p. per square foot on the strength of the said sale deeds. The learned First Additional Subordinate Judge has, on a consideration of the oral and documentary evidence in the case, fixed the value of the land as on the date of the said notification at Rs. 1,000 per cent or Rs. 2.30 per square foot. He has considered this aspect of the case in detail in paragraphs 11 to 14 of his common order and we see no sufficient ground to differ from him on the question of the valuation of the land.

3. The registration copy of the sale deed marked as Ex. B-3 in the case and the other sale deed relied on by the Land Acquisition Officer relate to portions of land in T.S. No. 1268 situate at a distance of a furlong from the acquired sites and the notification in this case was made much later on 25-8-1959. Thus, the sale price mentioned in Ex. B-3 in respect of

a land at a distance of a furlong and at a very much earlier period cannot afford a real guidance to value the acquired sites as on the date of the notification. On 14-3-1959, that is much earlier to the notification in this case, an Award 1 of 1959 was passed by the Special Tahsildar, Coimbatore, a copy of which has been marked as Ex. A-1. The award relates to the acquisition of T.S. Nos. 1143 and 1144 situate in No. 3 Street, Gandhipuram. T.S. Nos. 1143 and 1144 are much nearer to the acquired sites than T.S. No. 1268. It is clear from Ex. A-1 that the sites have been acquired at the rate of Rs. 1,34p. per sq. ft. The valuation adopted in Ex. A-1 is based on a sale deed in respect of a land in T.S. No. 1066 dated 28-8-1958, that is, nearly a year prior to the notification under S. 4 (1) of the Act in this case.

4. The claimants rely on 3 sale deeds, Exs. A-2 to A-4. Exhibit A-3 dated 9-11-1957 is a sale deed in respect of an extent of 1½ cents of land in T.S. No. 1125 which is almost adjacent to the land concerned in Appeal No. 386 of 1962 and it abuts the Power House Road. The sale price of Rs. 1,000 in that document works out to Rs. 666.66 per cent. R.W. 1 Stanis Sundararaja Udayar, Special Tahsildar and Land Acquisition Officer, admitted that the market price of the sites in the locality was more in 1959 and 1960 than in 1957 and 1958. Exhibits A-2 and A-4 are registration copies of sale deeds executed on 9-3-1960 and 10-2-1960 in respect of 5½ and 7 cents of lands in T.S. Nos. 1259 and 1124 respectively, for Rs. 7,500 each. The value of one cent of land works out to Rs. 1,363.62 according to Ex. A-2 and Rs. 1,071.43 according to Ex. A-4. It is true the sale deeds are a few months after the date of the notification under S. 4 (1) of the Act, but prior to the notification under S. 6 of the Act made in 1960. Even the sale transactions subsequent to the notification under Section 4 (1) of the Act are relevant and they cannot be ignored. It is true that if the subsequent transactions are not bona fide and they have been brought about for the purpose of the acquisition proceedings, they will have no value. But no such attack has been made against the originals of Exs. A-2 and A-4. It is also true that if by reason of the notification under S. 4 (1) of the Act, the value of the lands in the neighbourhood has increased, it should be taken into account in considering the value adopted in the subsequent transactions.

It should be noted that the acquisition of an extent of 9,452 sq. ft. for the purpose of widening the Power House Road in one part it cannot affect the value of the sites in the neighbourhood. The sale deeds under the originals of Exs. A-2 and A-4 have come into existence within a few months of the notification under S. 4 (1) of the Act. The land sold under the origi-

nal of Ex. A-2 abuts the Power House Road and is just opposite to the sites acquired in this case. The land sold under the original of Ex. A-4 is about 100 yards from the site concerned in Appeal No. 391 of 1962. It is true there is a building with basement in the property sold under Exhibit A-2. P.W. 1, Mariappa Mudaliar, the vendee under Ex. A-2, has given evidence that the building is only on a small portion of the site and the basement is not worth anything. The learned First Additional Subordinate Judge has observed that even if the value of the basement is fixed at the maximum amount of Rs. 1,000, the value of the land alone would work out to Rs. 1,000 per cent. There was a shed on the land sold under the original of Exhibit A-4. P.W. 2, Nanjappa Gounder, the claimant in Appeal No. 391 of 1962, has stated that it is only a Mangalore-tiled shed on poles and the value of the same would not exceed Rs. 500. Thus, excluding the value of the shed, the value of the land works out to Rs. 1,000 per cent. The learned First Additional Subordinate Judge has rightly found on the evidence adduced in this case that the value of the acquired sites as on the date of the notification under Section 4 (1) of the Act was Rupees 1,000 per cent.

5. We have already referred to the fact that only in Appeals Nos. 386 and 391 of 1962, the valuation of buildings has to be considered. The value of site is the only question raised in the other appeals with the qualification that in Appeal No. 393 of 1962, there is a further question about the valuation of a coconut tree. The learned First Additional Subordinate Judge has in paragraph 29 of his judgment made an elaborate calculation of the net income from the coconut tree for a period of 20 years and fixed the value of the coconut tree at Rs. 252.40. The learned Government Pleader referred to the decision in Shanmuga Velayuda v. Collector of Tanjore, AIR 1926 Mad 945 (2), where it has been pointed out that if a coconut tree is to be valued on the basis of its yield, the period for computation of value should be taken as only ten years. The more important contention urged by the learned Government Pleader is that once a site has been valued as a house site, the coconut tree should not have been valued again on the basis of its being a yielding tree. This contention is well founded as such mode of valuation will really result in duplication of values. If the land had been valued as an agricultural land, it is reasonable to ascertain the capitalised income of the fruit-bearing trees. But if the site is valued as a house site, the tree could not be valued on the basis that it is a fruit-yielding tree and at best, the value of the tree as timber or fuel alone could be taken into account. In the decision above cited, it has been held that the land acquired under

the Act should not be valued as a building site and at the same time valued upon the footing of the produce of fruit of the tree remaining there.

In *Collector of Thana v. Chaturbhuj*, AIR 1928 Bom 365, it has been held that if the Court puts a fictitious value on the property, on account of its so-called potentiality for building purposes, then that is an inclusive rate and nothing can be allowed in addition for the trees. In *Thareesamma v. Deputy Collector, Cochín*, 45 Mad LJ 339 = (AIR 1924 Mad 252), the contention of Mr. G. V. Ananthakrishna Aiyar for the appellants (claimants) that they were entitled to the value of the trees on the land on the footing that they were fruit-bearing trees was rejected as untenable because the basis of the claim was that the lands were valued as building sites and the claimants could not also have the advantage which they would be entitled to only if the lands had been dealt with as agricultural lands. It is pointed out in the decision that what has been awarded to the claimants is an inclusive price and that they cannot be heard to say that the trees should be separately assessed as fruit-bearing trees. The learned First Additional Subordinate Judge has erred in valuing the coconut tree as a fruit-bearing tree by computing the income for 20 years and awarding compensation of Rs. 252.40 in respect of the same. The learned Government Pleader has no objection to the value of the tree fixed by the Land Acquisition Officer at Rs. 45. Therefore, the order of the learned First Additional Subordinate Judge fixing compensation for the coconut tree at Rs. 252.40 is set aside; that part of the award made by the Land Acquisition Officer fixing the value of the tree at Rs. 45 is restored. For the foregoing reasons, Appeal No. 898 of 1962 is allowed in respect of the difference in valuation as regards the coconut tree, but is otherwise dismissed. The appellant and the respondent in the appeal are entitled to costs in proportion to their success.

6. The other appeals, Appeals Nos. 387, 389, 407 and 408 of 1962, in which the question of valuation of the land is the only question involved, are dismissed with costs in A.S. No. 389 of 1962.

7. Appeal No. 391 of 1962 is against the award in O.P. No. 196 of 1960 relating to compensation case No. 141 of 1960. The buildings on the acquired site which were demolished consisted of a laundry, a cycle shed and mutton stall which were leased on a monthly rent of Rs. 15, 20 and 10, respectively. There is the evidence of P.W. 2, Nanjappa and the evidence of P.W. 5, Gopinath, who is a tenant of the fourth room south of the three rooms which were demolished by reason of the acquisition. In fact, the claimant has asked for compensation for the damage to the wall

of the room occupied by P.W. 5 Gopinath. The tax receipts, Exs. A-6 and A-7, have also been produced and the half-yearly tax of Rs. 47.89 supports the claim of P.W. 2, that he was getting rent of Rs. 45 per month. In fact, there is no contra evidence in this case. The learned First Additional Subordinate Judge has taken the market value of the site with the building at 25 years annual net income on the ground that the guilt-edged securities fetch 4 per cent per annum on the date of the notification 25-8-1959. On this basis he arrived at the value of Rs. 10,005.50 and adding a sum of Rs. 500 as compensation for the damages to the wall of the fourth room and the demolition of the latrine (partly used for the three rooms that were demolished and partly used for the other portion of the building of the claimant P.W. 2, Nanjappa which have not been acquired), he found that P.W. 2 was entitled to Rupees 10,505.50.

8. It is not possible to rely on the evidence of R.W. 2, Mathal, Minor Irrigation Officer, to find out the value of the building on the basis of the cost of construction of such buildings. It is true R.W. 2 Mathal stated that the buildings are katcha and not pucca buildings. But in cross-examination he has stated that he does not recollect the rate per cubic foot. In fact, the learned Government Pleader did not attempt to rely on the evidence of R.W. 2.

9. Even in respect of the value of the building in Appeal No. 386 of 1962, the evidence of P.W. 3, Raju, the husband of the claimant in O.P. No. 202 of 1960, is that one room was let at Rs. 20 per month and two rooms at Rs. 15 each and a bunk at Rs. 10 and thus the buildings were fetching Rs. 60 per month. P. W. 7, Raju a tenant in respect of one of the five rooms has also been examined to corroborate the evidence of P.W. 3. The learned First Additional Subordinate Judge has found that the value of the land acquired in T.S. No. 1006/1 will be Rs. 12,016 and he has separately valued the land in T.S. No. 1007/1 as a vacant site. The evidence of R.W. 2 is that the buildings were of brick and lime mortar and plastered with cement mortar. We need not repeat the comments made by us with regard to the evidence of R.W. 2.

10. In both O.P. Nos. 196 and 202 of 1960 against which Appeals Nos. 391 and 386 of 1962 have been filed, the decrees are not in conformity with the order of the learned First Additional Subordinate Judge. In the decrees the amount which the claimants are entitled to get have been wrongly mentioned as the 'enhanced' amounts to which they are entitled in addition to the amount awarded by the Land Acquisition Officer. The decree should have been drafted in accordance with the order,

11. The main substantial question argued in both these appeals, Appeals Nos. 386 and 391 of 1962, is whether the claimants in these appeals are entitled to the amounts awarded as compensation which are in excess of the amounts claimed by them in the counter-statement filed by them in the lower Court in the reference under Section 18 of the Act. Thus, in paragraph 2 of the counter-statement filed by the claimant in C.C. No. 147 of 1960 in O.P. No. 202 of 1960 on the file of the lower Court, she has stated that the site acquired from her was worth at least Rs. 1,000 per cent. It is clearly stated in that paragraph that capitalising the value at 20 years' purchase, the loss to the claimant was Rs. 14,400. But the claimant has specifically stated that she has confined her claim to the modest amount of Rs. 5,000. In para. 9 of the counter-statement the claimant has prayed that the Court may fix the price of the site acquired at Rupees 1,000 per cent and grant Rs. 5,000 towards compensation for the loss of income from the buildings. Thus, she has claimed only Rs. 13,944.40. As against the amount of Rs. 4,313.14, awarded by the Land Acquisition Officer, she wanted an enhanced amount of Rs. 9,631.26. But the learned First Additional Subordinate Judge has awarded enhanced amount of Rupees 10,296.22, according to the order, and it has been wrongly mentioned in the decree as Rs. 14,609.36. The contention of the learned Government Pleader is that the Court had no jurisdiction to grant anything more than the amount of Rs. 9,631.26 claimed by Alameluthayammal, the respondent in App. 386 of 1962.

12. Similarly in App. 391 of 1962, the claimant Nanjappa Goundan has mentioned in Para. 6 of the counter statement that the value of the acquired site cannot be less than Rs. 1000 per cent and further stated that though he would be entitled to a sum of Rs. 18,000 for the buildings on the basis of 25 years' annual net income, he is content to receive Rs. 4500 in all for the buildings. Including the value of the latrine he has claimed that he is entitled to Rs. 5000 for the buildings, apart from Rs. 1000 for the construction of the wall for the room not included in the acquisition proceedings. In the last paragraph he has stated that he is entitled to compensation at Rs. 1000 per cent for the site, Rs. 5000 for the loss of the buildings and Rs. 1000 for the other inconveniences referred to above. Thus including the 15 per cent solatium he has claimed Rs. 8973. 20 P. and deducting Rs. 1674-95 awarded by the Land Acquisition Officer, he has claimed by way of enhancement Rs. 7298-25. But the learned First Additional Subordinate Judge has awarded enhanced compensation of Rs. 10505-50. The contention of the learned Government Pleader is that the Court had no jurisdiction to grant

anything more than the sum of Rs. 7298-25, claimed by Nanjappa Gounder.

13. Thus the important question for consideration in these two appeals 386 and 391 of 1962 is, whether the Court has jurisdiction in a reference under Section 18 of the Act, to award compensation in excess of the amount prayed for by the claimant, Section 9 of the Act provides for notice to be given by the Collector to persons known or believed to be interested in the property sought to be acquired calling upon them to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests. Under Section 18 of the Act, any person interested, who has not accepted the award of the Land Acquisition Officer may by a written application require that the matter be referred by the Collector for the determination of the Court. Section 25 of the Act is the relevant section for determining the jurisdiction of the Court with regard to the amount of compensation and it runs as follows:

"1. When the applicant has made a claim to compensation, pursuant to any notice given under Section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under Section 11.

2. When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

3. When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector."

Thus, under sub-clause (1) of Section 25 of the Act, the Court has no jurisdiction to award anything more than what has been claimed pursuant to any notification given under Section 9 of the Act. Sub-clause (2) of Section 25 of the Act provides for cases where the applicant has refused to make such a claim, or has omitted without sufficient reason to make such claim. In such cases, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector. But no objection was taken to the reference under Section 18 of the Act on the above ground. The Land Acquisition Judge will be incompetent to award a sum exceeding the amount awarded by the Land Acquisition Officer where the claimant did not state the specific amount of compensation for his property in pursuance of the notification under Section 9 of the Act, Clause (3) of Section 25 of the Act gives power to the Court to

award compensation of a sum not less than the amount awarded by the Collector in cases of omission by the claimant to make such claim, when it is satisfied that there was sufficient reason for such failure. This clause gives power to the Court in suitable cases to relieve the party from the stringent provisions contained in sub-clause (2) of Section 25 of the Act. Section 53 of the Act provides that save in so far as they may be inconsistent with anything contained in the Act, the provisions of the Civil Procedure Code shall apply to all proceedings before the Court under the Act. The Court hearing a reference under Section 18 of the Act has power to allow an amendment of the pleadings in a reference. But the jurisdiction to allow such amendment cannot extend to increasing the claim to a figure beyond that which was claimed before the Collector, as it would be against the provisions of Section 25 (1) of the Act. The appellants did not take any objection to the reference under S. 18 of the Act and the learned Government Pleader took exception only to the grant of compensation in excess of the amounts claimed in the counter statement of the claimants.

14. Having regard to the above principles, we are unable to accept the contention of the learned Advocate for the claimants, unsupported by any authority, that the Court has jurisdiction to award an amount of compensation determined on a consideration of the relevant provisions of the Act, irrespective of the fact that the claim is for a lesser amount. Even in a suit the plaintiff cannot get a decree for more than the amount claimed by him unless he gets the plaint amended. The provisions of the Civil Procedure Code have been made applicable to the Act in so far as they are not inconsistent with anything contained in the Act. The Court has, therefore, no jurisdiction to award anything more than what was claimed as compensation in the several cases.

15. For the foregoing reasons, we uphold the objection of the learned Government Pleader that the enhancement prayed for by the claimants in App. Nos. 386 and 391 of 1962, should be confined to the amounts claimed by them in their counter statements in the lower Court and we order accordingly. Thus the said appeals are allowed to this extent, namely, that the enhancement allowed by the Court shall be reduced to the amounts claimed in the counter statements, but they are dismissed in other respects. The parties in these appeals will be entitled to costs in proportion to their success.

Order accordingly.

AIR 1970 MADRAS 188 (V 57 C 49)

SPECIAL BENCH

M. ANANTANARAYANAN C. J.,

RAMAKRISHNAN AND NATESAN, JJ.

Doris Padmavathy, Petitioner v. V. Christodass, Respondent.

Matrimonial Case No. 6 of 1967, D/- 11-2-1969.

(A) Divorce Act (1869), Section 10 — Dissolution of marriage — Petition by wife on ground of adultery coupled with cruelty — Proof of grave cruelty alone is not sufficient — Mere assertion of adultery is also not enough.

Cruelty although grave is not per se a ground for dissolution of the marriage under Section 10, though it is a ground in itself for the grant of a decree for judicial separation between the parties. Adultery coupled with cruelty or adultery coupled with desertion for two years or more, must be established before the relief of divorce can be claimed. (Para 6)

The mere fact that the other party to the proceeding is ex parte, does not exonerate the Tribunal from the duty to see that the evidence is adequate to afford the basis for the conclusion that, in the particular case, the marriage has to be dissolved and matrimonial status disrupted. AIR 1963 Cal 133, Distinguished. (Para 7)

The Court must also not be satisfied with the mere assertion of a party that the other party is living in adultery, where the source of knowledge is not revealed and the party does not even purport to give evidence from personal knowledge as distinguished from hearsay. Collusion is also one of the matters that will have to be excluded before any relief can be granted. (Para 7)

(B) Divorce Act (1869), Section 22 — Decree nisi granted by District Judge dissolving marriage between parties — Reference under Sections 10 and 17 of the Act for confirmation — Cruelty alone proved and not adultery — High Court is competent under Section 22 to grant decree for judicial separation. (Para 8)

Cases Referred: Chronological Paras
(1968) AIR 1968 Cal 133 (V 55) =
71 Cal WN 605, Adelaide v. William

M. Subramania Rao and T. C. Ram-mohan, for Petitioner; S. I. Samiulla, I. A. Salam, T. Salvaraj and S. Abdul Satta, for Respondent.

M. ANANTANARAYANAN, C. J.: This is a reference under Ss. 10 and 17 of the Indian Divorce Act IV of 1869 made by the learned District Judge, Tiruchirappalli, for confirmation of the decree nisi granted by him dissolving the marriage between Doris Padmavathi (petitioner) and her husband V. Christodass (respondent). We

KM/LM/F791/69/MV/JM

may state, at the outset, that the respondent has remained *ex parte* throughout, and that the petitioner seeks divorce on the ground specified in a clause of Section 10 of the Act, namely, "adultery coupled with such cruelty as without adultery would have entitled her to divorce *a mensa et thoro*."

2. The facts are quite simple. In her petition, the petitioner states that she married the respondent on 15-9-1958, according to the rights of the Christian religion. Immediately after the marriage, the husband and wife lived together at Bhilai and later at Tiruchirapalli. The respondent was then transferred in 1961 to the Thermal Station at the Neyveli Lignite Corporation. The respondent was in poor health and began to act in a cruel manner towards the petitioner, sometimes even using physical violence. She tolerated this, hoping that his conduct would improve, as also, his health. On 17-9-1966, the respondent was enraged at the refusal of the petitioner to give finance for a foreign trip, and he beat her and actually attempted to throttle her. On hearing her cries, her mother, who was in the next room, had to intervene, and save her. The petitioner apprehended actual danger to her life, and left the house of the respondent with her mother. On 19-11-1966, there was another assault by the respondent against the petitioner and the respondent even made an attempt to drag her to the street and to use physical violence.

3. In addition to these averments of grave cruelty, the petitioner alleges that the respondent was leading an immoral life, that he deserted the petitioner, that he was suffering from venereal disease and that, after leaving her, the respondent has been living in adultery with one Elizabeth, daughter of Doraippan, without lawful marriage.

4. The petitioner has examined herself, and she has given evidence in some detail about the cruelty by the respondent towards her. She then adds that the respondent was later living an immoral life and that "he is living in adultery with one Elizabeth, daughter of one Dorakannu, who is distantly related to me."

5. The petitioner is corroborated by P. W. 2, who speaks to the incident on the 19th November when the respondent beat the petitioner and snatched away her tali. Another witness is P. W. 3, who deposes to the same incident of the assault by the respondent, and the removal of the tali of the petitioner. P. W. 3 says "The husband beat, kicked and mercilessly assaulted P. W. 1". On this evidence, the learned Judge has granted the decree *nisi*, that we have earlier referred to.

6. We have carefully scrutinised the evidence and we are satisfied that there is sufficient evidence, both of the petitioner

and the witnesses who corroborate her, concerning the grave cruelty of the respondent towards the petitioner. But unfortunately for the petitioner, such cruelty *per se* is not a ground for dissolution of the marriage under Section 10, though it is a ground in itself for the grant of a decree for judicial separation between the parties. It is conceded by the learned counsel for the petitioner that mere cruelty is not enough and that adultery coupled with cruelty, or adultery coupled with desertion for two years or more, must be established before the relief of divorce can be claimed.

7. We are quite unable to accept that there is any evidence in this case, with regard to the alleged adultery, upon which we could arrive at a reasonable inference against the husband. As precedents have repeatedly laid it down, adultery is the matrimonial offence of sexual intercourse with another, by one of the spouses, during the subsistence of the marriage, as a consensual act or relationship. The petitioner, no doubt, alleges that there was such adulterous relationship between the respondent and a certain Elizabeth, named in the petition. But, except for the bare averment, the evidence on this aspect is totally unsatisfactory. Even the name of the father of this Elizabeth is given out as Doraippan in the petition, and as Dorakannu in the testimony of P. W. 1. The statement "He is living in adultery with one Elizabeth is bare, and without amplification. We are not certain whether this is based on personal knowledge and, conceivably, it may be pure hearsay. The fact that the respondent did not appear to contest the proceeding can never be regarded as any safe basis or ground for acceptance of such vague and indefinite testimony, for the compelling reason that this Court in such matters, does not merely act as a Tribunal of adjudication between the rights of private parties; the status of matrimony is involved as well as the interests of society, and the Court has the right and duty to see that the matrimonial offence of adultery, if alleged by either spouse, is properly established by evidence that a Court can accept. Collusion is one of the matters that will have to be wholly excluded, before any relief can be granted, and for this reason also, the Court must not be satisfied with the mere assertion of a party, where the source of knowledge is not revealed and the party does not even purport to give evidence from personal knowledge as distinguished from hearsay. Learned counsel for the petitioner has drawn our attention to certain observations of Mukherjee J. in *Adelaide v. William*, AIR 1968 Cal 133, at p. 144. But we find, on a careful perusal of that decision, that the facts of that case were very different, involving other evidence including employment of a private detective, and that the learned Judge incidentally made an observation, in accepting

and acting on the evidence for adultery, that he also took into consideration the fact that the husband had not chosen to appear in Court and defend himself against the charge. We do not understand this decision as laying down any different principle, from the broad principle which has been reiterated in such cases, that the mere fact that the other party to the proceeding is *ex parte*, does not exonerate the Tribunal from the duty to see that the evidence is adequate to afford the basis for the conclusion that, in the particular case, the marriage has to be dissolved and matrimonial status disrupted.

8. As has been the course taken by us in similar cases where cruelty alone is proved, and not adultery, we are competent to grant a decree for judicial separation under Section 22 of the Act, on the ground of the established grave cruelty. In the present case also, we accept the reference to this extent, and grant a decree for judicial separation between the parties. The learned counsel for the petitioner submits that, if the alleged adulterous relationship between the respondent and a third party is even now continuing, it may be open to the petitioner to take out fresh proceedings for divorce upon that fresh and future cause of action. We do not desire to make any observations in anticipation on such a matter; but if the necessary facts exist, the petitioner may certainly proceed to such remedies at law as the petitioner may be advised to take. No order as to costs throughout.

Reference partly accepted.

AIR 1970 MADRAS 190 (V 57 C 49) RAMAKRISHNAN AND SADASTIVAM JJ.

Somasundaram Mills (P.) Ltd., Coimbatore, Appellant v. Union of India represented by Commissioner of Income Tax, Madras and others, Respondents.

Appeal No. 469 of 1963, D/- 9-7-1969, from decree of Principal Sub-J., Coimbatore, in Original Suit No. 182 of 1961.

(A) Civil P. C. (1908), S. 73 — Income Tax Act (1922), Sec. 46 — Priority of debts due to Government — Right of priority is a common law right recognised in India and preserved under Article 372 of the Constitution — Principles of priority — Executing Court should be specifically moved — Attachment by Collector in independent proceedings for recovery of arrears under Section 46, Income Tax Act would not suffice for enforcing priority — (Constitution of India, Art. 372).

The right to priority of Government dues over other dues to be recovered from a debtor is a common law right which was recognised in India before the Indian Constitution, and is preserved after the coming

into force of the Constitution by reason of Article 372. Before priority can be claimed, when the assets are in the possession of the executing Court, the Crown (or the Government) has to apply to the Court for getting priority. The request may be made in a simple application; no special form is necessary. At the time of the application of the Crown (or the Government) the assets should be the property of the debtor and not of the decree-holder. If the assets have become the property of the decree-holder the claim for priority cannot be enforced. If the Crown (or the Government) had been negligent and had failed to apply before the amounts were paid over to the decree-holder, his rights would have supervened, and thereafter it is not open to the Crown (or the Government) in exercise of the claim for priority, to demand that the amounts paid over should be returned to them. Case law discussed. (Para 5)

An attachment by the Collector in independent proceedings for the recovery of arrears permitted under Section 46 of the Income Tax Act, would not suffice for the purpose of enforcing the priority before the Executing Court. It is necessary that the Executing Court should be specifically moved by the Government while the assets are in its custody, as the property of the judgment debtors for granting the priority. The relief to be granted is in respect of amounts in Court belonging to the debtor. (Paras 8, 15)

(B) Civil P. C. (1908), Section 73 — Income Tax Act (1922), Section 46 — Government debt — Priority of — Lots attached by decree holder — Government must apply to Executing Court before particular sale proceeds are distributed to decree holder after sale of those particular lots — Government's claim cannot be enforced against the amount realised in execution by sale of lots and paid over to attaching decree holder long before the application by Government.

The Government's claim for priority cannot be enforced against the amount which has been realised in execution by sale of lots, and paid over to the attaching decree holder, long before the application was made by the Government Department to the Executing Court for the relief.

(Para 17)

In the course of execution the lots attached by the decree holder need not be sold all together, they could be sold piecemeal, and the sale could be stopped when a sufficient number of lots has been sold to meet the decree-holder's claim. The sale in such a case of each lot is viewed independently and the proceeds, as and when the lot is sold, are adjusted towards the decree and paid over to the decree holder without waiting for the sale of the entire lots for satisfying the decree holder's claim. Therefore, when relief is sought by the Government for enforcing its right of priority

against any part of the sale proceeds in the custody of the Court, the Government must apply to the Executing Court before the particular sale proceeds are distributed to the decree holder after the sale of those particular lots. It would not be open to the Government to apply after the particular lots are sold and the proceeds had been distributed and urge, that the entire execution is not complete, and therefore what has taken place before the application following the sale of particular lots, should be reopened for the purpose of enforcing the claim of priority. (Para 16)

It is for the authorities of the Income-tax department, and particularly the Collector and the Tahsildar, who have been entrusted with the duty of recovering the arrears, to be vigilant and take steps to realise expeditiously the Government dues. After having failed to do so, it is not open to them to file a separate suit seeking for direction to the decree holder to refund the money which had been paid to him in due accordance of execution according to law. (Para 18)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1061 (V 52) =
(1965) 2 SCR 289, Builders Supply Corporation v. Union of India 6
(1962) AIR 1962 Mad 59 (V 49) =
(1961) 2 Mad LJ 398 (FB), Collector of Tiruchirapalli v. Trinity Bank Ltd. 8
(1956) AIR 1956 Cal 23 (V 43) =
59 Cal WN 1117, Basanta Kumar v. Panchu Gopal 11, 14
(1955) AIR 1955 Cal 423 (V 42) =
59 Cal WN 701, Murli Tahilram v. Asoomal and Co. 12
(1938) AIR 1938 Mad 360 (V 25) =
ILR (1938) Mad 744 (FB), Manickam Chettiar v. Income-tax Officer, Madura 7, 8
(1936) AIR 1936 Mad 132 (V 23) =
ILR 59 Mad 428, Deputy Commr. of Police, Madras v. Vedantam 10
(1918) AIR 1918 Mad 1111 (V 5) =
ILR 40 Mad 767 = 18 Cri LJ 426, Pichu Vadhiar v. Secy. of State for India 9
(1903) ILR 26 Mad 179, Ramanathan Chettiar v. Subramania Sastrigal 16

G. Vasantha Pai, M. Sundaram and D. Padmanabha Pai, for Appellant; V. Balasubramanian and V. Kunchithapadham, for Respondents.

RAMAKRISHNAN, J.: This appeal is filed by Messrs Somasundaram Mills (Private) Limited, Coimbatore, the third defendant in O.S. No. 182 of 1961, on the file of the learned Subordinate Judge of Coimbatore. The plaintiff, the principal respondent in this appeal, is the Union of India, represented by the Commissioner of Income-tax, Madras. The first defendant is a partnership firm represented by its partners Somasundaram Chettiar and Kala-

raja Chettiar. One Arunachala Chettiar is the second defendant. The point in issue in this appeal is the nature of the priority to be given to the claims of the State over the claims of other money creditors.

2. The facts necessary for the consideration of the present appeal can now be set down briefly. For recovery of arrears of income-tax due by the first and second defendants to the Income-tax Department, seven certificates were issued under Section 46(2) of the Indian Income-tax Act, 1922, to the Collector of Coimbatore, by the authorities of the Income-tax Department for the purpose of recovery. Under the Revenue Recovery Act, The income-tax assesseees were the owners of shares in Kaleeswarar Mills Limited, Coimbatore. On receiving the certificates the Collector of Coimbatore issued prohibitory orders on 30-3-1957 to Kaleeswarar Mills Limited against transferring the shares. The Collector also issued Exhibit A-11 proceedings appointing the Tahsildar of Coimbatore as receiver of the shares in respect of which he had issued prohibitory orders, to Kaleeswarar Mills. The Tahsildar was directed to take immediate steps to sell the attached shares of the defaulters in auction and report the result in due course.

3. Unfortunately the Tahsildar did not take action accordingly, but as the lower Court has described, "slept over the matter." In the meantime, the third defendant, a creditor of defendants 1 and 2, who had obtained a simple money decree against them in O.S. No. 102 of 1957, attached the aforesaid shares of Kaleeswarar Mills and sold them in Court auction subject to the first charge in favour of one Umayal Achi, the wife of one of the partners of the first defendant. These shares which had been attached were divided into five lots and sold successively during several dates in 1958. The third defendant, after adjusting the claim of the prior chargeholder, received Rs. 20,245, out of the sale proceeds of the shares on 23-12-1958 and 24-12-1958. Some more shares, about fifty in number, were sold on 22-12-1959 and the sale proceeds of Rs. 6,000 were deposited in the Court. Before that amount had been paid out to the decreeholder, the Union of India represented by the Income-tax Officer, applied to the District Judge of Coimbatore, the executing Court, under Exhibit B-4, referring to the attachment for income-tax arrears and the prohibitory order issued by the Collector on March 30, 1957. The application prayed for payment out of Rs. 6,000 to the Income-tax Department for adjustment against the arrears of tax due from Kalaraja Chettiar. This prayer was granted. Then on 21-6-1961 a notice was sent by the advocate for the Union of India to the three defendants stating that the amount which the third defendant had realised from the sale proceeds of the shares on 23-12-1958

and 24-12-1958, namely, Rs. 20,245, in law belonged to the Income-tax Department, that it had been taken away by the third defendant, that the amount, by the right of priority of the Crown, belonged to the Government and that it should be paid over to the Government. This claim was denied and the present suit was filed for the recovery of the said amount.

4. The learned Subordinate Judge held that, notwithstanding the fact that the suit amount had been paid to the decree-holder in execution and that only subsequently the Government made an application to the executing Court for enforcing its priority the decree-holder was bound to return the money to the Government. A decree was passed accordingly in favour of the plaintiff with costs against the third defendant. It is against this decision that the present appeal is filed.

5. Learned Counsel Sri Vasantha Pai for the appellant has referred to a series of decisions at the time of the bearing of the appeal, which have a bearing on the question of the priority of Government dues over other dues to be recovered from a debtor. The main principles which can be culled from these decisions are the following. This right to priority is a common law right which was recognised in India before the Indian Constitution, and is preserved after the coming into force of the Indian Constitution by reason of Art. 372. Before priority can be claimed, when the assets are in the possession of the executing Court, the Crown (or the Government) has to apply to the Court for getting priority. The request may be made in a simple application; no special form is necessary. At the time of the application of the Crown (or the Government) the assets should be the property of the debtor and not of the decree-holder. If the assets have become the property of the decree-holder, the claim for priority cannot be enforced. If the Crown (or the Government) had been negligent and had failed to apply before the amounts were paid over to the decree-holder, his rights would have supervened, and thereafter it is not open to the Crown (or the Government) in exercise of the claim for priority, to demand that the amounts paid over should be returned to them.

6. We shall briefly refer to the decisions cited in this connection. Builders Supply Corporation v. Union of India, AIR 1965 SC 1061, lays stress upon the fact that this right of priority is a common law right accepted in India and preserved under Article 372 (1) of the Constitution.

7. The decision in Madickam Chettiar v. Income-tax Officer, Madura, AIR 1938 Mad 360 (FB), lays down that the Crown's priority can be enforced by invoking the inherent power of the Court under Section 151 of the Civil Procedure Code by an application for the payment of the debt

due to the Government, without having to file a suit. It was pleaded that the executing decree-holder, having attached the properties, his priority as a secured creditor should be recognised. It was held that such a right was not given to him by the attachment, and that the Crown's right should be given priority in pursuance of its application made before there was any payment of the debts to the decree-holder.

8. Collector of Tiruchirapalli v. Trinity Bank Ltd., (1961) 2 Mad LJ 398 = (AIR 1962 Mad 59) (FB), was a Full Bench decision which covers a variety of topics with which we are not now concerned here. At p.401 (of Mad LJ) = (at p. 62 of AIR), the earlier decision in AIR 1938 Mad 360 (FB) was referred to for the view that the Crown was entitled to prior payment over all unsecured creditors and that there was no reason why the Crown should not be entitled to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor without having to file a suit. It is clear, therefore, from the above observations that the Crown has got a duty to apply to the executing Court for an order granting its priority and that the relief to be granted is in respect of amounts in Court belonging to the debtor.

9. The decision in Picbu Vadhiar v. Secy. of State for India, ILR 40 Mad 767 = (AIR 1918 Mad 1111), lays down that the surplus of sale proceeds in the hands of a mortgagee was held by him in trust for the mortgagor-debtor and, therefore, the Crown could enforce its claim against that amount, by way of priority.

10. The decision in Deputy Commr. of Police, Madras v. Vedantam, AIR 1936 Mad 132, also lays emphasis on the executing Court receiving notice of the Crown's debt, for which it claims priority.

11. Basanta Kumar v. Panebu Copal, AIR 1958 Cal. 23, is a Bench decision where it was held:

"Where the executing Court allows a claim for rateable distribution by a decree-holder and all that remains to be done is the ascertainment of the exact amount which each decree-holder is entitled to and payment of the same, the money in the hands of the Court can no longer be considered in law to be the judgment-debtor's money. If, therefore, subsequent to such order, a letter of attachment in respect of a public demand due from the judgment-debtor is received by the executing Court, the latter cannot take any action on such letter on the basis that it is still the judgment-debtor's money.

The executing Court having once declared that it is decree-holder's money, would be clearly wrong in complying with the letter of request of the certificate officer to remit the sale proceeds to him. In such a case the question of priority of State's claim does not arise."

12. This decision as well as the earlier decision of Mukharji, J. in *Murli Tahilram v. Asoomal and Co.*, AIR 1955 Cal 423, draw a dividing line, even at an earlier stage before the actual payment to the decree-holder. If the Court had passed an order for payment to the decree-holder before the application by the Government for claim to priority had been received, even at the stage according to the Calcutta decision, the money ceases to belong to the judgment-debtor, and must be deemed to belong to the decree-holder, therefore the Crown's claim for priority could not be granted, if it was made after the passing of the order. But in the present case, such a situation does not need to be visualised; not merely has the Court made a direction for payment of the money to the decree-holder, but it has also been paid to the decree-holder before the Government's application was made to the executing Court.

13. The aforesaid principles are referred to by Mulla in his Commentaries on the Code of Civil Procedure (Vol. I, 13th Edn.), under Section 73, at p. 355, where the following observations are found:—

“But this priority exists only so long as the assets remain the property of the judgment-debtor. When an order for rateable distribution is made, the title of the judgment-debtor to the fund in Court is extinguished and with that the right of the Government to proceed against it must cease, there being no question thereafter of priority. It was accordingly held that, where an order for rateable distribution had been made, a claim made thereafter by the Certificate Officer under the Public Debts Recovery Act for payment out of the fund in Court was not maintainable.”

14. It will be noticed that the principle referred to by Mulla in the above extract is derived from the several decisions to which we have just now referred, in particular, the decision in AIR 1956 Cal 23.

15. The learned counsel appearing for the respondent (Income-tax Department), Sri Balasubramaniam, urged that in the present case there has been attachment by the Collector of the entire shares in 1957 itself and therefore it was sufficient to give the Government priority. We are not inclined to accept this argument. The decisions above referred to clearly lay down the necessity for an application to be made to the executing Court which has the assets in its custody. An attachment by the Collector in independent proceedings for the recovery of arrears permitted under Section 46 of the Income-tax Act, would not suffice for the purpose of enforcing the priority before the executing Court. It is necessary that the executing Court should be specifically moved by the Government while the assets are in its custody, as the property of the judgment-debtors for granting the priority. In any event, according to the

decision of the Calcutta High Court, the application should be made even before the order for rateable distribution is made. But we are not expressing any opinion on that part of the decision, because it does not arise for consideration in this case. Here we have an *a fortiori* case where payment has also been made to the decree-holder before the application was made by the Department to the executing Court.

16. It was next urged by the learned counsel for the Department, that it would suffice to give the right of priority to the Government if their application is made before the entire assets attached in execution are realised and distributed. It is urged that in the present case the application has been made before the entire set of lots of shares had been sold out following their attachment, and that, therefore, priority should be given even as against the proceeds of the lots sold earlier and the decree-holder should be asked to refund the amounts. With this contention also we are unable to agree. It is well known that in the course of execution the lots attached by the decree-holder need not be sold all together, that they could be sold piece-meal, and that the sale could be stopped when a sufficient number of lots has been sold to meet the decree-holder's claim. The sale in such a case of each lot is viewed independently and the proceeds, as and when the lot is sold, are adjusted towards the decree and paid over to the decree-holder without waiting for the sale of the entire lots for satisfying the decree-holder's claim. Therefore, when relief is sought by the Government for enforcing its right of priority against any part of the sale proceeds in the custody of the Court, the Government must apply to the executing Court before the particular sale proceeds are distributed to the decree-holder after the sale of those particular lots. It would not be open to the Government to apply after the particular lots are sold and the proceeds had been distributed and urge that the entire execution is not complete, and, therefore, what has taken place before the application following the sale of particular lots, should be reopened for the purpose of enforcing the claim of priority. Our attention was drawn to an earlier decision of this Court of a single Judge in *Ramanathan Chettiar v. Subramania Sastrigal*, (1903) ILR 26 Mad 179, where a different view has been taken as regards the sale of lots in execution. But in that case the learned Judge has expressed his view that the authorities on the point are not uniform and that the position is not free from doubt. Even in that case the sale proceeds remained in Court and had not been paid over to the decree-holder, which is not the case here. But later decisions appear to be in consonance with the view we have expressed above. Vide Mulla's Commentary on the Code of Civil Procedure (Vol. I, 13th Edn.), p. 343.

17. For the aforesaid reasons, we are of the opinion that this is a case where the Government's claim for priority cannot be enforced against the amount which has been realised in execution by sale of lots, and paid over to the attaching decree-holder, long before the application was made by the Government Department to the executing Court for the relief.

18. The learned Subordinate Judge has referred in the course of his judgment to wrongful receipt of the money by the decree-holder from the District Court and made the comment that the third defendant had suppressed the fact of the prior attachment even while bringing the shares to sale. But there is no plea and no evidence to find any conduct on the part of the third defendant indicative of fraud or a wrongful course of conduct. Even assuming that he was aware that the Government had directed the Collector to attach the shares under Section 48 of the Income-tax Act, in view of the long inaction of the Tahsildar, it is quite possible that the third defendant might have been under the impression that the Government was not eager to press their claim for priority in the executing Court. It is not for the third defendant to remind the executing Court in such a case of the attachment by the Collector of the shares which had been effected long previously. It was for the authorities of the Income-tax Department, and particularly the Collector and the Tahsildar, who had been entrusted with the duty of recovering the arrears, to be vigilant and take steps, whether under the Revenue Recovery Act or under the Income-tax Act, to realise expeditiously the Government dues. After having failed to do so, it is not open to them to file a separate suit seeking for direction to the decree-holder to refund the money which had been paid to him in due course of execution according to law.

19. The appeal, therefore, succeeds and the plaintiff's suit is dismissed. The appellant will get his costs throughout.

20. Pending the appeal, the appellant has given a bank guarantee as security for the amount decreed. It will be cancelled and delivered to the appellant.

Appeal allowed.

AIR 1970 MADRAS 194 (V 57 C 50)

RAMAKRISHNAN, J.

Messrs. P. S. N. S. Amhalavana Chettiar and Co. (P.) Ltd., Madras, Petitioner v. Regional Provident Fund Commissioner, Madras, Respondent.

Writ Petn. No. 400 of 1966, D/-15-11-1968.

Employees' Provident Funds Act (1952), Ss. 2-A, 2 (f) — 'Establishment' — Mean-

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ing of — It means house of business — Applicability of Act to employees in office establishment.

The word 'establishment' is not defined in the Act but the meaning given to it in decided cases is 'house of business'. AIR 1966 Mad 416 and W. A. No. 167 of 1965 (Mad.), Foll.

An establishment which involves the running of a factory may also require a staff for procuring raw materials and disposing of the manufactured products and also for the maintenance of accounts. There can be no integral relation between all these items of work and it may not be proper to separate the process of manufacture in the factory from the office establishment which attends to work connected with the factory and its raw materials or products and its accounts. Establishment for this purpose must be viewed in a larger sense than the process of manufacture. Section 2 (f) defines 'employee' as meaning any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer. Stress is thus laid on the employee being employed 'in connection with the work of the establishment'. There may be scope, on a more careful examination of the work done by the individual workers in the office, to find out whether such connection between their work and the work of the factory can be established or not and confine the application of the Employees' Provident Funds Act to the persons who are found to satisfy this test. (Para 4)

Cases	Referred	Chronological	Paras
(1966) AIR 1966 Mad 416 (V 53)=			
ILR (1967) 1 Mad 214, R. L.			
Sahni and Co. v. Union of India			4
(1965) W. A. No. 167 of 1965 (Mad.)			4
(1961) AIR 1961 Mad 176 (V 48)=			
1961-1 Lab LJ 593, Employees' State Insurance Corporation v. Ganapathia Pillai			4

M. S. Abdul Azeez, for Petitioner; S. Ramasubramaniam, for Respondent.

ORDER: This writ petition is filed by Messrs. P. S. N. S. Amhalavana Chettiar and Co. (P.) Ltd., Madras. According to the affidavit of the petitioner, the petitioner is a private limited company carrying on the business of imports and exports dealing in non-ferrous metals and other commodities like papers, Madras cables, and are also engaged in the flotation of new concerns. The registered office of the company is situated at No. 14, Mint Street, Madras-3 and all the business of the company is carried on in that office, where there are five employees. In 1951, as part of the activities, the petitioner started a factory styled as Sri Ram Rolling Mills at No. 7, Nelson Manicka Mudaliar Road, Aminjukurai, about five miles from the above registered office at Mint Street. The fac-

tory was engaged in rolling non-ferrous metals and about 80 workers are employed in the factory. After the coming into force of the Employees' Provident Funds Act (Central Act 19 of 1952), the provisions of that Act were applied to the workers in the factory and the petitioner has raised no objection to such application. The petitioner is aggrieved with the order issued to it on 21-12-1965 bringing the employees in the office at Mint Street within the scope of the Employees' Provident Funds Act 19 of 1952. The order states:

".....it has been decided that the individuals working in the head office, doing the job of maintenance of accounts, procuring of raw materials and selling of articles produced by the factory are eligible to be enrolled as members of Employees' Provident Fund from 1-1-1961.

You are, therefore, requested to enroll those employed in the head office in connection with the work of the factory as members of the Employees' Provident Fund with effect from 1-1-1961 and furnish relevant supplementary returns and remit contributions and administrative charges, etc."

2. The petitioner contends in his affidavit that the workers in the Mint Street office cannot be treated in any sense as employees of the factory and that the Employees' Provident Funds Act cannot be extended to them. This contention is amplified by stating that the employees at the office of the company at Mint Street "do not do and are not in any way concerned or connected with any of the processes of manufacture in the factory". For the above reasons the petitioner has applied in this writ petition under Art. 226 of the Constitution for quashing the aforesaid order dated 21-12-1965 by a writ of certiorari.

3. In the counter-affidavit of the respondent, the Regional Provident Fund Commissioner, it is stated that when a physical check was made on 24-3-1965 by the Provident Fund Inspector, it was revealed that some of the employees were working at No. 14, Mint Street, Madras, relating to the factory work, and that, as the company owns the factory and as the employees of the company attend to all the work of purchasing the raw materials, selling the finished products of the factory, maintaining accounts, etc., the company is the head office and the factory is only a branch of the company for all practical purposes. On this basis, the petitioner was required to enroll all its employees (in the head office) and pay the provident fund dues from 1-1-1961 the date on which Section 2-A became operative. The counter-affidavit goes on to state that it is the company of the petitioner which procures the raw materials for the factory, sells the finished products and administers the affairs of the factory, and that as there is unity

of management, supervision and control, unity of finance and employment, unity of labour and conditions of service, etc., between the factory and the company, it is not open to the petitioner to contend that the company is not a unit of the factory and that Section 2-A of the Act cannot be invoked. Section 2-A states:

"Establishment to include all departments and branches—For the removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment."

4. The word 'establishment' in the Act, as this Court had occasion to point out more than once in a number of prior decisions has not been defined in the Act, but an attempt has been made to do so by a Bench of this Court in *R. L. Sahni and Co. v. Union of India*, AIR 1966 Mad 416, where the meaning given to the word 'establishment' is 'house of business', which is one of the different meanings for the word found in the Oxford Dictionary. The principle of this decision has been followed by a subsequent Bench of this Court (to which I was a party) in an unreported decision in *W. A. No. 167 of 1965 (Mad.)*. The question for consideration is whether the factory at Aminjikarai and the office at Mint Street, Madras, constitute one 'house of business' so as to form a single establishment for the purpose of the Employees' Provident Funds Act. The department has taken the stand that all the workers in the office at Mint Street are engaged in work which is connected with the work in the factory. In the impugned order it is set down that the work in the Mint Street office connected with the work of the factory includes the maintenance of accounts, procuring of raw materials and selling of the articles produced by the factory. The petitioner, on the other hand, contends in his affidavit that the work done by the employees in the office at Mint Street, Madras, is not in any way concerned or connected with any of the processes of manufacture in the factory. It appears to me that this restriction of the work of the employees in the company to the process of manufacture in the factory is taking too narrow a view. An establishment which involves the running of a factory may also require a staff for procuring raw materials and disposing of the manufactured products and also for the maintenance of accounts. There can be integral relation between all these items of work and it may not be proper to separate the process of manufacture in the factory from the office establishment which attends to work connected with the factory and its raw materials or products and its accounts. Establishment for this purpose must be viewed in a larger sense than the process

of manufacture. But the petitioner contends that the work in the Mint Street office is not exclusively connected with the work of the factory. The factory business is only one of a number of activities which are carried out in that office. The petitioner is aggrieved because all the employees in the Mint Street office have been automatically assumed to have done work connected with the factory, while there is room for a more careful examination of the work which the employees at the office are asked to do and determine whether there is an integral connection between their work and the work of the factory. In this connection the petitioner's counsel offered to produce data which would show that it is possible to segregate the work done by the individual employees in the Mint Street office in the above manner, and according to him only such of those employees whose work can be shown to be connected with the factory could be brought under the provisions of the Employees' Provident Funds Act. In support of his argument the learned counsel has also referred to the judgment of this Court in *Employees' State Insurance Corporation v. Ganapathi Pillai*, 1961-1 Lab LJ 593 = (AIR 1961 Mad 176), a case which arose under the Employees' State Insurance Act, 1948. There also the word 'employee' meant any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies. Of course, there is a further extension of the definition in this Act which gives it a wider scope. Stress is laid by the learned counsel on the observations at p. 598 (of Lab LJ) = (at p. 179 of AIR), where reference is made to an affidavit to show that a particular worker did not attend to the work of the factory as such, but his work was confined to the accounts of the managing agent's office and that, of the other persons sought to be made liable, it could not be said in any sense that they were employed on any work of or incidental or preliminary to or connected with the work of the factory, but they were all persons employed in the managing agent's office. These observations follow the definition of 'employee' in S. 2 (9) of the Employees' State Insurance Act which is clearly an extended one, whereas under the Employees' Provident Funds Act, the definition of 'employee' is more succinct. Section 2 (f) of the latter Act defines 'employee' as meaning any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer. Stress is thus laid on the employee being employed 'in connection with the work of the establishment'. Assuming, therefore, that 'establishment' has to be viewed in the sense of a 'house of business' as laid down in the decisions mentioned above, it is necessary

to find out which of the workers in the Mint Street office fall within the definition in Sec. 2 (f); that is, which of them are persons who are employed in connection with the work of the establishment of the petitioner in its sense of a 'house of business'. There may be scope, on a more careful examination of the work done by the individual workers in the Mint Street office, to find out whether such connection between their work and the work of the factory can be established or not and confine the application of the Employees' Provident Funds Act to the persons who are found to satisfy this test. The impugned order dated 21-12-1965, appears to assume that all the workers in the Mint Street office are engaged in connection with the work appertaining to the factory, like the maintenance of accounts, procuring raw materials and selling of the articles produced by the factory. The counsel for the petitioner has filed a supplementary affidavit detailing the work done by the employees in the Mint Street office. It will be open to the petitioner to afford data to the Regional Provident Fund Commissioner for the purpose of showing whether all or only some of the workers in the Mint Street office are connected with the factory in the above manner, or whether there is still room for any of the workers in that office being exempt. The order of the Regional Provident Fund Commissioner appears to involve a conclusive determination that all the workers of the Mint Street office are liable to contribute under the Employees' Provident Funds Act. But in view of the supplementary affidavit now filed before me, another opportunity will be given to the management to produce data to clarify the position. The Regional Provident Fund Commissioner is directed to reconsider the case of the workers in the Mint Street office, and if any of them are found not to be connected with the work of the factory, exclude them from the scope of the Employees' Provident Funds Act, if the data afforded are sufficient for that purpose.

5. The writ petition is allowed and the respondent is directed to re-examine the case of the workers in the Mint Street office in the light of the circumstances mentioned above. I may add that one of them is now alleged to have left the office subsequently. Now there remains only four workers for consideration. No order as to costs.

Petition allowed.

AIR 1970 MADRAS 197 (V 57 C 51)

VEERASWAMI AND RAMA-
PRASADA RAO, JJ.

Messrs. R. Kanakasabai and others, Ap-
plicants v. The Controller of Estate Duty,
Madras, Respondent.

Tax Case No. 2 of 1966 (Reference No. 1
of 1966), D/-9-4-1969.

(A) Estate Duty Act (1953), S. 12 —
Applicability — Reservation, express or
implied, of interest in property gifted neces-
sary — Provision for maintenance of donor
insufficient to attract section.

(Para 2)

(B) Estate Duty Act (1953), S. 10 —
“Entire exclusion of any benefit” — In-
terest in the property gifted unnecessary —
Provision for maintenance of donor by
donee is a benefit — But mere expression
of hope of being maintained is not benefit.

It cannot be contended that the benefit
referred to in Section 10 should be in the
nature of an interest in the property gift-
ed. If it was intended that the benefit
should be founded on or be derived only
from the property gifted, the section would
have been differently worded. A provision
for maintenance of the donor in a gift deed
even if no charge on the property is created
will amount to such a benefit attracting
duty as property passing to that extent.
But a mere confidence expressed by the
donor as to his maintenance by the donee
will not amount to a provision for mainte-
nance.

(Paras 2, 3)

(C) Estate Duty Act (1953), S. 10 —
“To the extent of the benefit” — Gift with
reservation of interest — Entire subject-
matter of the gift not dutiable but only the
extent of the benefit — Benefit by way of
provision for maintenance — Valuation.

In the case of a gift with a reservation
of a benefit, it is not the entire subject-
matter of the gift which is dutiable but
only the value of the benefit so reserved.
In the case of a benefit by way of provi-
sion for maintenance of the donor, the value
thereof is to be fixed by multiplying by the
number of years of the donor's existence
the annual amount of maintenance where it
is stipulated. Where it is not stipulated,
it is for the Revenue to fix the quantum in
consultation with the accountable person.

(Para 4)

K. Srinivasan, D. S. Meenakshisundaram
and K. C. Rajagopala, for Applicants; V.
Balasubramanian and J. Jayaraman, for Res-
pondent.

VEERASWAMI, J.: This is a reference
under the Estate Duty Act at the instance
of the accountable persons. One Rathna-
sabhpathi Pillai died on February, 5, 1959.
The subject-matter of the reference is the
total value of six gifts of immovable prop-
erty made by the deceased person in
favour of his sons, grandsons, daughter

and wife namely, Rs. 7,33,656. The Reve-
nue considered that the reservation in each
of the gifts towards maintenance attracted
Section 12, or, in the alternative, Sec. 10:
The question to consider is:

“Whether, on the facts and in the cir-
cumstances of the case, the properties set-
tled by the deceased by the six deeds of
settlement valued at Rs. 7,38,656 or any
part thereof was not liable for inclusion in
the estate of the deceased as property
deemed to pass on his death?”

2. We are of the view that there is
no room whatever for the application of
Section 12. The gift deeds were all exe-
cuted more than two years prior to the
death of the deceased. The first four deeds
are in favour of his sons and grandsons and
are in stereotyped form. The disposition
in these documents of the immovable prop-
erty is of absolute ownership. On that
matter there can be little doubt. But the
disposition was followed by these words,
“During my lifetime, you should pay me
rupees one thousand per annum for the
expenses of my livelihood”. The payment
should be made out of the income from the
properties given to the grandsons. In the
case of the gift to the daughter, the words
were, “You should maintain myself and my
wife Rajambal alias Sivanandavalli Ammal
till our lifetime”. In the case of the wife,
the language is, “Since I am getting sickly
and I feel I may not live long from now
and on the confidence that you will main-
tain me till my life, I hereby give by
means of this settlement with immediate
effect...” The provision in the first
four deeds for payment of a sum of Rupees
1,000 per annum, in our opinion, is not a
charge on the property given as a gift, nor
does it create any interest therein. The
position is the same in respect of the deed
in favour of the daughter. So far as the
wife is concerned, there is not even a provi-
sion for maintenance. All that is found is
a confidence expressed by the donor as to
his maintenance by the wife. For Sec. 12
to apply, there should be a reservation of
an interest in the property settled. The
reservation may be express or implied, but
it should be of an interest in the property
which is the subject-matter of the settle-
ment. That is clearly not the case here in
any of the deeds. We are unable to accept
the contention for the Revenue to the
contrary.

3. The question then is whether Sec-
tion 10 is attracted. In our opinion, the
non-exclusion clause as to possession and
enjoyment does not apply. The deeds are
clear on that, for, they say that possession
has been delivered. It has to be assumed,
therefore, that the donee in each case as-
sumed possession and enjoyment and to
the entire exclusion of the donor. The
question then is whether there was a exclu-
sion of the donor from any benefit to him
by contract or otherwise. That the provi-

sion for payment of maintenance in the deeds in favour of the sons, grandsons and daughter amounted to a contract can admit of no doubt. The obligation to pay maintenance is supported by the consideration of making a gift in each of these cases. The only other question, therefore, is, is it a benefit reserved to the donor by the contract within the meaning of Section 10. We should think that it is such a benefit. The contention for the accountable persons is that the benefit should be in the nature of an interest in the property given as gift. We are unable to construe the last words in the section in that manner. In our opinion, there is no warrant for it. The non-exclusion is in two parts, one in respect of possession and enjoyment of the property which is the subject-matter of the gift and the other from any benefit to the donor which need not necessarily be from the property. If it is intended that the benefit should be founded on or be derived only from the property which is gifted, the section would have been worded differently. It does not say that it should be a benefit to the donee from the property by contract or otherwise. We are inclined to think that any benefit which the donor bargains for by a contract embodied in a document which conveys the property by way of gift would be within the purview of the section. We are of the view that the provision for maintenance in the four deeds in favour of the sons and grandsons and also the provision in the deed in favour of the daughter do amount to such a benefit which will attract duty as property passing to that extent on the death of the deceased. It follows that it is not the entire subject-matter of the gift that will be dutiable but only to the extent of the benefit.

4. How the benefit would be valued is a different matter. But it is obvious that the valuation of the benefit would in every case arise only on the death of the donor. That the value of the benefit, that is to say, the amounts of maintenance fixed in each of the first four deeds multiplied by the years of the donor's existence would give the provision (sic) in the deed in favour of the daughter is concerned, no sum has been fixed as maintenance. It is for the Revenue in consultation with that accountable person to fix the quantum in that case which would be taken as having passed on the death of the deceased. We may add that so far as the deed in favour of the wife is concerned, in our opinion, it makes no provision at all for maintenance in the form of any kind of reservation.

5. Learned Counsel for the Revenue argues that the entire value of the property should be taken as having passed. But it is hardly necessary to say that Section 10 does not admit of it. That section is clear that only to the extent of the non-exclusion of benefit there would be passing.

6. We answer the question in favour of the accountable persons but in the manner indicated above, with costs. Counsel's fee Rs. 250.

Answered accordingly.

AIR 1970 MADRAS 193 (V 57 C 52)

KRISHNASWAMY REDDY, J.

Public Prosecutor, Appellant v. Pitchaiah Moopanar alias Pitchaiah Pillai, Respondent.

Criminal Appeal No. 492 of 1966, D/- 18-10-1968, from Order of S. J., Madurai in Cri. Appeal No. 103 of 1965.

Penal Code (1860), Sections 304-A, 337, 338 and 290 — Accused, a layman, putting up a building employing masons — Masons constructing it negligently — Collapse of building resulting in the death of several inmates — Accused held could not be convicted — (Tort — Negligence — Collapse of building).

Where the accused, the manager of a school, had a building put up at a cost of Rs. 35,000 employing masons therefor and the masons constructed the same with excess of sand in the mortar, the building collapsed killing several inmates, and the evidence showed that the accused was a layman who had to depend on others skilled in the matter of putting up buildings:

Held, that the accused could not be held guilty for the negligence of the persons who actually constructed the building which negligence was the causa causans for the collapse of the building. The fact that the accused's act might have been the causa sine qua non was not sufficient. AIR 1965 SC 1616, Foll.

(Paras 9 and 11)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 1018 (V 52) =

1965 (2) Cri LJ 550, Mohd.

Rangawalla v. Maharashtra State 10

Asst. Public Prosecutor, for Appellant; V. Rajagopalachari, for V. V. Raghavan, for Respondent.

JUDGMENT: This appeal has been preferred by the Public Prosecutor against the order of acquittal of the respondent by the Sessions Judge, Madurai, in C. A. No. 103 of 1965 by his judgment dated 18-2-1968, setting aside the conviction and sentence imposed by the Special Additional First Class Magistrate, Madurai, in C. C. No. 1 of 1964 under Sections 304-A, 337, 338 and 290, I. P. C.

2. The prosecution case is briefly this: The respondent Pitchaiah Moopanar was the Manager and correspondent of the Saraswathi Higher Elementary School, Maninagar Second Street, Madurai. At about 12 noon on 4-4-1964, a portion of the building collapsed while classes were being held in the school resulting in the death of 35 girl

students and a middle aged woman. Further, 16 students sustained grievous injuries and 142 students sustained simple injuries. A cow and two calves died, and one cow was injured. The Collector of Madurai directed P. W. 215 Sri. Jayapalan, Executive Engineer, to inspect the building and submit a report as to the cause for the collapse of the building. An enquiry was also held by the Revenue Divisional Officer, Madurai. Certain broken pieces of brick masonry construction were examined by P. W. 214 Sri. Muthukumaran, Research Officer at the Research Laboratory of the Soil Mechanics and Research Division of the Public Works Department and he gave his opinion. After receiving the report of P. W. 215, based upon the report of P. W. 214, the Inspector of Police, B. North Circle, Madurai, filed a charge-sheet against the respondent under Sections 304-A, 336, 337, 338, 288 and 290 read with 109 I.P.C.

3. It is the case of the prosecution that the respondent who was the Manager of the said school was responsible for the proper upkeep and maintenance of the building in which the school was being conducted and that he had not exercised that amount of reasonable care expected of him in constructing and maintaining the building. The respondent had taken on lease the vacant portion around a Samathy on a monthly rent of Rs. 7 from P. W. 205 Karuppan Chettiar to whom the site belonged and was conducting the school in tiled shed. Subsequently, he took permission from P. W. 205 for constructing a double storeyed building on the site and after the building was constructed, an agreement was entered into between the respondent and P. W. 205 that the respondent was to pay Rs. 250 per month as rent, that this amount was to be deducted from the value of the building which was fixed at Rs. 32,000 and that after the entire amount is wiped out by adjustment of rent, P. W. 205 would become the owner of the building.

The prosecution suggested that the respondent, with a view to make profit out of running of the school and since the building itself would not belong to him after some time, got the building constructed with bad materials and without proper technical advice and assistance and in violation of certain orders passed by the Municipality and thus was rash and negligent in putting up the building in a hurried manner without devoting any care expected of a prudent man. It was also suggested that even after the construction of the building, he was not attending to the repairs of the building then and there even when he had come to know that the building required immediate repairs.

4. The prosecution let in evidence to show that the respondent submitted a plan for the construction of building, prepared by P. W. 203 Meenakshisundaram, an unlicensed Surveyor and after the plan was approved by the Municipality, he made

deviations from the approved plan and constructed the building and that in spite of notice to remove the deviations, he disobeyed the orders of the Municipality and completed the construction hurriedly and that as a result, he was prosecuted and sentenced to pay fine. The prosecution has further tendered evidence that in respect of the construction of the building, lime mortar used was prepared by the respondent himself, using almost double the quantity of sand that would be mixed with lime and that he had not taken any technical advice whatever but constructed the building with the aid of Cooly masons.

Evidence was also tendered that the pillars, both in the ground floor and in the first floor were heavily overloaded, that the excess load on the masonry pillars had resulted in cracks to the building, that in spite of such cracks, no attempt was made by the respondent to take proper technical advice even at that time and that he was callously indifferent to the safety to the building as well as the persons who used it. It is also the case of the prosecution that besides the cracks on the walls of the building, in some places, the beams had sagged on account of over-loading and that casuarina posts had been given as props to support the bent beams and that even then the respondent had not taken proper steps to ensure the safety of the building.

5. The respondent contended that he had taken proper technical advice from one Nataraja Pillai, a Retired Assistant Town Planning Officer of Madurai Municipality and after getting his advice, he entrusted the work of construction to the mason. P. W. 206 Ramaswamy Naidu deposed that he was not a skilled person, that he was not responsible for mixing of mortar using more quantity of sand, that he was not supervising the construction as he did not know the technique of construction and that the said Nataraja Pillai was supervising the construction. He further added that he was effecting repairs whenever he was told about the necessary repairs to be done, that he did not construct the building with profit motive, that the immediate cause of the fall was really the action of a mason who tampered with a pillar which required repairs and that he was neither rash nor negligent in the construction of the building or its upkeep. The respondent examined nine witnesses to substantiate his case.

6. The learned Magistrate, after hearing the evidence tendered by the prosecution found that the respondent constructed the building at a cheap cost with a profit motive and without taking proper technical advice and that that itself would be a rash and negligent act and, therefore, convicted the respondent.

7. On appeal, the learned Sessions Judge acquitted the respondent by his well-reasoned judgment after having discussed all

the points raised by both sides. He ultimately found that the respondent was not a skilled person that he had to depend upon the mason for the construction of the work and that the respondent could not have known as to what kind of mortar and what quantity of mortar should be used as it was not within his knowledge. The learned Judge accepted the version of the respondent that the work has done by the mason, Ramasami Naidu (P. W. 206) and that the respondent could not be held liable for the rash and negligent act. The learned Sessions Judge also found that the respondent would not have constructed the building in a hurried manner by using bad materials as he had put his own money spending a sum of Rs. 32,000 for the purpose of occupying it at least for ten years, so that the amount spent by him could be wiped out by adjustment of rent for ten years.

8. There cannot be any doubt that the building collapsed as a result of which, unfortunately 35 school children died and several others were injured. The main question is whether the collapse of the building was due to the rash or negligent act of the respondent. The learned Public Prosecutor reiterated the same points urged on behalf of the prosecution before the appellate Court, but stressed before me that the act of the respondent in not having attended to immediate repairs by taking technical advice after having come to know that it required such repairs should be held to be a rash and negligent act on his part. He relied upon the evidence of P. W. 203 Paramanandam, the carpenter. P. W. 208 stated that a few months before the collapse of the school building the respondent sent for him to inspect the beams of the building. He found one beam of the ground floor and one beam of the first floor bent.

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x x x x x x x x

9. It is not the case of the prosecution that the respondent himself constructed the building. It is not disputed that he sought the assistance of the masons and the masons constructed the building. If the masons had not done the work properly and if they had been negligent in not mixing the lime mortar in proper proportions, the respondent could not be made liable for the negligence of those persons who actually constructed the building, who are supposed to be skilled. The respondent is a layman. He, therefore, cannot be held liable for the negligence of the persons who actually constructed the building which negligence is the *causa causans* for the collapse of the building.

10. In Mohd. Rangawalla v. Maharashtra State, AIR 1965 SC 1616, it is held that death must be direct result of the rash or negligent act of accused and the act must be efficient cause without intervention of another's negligence, and it must be the

causa causans, and it is not enough that it may have been the *causa sine qua non*.

11. In the result, I find, taking an all round view of the case, that the prosecution has not established beyond reasonable doubt that the school building collapsed causing the death of several persons and injuries to several others by the rash and negligent act of the respondent. In any event, I do not see any compelling reason to reverse the order of acquittal, by the learned Sessions Judge.

12. It is of course unfortunate that several school children died as a result of the collapse. If the Municipal authorities had taken care to inspect the building periodically being a public institution, this unfortunate incident could have been probably avoided. It is gratifying to note that immediately after this incident, the State has brought a legislation to control and regulate the construction, upkeep and maintenance of the public buildings. It is at least expected in future that the authorities concerned would be vigilant and take that much of the care expected of them to inspect the buildings, wherein public institutions are housed, and, if they find such buildings are unsafe, to take immediate appropriate action as they deem fit.

13. The appeal is dismissed.

Appeal dismissed.

AIR 1970 MADRAS 200 (V 57 C 53)
M. ANANTANARAYANAN C. J. AND
NATESAN J.

Maimoon Bivi and another, Appellants v. O. A. Khajee Mohideen and another, Respondents.

Letters Patent Appeal No. 83 of 1964, D/- 4-3-1969, from judgment of Kailasam J., in A. S. No. 402 of 1961.

(A) Mahomedan Law — Succession and administration — Devolution of inheritance — Death of Mahomedan intestate — *Heirs* take as tenants-in-common in specific shares — Theory of representation not recognised — Widow and minor children left as heirs — Management of estate assumed by widow's father, and income spent for maintenance and education of heirs — Acquisition of new property in widow's name — No evidence to show that any surplus from income of estate was utilised for acquisition — Newly acquired property held not partible — Section 90, Trusts Act, did not apply — Order of Kailasam J. in A. S. No. 402 of 1961 (Mad), Reversed — (Trusts Act (1882), S. 90).

Where a Mahomedan dies intestate, his estate devolves on his heirs and they take the estate as tenants-in-common in specific shares. The theory of representation is not recognised under the Mahomedan Law and the interest of each heir is separate and distinct.

(Para 3)

KM/BN/F774/69/VBB/M

There is no provision in Mahomedan Law that the acquisitions of the several members of a family are made for the benefit of the family jointly. Children in a Muhammedan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another, AIR 1925 Mad 1149 and AIR 1928 Mad 14, Rel. on. (Para 3)

After the death of a Mahomedan intestate, leaving behind an adult widow and two minor children, the widow with her children came to live in her father's house. The father who was a well-to-do person assumed the management of the whole estate and spent out of the income from the properties for the maintenance of the widow and her children as well as for education of the children. During her father's management the father acquired a new property in the widow's name. It was not shown that the funds of the joint property were utilised for the purchase of the property.

Held (i) that the newly acquired property of the widow as tenant in common was not partible. To make the property acquired in her name partible, it must be established that the property was purchased in her name as representative of the common estate. It could not be said that the widow had gained an advantage in derogation of her minor children, as she was not in management of the estate. The burden was on the party claiming that it was an acquisition in the name of the widow for and as representative of the co-owners. (Para 4)

(ii) Section 90 Trusts Act did not apply. For it to apply, it must be established that the party against whom relief is sought availed himself of his position as co-owner and gained an advantage in derogation of the rights of other persons interested in the property, or as representing all persons interested in the property gained an advantage. Then, of course, he must hold the advantage gained for the benefit of the other persons interested in the property, but subject to their obligation to share the expenses incurred in acquiring the advantage. In the instant case, admittedly, the management of the common properties was not with the widow, but the management was by the widow's father for the benefit of all the heirs. Order of Kailasam J. in A. S. No. 402 of 1961 (Mad), Reversed. (Paras 3, 4)

(B) Letters Patent (Mad), Clause 15 — Appeal under — No inhibition against interference on facts — Comparison with powers under Section 100, Civil P. C. — (Civil P. C. (1908), S. 100).

The appeal under Clause 15 Letters Patent is in the nature of rehearing of the appeal. While there is a specific inhibition under Section 100 Civil P. C. against interference on facts in second appeal, there is no such inhibition under Clause 15 Letters Patent. There is no rule of law that a

finding, arrived at by a single Judge of the High Court in first appeal, is not open to be challenged on facts under Clause 15 Letters Patent. Of course, in a Letters Patent appeal, the High Court will give the utmost consideration to an inference of fact made by single Judge of the High Court and will be hesitant to differ from the same. (Para 5)

Cases Referred: Chronological Paras
(1966) AIR 1966 Mad 266 (V 53) =
ILR (1966) 1 Mad 468, Venkata-
subramania v. Eswara Iyer 3
(1928) AIR 1928 Mad 14 (V 15) =
106 Ind Cas 76, Abdul Huck v.
Seethamsetti Jayarao 3
(1925) AIR 1925 Mad 1149 (V 12) =
49 Mad LJ 675, Abdul Samad
Khan v. Bijjan 3
(1897) 1897 AC 180 = 66 LJ Ch
413, Kennedy v. De Trafford 3
A. Sundaram Iyer, G. M. Abdul Khader
and S. M. Amjad Nainar, for Appellants;
S. V. Venugopalachari and S. Padmanabhan,
for Respondents.

NATESAN J.: This is an appeal under the Letters Patent from the judgment of our learned brother Kailasam J. in a regular first appeal. The suit is one for partition of the properties of a deceased Muhammad Ahmed Meeran who in March 1943, leaving as his heirs his widow Maimoon Bivi, minor son Khaja Mohideen and minor daughter Mohideen Bathammal, filed by Khaja Mohideen after becoming a major. The widow, the chief contestant in the suit, is the first defendant. The minor daughter of the deceased represented by her husband as guardian is the third defendant. She became a major pendente lite. The suit properties comprise the plaint first and second schedule properties. The first schedule properties were secured as the two-third share of the deceased Ahmed Meeran in his father's estate under the decree in O.S. No. 329 of 1943 on the file of the District Munsif Court, Tirunelveli. The second schedule property stands in the name of the widow the first defendant, under a purchase as per the original of Exhibit A-13, 13-3-1955. It is the case of the plaintiff that the second schedule property, though standing in the name of the first defendant, has to be partitioned among the heirs of the deceased Ahmed Meeran, as the property was purchased in the name of the first defendant with the surplus income from the first schedule properties for the benefit of all the heirs. There is no dispute as regards the first schedule properties and the shares the parties are entitled to therein—the plaintiff to 14/24th share, the first defendant to a 3/24th share and the daughter the third defendant to the remaining 7/24th share. The contest is only in respect of the second schedule property which the first defendant claims to be an acquisition made by her for herself. The learned Subordinate Judge upheld the first defendant's exclusive right to the

second schedule property and granted a preliminary decree for partition of the first schedule properties except item 9. On appeal to this Court, our learned brother, Kailasam J., allowed the appeal upholding the plaintiff's claim for partition of the second schedule property also. The Letters Patent Appeal is directed against the variation of the decree in respect of the second schedule property.

2. The short question for consideration is whether the second schedule property was acquired with the income from the first schedule properties as an accretion to the common estate as pleaded by the plaintiff. The common case of the parties is that, after the death of her husband, the first defendant along with her children was living in her father's house and that her father was looking after the first schedule properties. He was spending out of the income from the properties for the maintenance of the first defendant and her children as well as for education of the children. It is an admitted fact that he was a well-to-do person. He died on 3-10-1935. It is the plaintiff's case that the maternal grandfather purchased the second schedule property with the surplus income from the first schedule properties. The first defendant would contend that she had funds of her own, that she used to earn by doing yarn-winding, stitching and embroidery work, that her father also used to give her moneys, that she lent out the moneys and after realising moneys lent, she purchased the second schedule property.

3. To start with, certain principles have to be borne in mind while considering the claims made in this case and examining the evidence on record in relation thereto. We are here concerned with a property acquired by a Muslim woman at a time when her husband's estate was owned in common by her along with other heirs, her children. Another important feature is that the common properties were in the management of her father. She was an adult and the other co-heirs were minors. Under the Muhammadan Law, she was not the property guardian of the minors. Nor was the maternal grandfather who was actually in management of the properties, guardian of the minors. He had assumed management of the family properties, no doubt, for the benefit of the co-heirs. It is well established that, even in the case of a joint Hindu family where there is sufficient nucleus, there is no presumption that property standing in the name of a female member of the family is joint family property. As pointed out in *Abdul Samad Khan v. Bibi Jan*, 49 Mad LJ 675 = (AIR 1925 Mad 1149), there is no provision in Muhammadan Law that the acquisitions of the several members of a family are made for the benefit of the family jointly; and the principles and presumptions applicable to the case of a joint Hindu family are not

applicable to a Muhammadan family. At the moment of his death, the estate of a deceased Muhammadan devolves on his heirs and they take the estate as tenants-in-common in specific shares. The theory of representation is not recognised under the Muhammadan Law and the interest of each heir is separate and distinct. As observed in *Abdul Huck v. Seethamsetti Jaya Rao*, 106 Ind Cas 78 = (AIR 1928 Mad 14), children in a Muhammadan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another. In that case, the children of a deceased Muhammadan were minors at the time of his death and their paternal uncle who managed the properties on their behalf purchased some property in the name of one of the minors. The contention that inasmuch as the property was purchased in the name of a minor it must be taken to have been purchased for the benefit of the whole family, was rejected. But, as there was evidence that some cash left by the deceased was utilised for the purchase, it was held that to the extent the amount was taken for the purchase from the general estate of the minor in whose name the property was purchased had to give credit to the estate for the amount. It was said that when accounts were taken the family would be entitled to debit against the person in whose name the property was purchased the amounts utilised for the purchase, and that the fact that the property was purchased by him with money taken from the father's estate would not make the property the common property of the family. We may here usefully refer the following observations of ours in *Venkatashubramania v. Eswara Iyer*, AIR 1966 Mad 266 at p 289:

"Amongst tenants-in-common where one tenant-in-common acquires property in his individual right with no intention of making it common property, the property will not be divisible.....As noticed in *Kennedy v. De Trafford*, 1897, AC 180, there is no fiduciary relation between tenants-in-common of real estate as such. Nor can one tenant-in-common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character. A co-sharer would continue to account for the rents and profits received by him in excess of his share; but even if he fails to maintain separate account of his lawful share and is in possession of excess profits, the funds collected by him do not get impressed with the character of joint funds. There is no trust in favour of the persons who have not joined in the acquisition of the profits or in investments. As to Section 90 of the Trusts Act, for it to apply, it must be established that the party against whom relief is sought availed himself of his position as co-owner and gained an advantage in derogation of the

rights of other persons interested in the property, or as representing all persons interested in the property gained an advantage. Then, of course, he must hold the advantage gained for the benefit of the other persons interested in the property, but subject to their obligation to share the expenses incurred in acquiring the advantage.

4. In the present case, admittedly, the management of the common properties was not with the first defendant. The management was by the first defendant's father for the benefit of the first defendant and her children and the purchase was made in her name. To make the property acquired in her name partible, it must be established that the property was purchased in her name as representative of the common estate. It cannot be said that the first defendant had gained an advantage in derogation of her minor children, as she was not in management of the estate. The case of the first defendant is that the funds of the joint family were not utilised for the purchase of the property and that it was out of her own earnings, to which was also added moneys given to her by her father, that the property was purchased. True, if it is found that the purchase had been made by the grandfather from out of the surplus in his hands, taking the sale deed in the name of his daughter, the then adult co-owner of the properties, a case for partition of the property between the co-owners may be held made out. But the burden in this respect is on the party claiming that it is an acquisition in the name of the first defendant for and as representative of the co-owners.

5. The plaintiff relied principally on the evidence of his maternal uncle, the brother of the first defendant who has given evidence as P.W. 2, and the account book Exhibit A-2 on which our learned brother Kailasam J., rested his decision. Learned counsel for the plaintiff had to concede that, if the account book Exhibit A-2, and the evidence of P.W. 2 are rejected, the plaintiff has no case for partition of the second schedule property. The learned trial Judge who heard and saw the witness has rejected the oral evidence of P.W. 2, and, as regards the account book Exhibit A-2, he concluded that Exhibit A-2 is not a genuine account book and that it was cooked up for the purpose of the suit. Mr. S. V. Venugopalachari, counsel for the plaintiff, contended that the questions whether Exhibit A-2 is a genuine account or not or whether the evidence of P.W. 2 should be accepted or not are pure questions of fact, in respect of which this Court in Letters Patent appeal would not reassess the evidence. It is said that the matter is now at the second appellate stage. We cannot agree. The appeal under Cl. 15 Letters Patent is in the nature of rehearing of the appeal. While there is a specific inhibition under S. 100, Civil P. C., against

interference on facts in second appeal, there is no such inhibition under Cl. 15, Letters Patent. Clause 15 is differently worded from S. 100, Civil P. C., and the appeal before us is from a judgment in a regular appeal under S. 96, Civil P. C., heard by a single Judge of this Court. Our attention has not been drawn to any rule of law that a finding, arrived at by a single Judge of the High Court in first appeal, is not open to be challenged on facts under clause 15 Letters Patent. Of course, in a Letters Patent Appeal, this Court will give the utmost consideration to an inference of fact made by learned single Judge of this Court and will be hesitant to differ from the same. But there are cases and cases and we are concerned with the reversal of finding of fact depending to an extent on the credibility of witnesses assessed against by the trial Judge who heard and saw the witnesses. Having regard to this aspect, we cannot, as desired by learned counsel for the plaintiff, at the outset refuse to re-examine the evidence ourselves. Only when there is no question as to the truthfulness of a witness and the question is as to the proper inference to be drawn from truthful evidence, the original Court is in no better position to decide the matter than the appellate Court.

(Their Lordships, after discussing the evidence, oral and documentary, in paras 6 to 8, found themselves in entire agreement with the Subordinate Judge that the acquisition of the second schedule property was for the exclusive benefit of the first defendant and not as representing the co-heirs, and concluded.)

9. In the result, the Letters Patent Appeal is allowed and the decree and judgment of the trial Court in regard to the second schedule property are restored. The parties will bear their respective costs in this appeal.

Appeal allowed.

AIR 1970 MADRAS 203 (V 57 C 54)
VENKATADRI AND VENKATA-
RAMAN, JJ.

Sree Shanmugar Mills Ltd., by Managing Agents Sri Alagai Ltd., Appellant v. S. K. Dharmaraja Nadar and another, Respondents.

O.S.A. No. 68 of 1959 and C.M.P. Nos. 14419 and 14420 of 1967, D/-143-1968, (From O.P. 297/1957 D/-30-4-1959).

(A) Companies Act (1956), Ss. 433 (e) and 434 (c) — "Unable to pay its debts" — Assets not to include value of building and machinery without which company cannot function as such.

In a creditor's petition to wind up the company on the ground that the company was unable to pay its debts within the meaning of S. 433 (e) read with S. 434 (c) of

the Companies Act, the Company resisted, the action alleging that while its liabilities amounted only to Rs.8,72,414, its assets were of value of Rs.10,79,130. It was found that the value of assets stated included the value of building and machinery excluding which only a sum of Rs.3 lakhs would be available to discharge its liabilities.

Held that for determining the question as to whether the Company would be able to meet its then demands, the value of such assets without which it could not carry on business, should not be taken into account. The test of inability to pay the debt under S. 433 (e) was not whether the Company, if it converted all its assets into cash, would be able to discharge its debts, but whether in a commercial sense the existing liabilities could be paid by it while it continued to carry on as a company. Therefore, the company must be considered unable to pay its debts within the meaning of the above provisions. O.P. No. 297 of 1957, D/-30-4-1959 (Mad.) by Ramachandra Iyer, J., Affirmed. (Para 3)

(B) Companies Act (1950), Ss. 433 (e), 434 (e) and 406 — Winding up ordered — Appeal filed against order — Arrangement with third party — All original creditors paid up by third party — On date of hearing of appeal, company still unable to pay the third party — Company pleading coming into force of an automatic stay under the terms of the arrangement — Shareholders, intending to run the mills themselves raising funds from market — Held, company should be deemed unable to pay its debts; that there was no automatic stay of winding up and that in such a position the shareholders could not be given charge of the mills.

The Court ordered a company to be wound up for the reason that it was unable to pay its debts. The company preferred an appeal and applied for stay of operation of the winding up order. The company entered into an arrangement with a third party who took the company's mills on lease for ten years, and in return advanced moneys to discharge debts owed by the company. The said party was to get a charge over the assets and properties of the company for the sums advanced by it. Another term in the compromise memo. stated that the winding up was to be stayed permanently on payment in full to the creditors by the Official Liquidator and on a report to that effect being filed before the Court. The compromise was approved and the 3rd party discharged all the debts owed by the company and claimed declaration of charge in their favour for the amounts advanced and interest. During the first three years, the lessee did earn profits; but later on there were losses mainly on account of general economic factors. The lessee opted to surrender the lease prematurely provided the moneys advanced by

them was paid and they even agreed to give up substantial sum if the payment was immediate or in near future. There was no prospect even if the mills were to be run by the shareholders. Though the shareholders wanted that possession of the mills be given to them under a scheme and they proposed to manage it by raising funds from the general public, they were themselves not willing to invest further funds or to take fresh issue of shares. The company also argued that inasmuch as all the debts were discharged, there was an automatic permanent stay of winding up by reason of the term of the arrangement.

Held, (1) that, in view of the fact that the company was not in a position to pay the debt due to the lessee for advances made and interest established, it was unable to pay its debts even at this stage.

(2) that there could be no automatic stay of winding up as claimed because firstly, S. 466 contemplated a specific application for such purpose and secondly, the decretal order embodying the compromise did not give a direction that on payment in full to the original creditors there would be an automatic stay of the winding up.

and (3) that there being no prospects whatever for even the shareholders to run the mills and earn profits to the extent of being able to pay the new creditors who might come in, the Court ought not to hand over the affairs of the company to them cancelling the winding up order. The considerations which should govern the Court in an application for stay of the winding up order were precisely the considerations which would govern the Court when it was asked to stay a receiving order in bankruptcy. The Court should not hand over a commercially insolvent company to the shareholders and let the shareholders loose upon the market free to raise loans. The Court owed a duty to the public in such a matter. (1889) 22 QB 632 and (1893) 2 QB 219 and AIR 1949 Cal 69, Foll.; (1898) 1 QB 241 and (1869) 8 Eq 688 and 1928 WN 238, Dist.; O.P. No. 297 of 1957, D/-30-4-1959 (Mad.) by Ramachandra Iyer, J., Affirmed. (Para 15)

Cases Referred: Chronological Paras
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matter of E. I. Cotton Mills 23
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(1893) 1893-2 QB 219 = 62 LJQB
569, In re Flatan 19
(1889) 22 QB 632 = 80 LT 943,
In re Hester 18
(1869) 8 Eq 688, In re South Bar-
rule Slate Quarry Co. 21
V. Balasubramanyam, for Appellant.

VENKATARAMAN, J.: This appeal has been filed against the order dated 30-4-1959 of Ramachandra Iyer, J. (as he then was), in O.P. No. 297 of 1957 on the file of this Court directing a winding up of the appellant company, Sri Shanmugar Mills Ltd. The company was incorporated in 1945 with its registered office at Rajapalayam in Ramanathapuram District, and with a share capital of rupees twenty-five lakhs of which rupees eight lakhs odd worth of shares have been subscribed and paid up. The primary object and business of the company was to buy cotton and spin it into yarn. Dharmaraj Nadar, who filed the petition for the winding up of the company was a creditor of the company in a sum of Rs. 43,548.98 as on 30-10-1957. He had supplied cotton to the company and had not been paid therefor. The petition for winding up was filed on 15-11-1957. The ground stated in the petition for the winding up was that the company was unable to pay its debts within the meaning of Section 433 (e) of the Companies Act, 1956. Section 434 says that a company shall be deemed to be unable to pay its debts under three contingencies numbered as (a), (b) and (c). Clause (a) deals with a case where a creditor makes a demand and the company for three weeks thereafter neglects to pay the sum. The creditor did not give any notice and did not invoke this clause. Clause (b) deals with a case where execution is returned unsatisfied in whole or in part. That also does not apply. It was clause (c) that was invoked, and which was applied by the learned Judge. That says that a company shall be deemed to be unable to pay its debts, if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

The learned Judge passed his order on the ground that on 31-10-1957 the company was unable to pay its debts within the meaning of the above clause. On 31-10-1957 the total liabilities of the company amounted to Rs. 8,72,414. (Vide p. 49 of the typed bundle supplied by the appellant). No doubt, the book value of the assets of the company was Rs. 10,79,130 and mainly on that footing the company contended that the assets exceeded the liabilities and that it could not be said that the company was unable to pay its debts. The learned Judge, however, repelled this argument on the following reasoning:—

“As against these liabilities the assets are substantially the machinery and the building. It is admitted in the counter-affidavit that the machinery is old. The company has not even been able to pay for the additional spindles allotted by the Government. The mere fact that the book value of the assets is estimated at nearly rupees ten

lakhs would not mean that the company would be able to pay its debts. The question whether a company would be able to meet its present demands could not entirely depend upon the circumstances that the assets if realised might exceed the liabilities. The nature of the assets, e.g., machinery and building is such that they should not be realised if the company were to run. They could not, therefore, be taken as presently realisable assets. That being so, they cannot be properly taken into consideration for considering the ability of the company to pay its debts, when one is viewing the matter as to whether the company while functioning as a company would be able to pay its debts. It may be noticed that the liabilities of the company are such that it would be impossible to pay them except by the sale of the assets, which are necessary for the functioning of the company. The demands of the Income-tax authorities and the other creditors have to be paid. It is not disputed that the company was unable to meet the claim of a creditor who subsequently filed a suit, O.S. No. 4 of 1957, in the District Munsif Court, Srivilliputhur. The petitioner's claim which was for cotton supplies to the company has not been paid. Even the charges for the consumption of electricity by the mills remained undischarged and the explanation that the initial deposit would cover the amount due by way of arrears cannot be accepted as the deposit could not be so adjusted unless contract for the supply of electrical energy is terminated. In that event the mills would have to stop working.

Mr. Mohan Kumaramangalam, the learned advocate for the company, contended that when the assets of the company on the date of the presentation of the petition are compared with the liabilities of the company, the former would exceed the latter and, therefore, the company should not be held to be commercially insolvent. In making that submission the learned counsel included the value of the machinery and building. The test of inability to pay the debt under Section 433 (c) is not whether the company, if it converts all its assets into cash, could be able to discharge its debts, but whether in a commercial sense the existing liabilities could be paid by the company while it is running as a company. It cannot be said that if the machinery and the building had to be realised for the purpose of paying the existing debts the company could run its business. If such assets are excluded the other assets which amount to about rupees three lakhs (vide market value adopted in the counter-affidavit) would hardly be sufficient to meet the demands.”

2. The learned Judge proceeded to point out that on 5-3-1959 the position was even worse.

3. We are of the opinion that the learned Judge was right in taking into ac-

count the position as on 31-10-1957 and that the reasoning on which be ordered the winding up is correct. The essence of the reasoning is that the debts of the company could not be paid without selling its machinery and building and, if the machinery and the building were to be sold, the mills could not run and the company would necessarily have to be wound up. The correctness of this reasoning cannot be questioned and has not been questioned before us by Sri V. Balasubramanyam, the learned counsel for the appellant.

But his attempt has been to make out before us that in view of the events which happened subsequent to 30-4-1959 and the circumstances as they stand today, the position is different. In order to appreciate his argument, it is necessary to state briefly what happened after the appeal was filed.

4. The Official Liquidator took charge of the company and its assets. The shareholders were able to persuade a partnership called Sri Jaya Jothi and Company to advance moneys to the company to pay off the various creditors, and in consideration of the advances Jaya Jothi and Company were to become lessees of the company for a period of ten years to work the mills and earn profit. In the first instance, they were to pay an amount which would discharge the creditors of the company to the extent of 25 per cent straightway and the rest of the amount had to be paid in instalments. This arrangement was embodied in a compromise dated 29-4-1960 in the application (C.M.P. No. 1285 of 1960) which was filed for stay of the operation of the winding up. This compromise was approved by the Bench of this Court dealing with the appeal then. It was later modified by order dated 21-6-1960 and it was provided that the duration of the lease should be a period of ten years or till the advances of Jaya Jothi and Company were repaid whichever was later. The advances were to carry interest at $7\frac{1}{2}$ per cent per annum. The monthly rent which the lessees had to pay for the 6,500 spindles then existing was Rs. 6,000. The compromise provided for a rent of 63 p. per month for every additional spindle which might be installed—actually the Government had already sanctioned an additional spindleage of 5,000.

Clauses 14, 15 and 17, may be usefully quoted:

"14. Sri Jaya Jothi and Company is to hold a charge over the company's properties and assets in respect of the amounts due to it by the company but the charge shall take effect only after the payment in full to the creditors is completed.

15. The Official Liquidator is not to sell the mills and other properties of the company so long as no default occurs on the part of Sri Jaya Jothi and Company in discharge of its obligations under the foregoing provisions.

17. The winding up is to be stayed permanently on payment in full to the creditors by the Official Liquidator and on a report to that effect being filed in this Honourable Court."

5. In pursuance of the compromise, Jaya Jothi and Company advanced amounts from time to time and it may be taken that as on 31-12-1967 all the original creditors of the company had been paid off and the lessees had also provided the Official Liquidator with the funds necessary to meet the liabilities of the Income-tax Department. The details may be gathered from the reports of the Official Liquidator, one dated 11-1-1968 in C.M.P. No. 14730 of 1967, and the other dated 18-1-1968 in C.M.P. Nos. 14419 and 14420 of 1967. On the ground that the other creditors have all been paid, Jaya Jothi and Company have filed C.M.P. No. 11974 of 1966 and C.M.P. No. 14730 of 1967 for a declaration of a charge in their favour for the amounts advanced by them under clause (14) of the compromise quoted above. The advances made by the lessees amounted to Rupees 8,66,203.46 on 31-12-1967 and the interest due thereon as on 31-12-1967 was about Rs. 3,09,000. The principal sum, viz., Rs. 8,66,203.46 would carry interest at $7\frac{1}{2}$ per cent per annum even after 31-12-1967. Any small amounts which might have been adjusted or paid off would have to be deducted from this but it would not be much and would only be in the region of Rupees 50,000.

6. The main argument of Sri V. Balasubramanyam is that here was a person, Jaya Jothi and Company, who was prepared to advance such huge amounts within a year of the order of winding up and has worked the mills for over seven years, apparently, with profit at least in the earlier years. On these facts Sri Balasubramanyam contends that the company must be said to be in a position to command credit and therefore can no longer be said to be unable to pay its debts within the meaning of Section 434 (c). In other words, it cannot now be called "commercially insolvent", to use the usual parlance.

7. The subsidiary argument of Sri V. Balasubramanyam is that now that all the original creditors have been paid off and the only creditor remaining is Jaya Jothi and Company, clause (17) of the compromise will come into play and, according to that, the winding up order is to be stayed permanently. Sri Balasubramanyam contends that, in effect, this means that the winding up order has to be set aside. There is a provision in the Companies Act itself, namely, S. 468, which contemplates an order of the Court staying the winding up proceedings either altogether or for a limited time on such terms as the Court thinks fit.

8. Before considering the arguments it is necessary to state some further facts. On 2-11-1966 Jaya Jothi and Company filed

C.M.P. Nos. 11974 to 11976 of 1966 supported by a common affidavit dated 30-10-1966. In that affidavit they stated that the annual income by way of rentals, etc., which would accrue to the company was Rupees 81,455 per year, but as against that the liabilities would amount to about Rupees 96,000 a year (the principal liability being Rs. 65,000 due as interest to the lessees on their advances), showing a net loss of about Rs. 10,000 a year. At that rate even the interest due to the lessees could not be paid completely and would be mounting up and there could be no hope of the company repaying the debts of Rs. 11,75,000 due to the lessees. Now the lease in favour of Jaya Jothi and Company commenced on 12-6-1960, (vide order dated 21-6-1960), and though the lessees were entitled to continue as lessees for ten years from 12-6-1960, the lessees stated in their affidavit that they were willing to forego their right to run the mills for the remaining period of three and a half years and surrender possession of the mills on condition that the entire amount due to them was paid. They stated that they were incurring only loss by running the mills. They further stated that the assets of the company, worth over rupees ten lakhs in 1959, would not be worth more than rupees five lakhs when they filed the affidavit, because of depreciation. They, therefore, prayed firstly for a declaration of their charge (C. M. P. No. 11974 of 1966), secondly for a direction to the Official Liquidator to pay the amounts lying in his hands towards the debts payable to the lessees and thirdly to dispose of this appeal expeditiously.

8-A. In regard to the above the Official Liquidator filed his report dated 27-1-1967. He pointed out that it was not practicable to pay off the dues of Jaya Jothi and Company with the amount available with him and that the amount available with him had to be utilised to meet other liabilities. We disposed of the matter in part on 9-3-1967 and as an interim measure we directed the Official Liquidator to pay a sum of Rupees 25,000 to Jaya Jothi and Company and we allowed Jaya Jothi and Company to adjust a sum of Rs. 25,000 per mensem out of the rentals payable by them towards the interest due to them. Before disposing of the appeal and declaring the charge we directed the Official Liquidator to convene a meeting of the shareholders to ascertain their opinion whether the winding up was to be continued or discontinued. Accordingly a meeting was held on 11-5-1967. The shareholders passed the following resolution:

"Whereas Rajapalayam Sree Shanmuga Mills Limited, was ordered to be wound up by the High Court, Madras, in O. P. No. 297 of 1957 on 30-4-1959 on the ground of inability to pay its debts, whereas the debts have all been now paid except

the amount due to the lessees which is governed by the terms of the lease agreement dated 29-4-1960 and whereas steps are being taken to discharge the liability to the lessees, it is resolved by this General Body of Shareholders to pray the High Court to set aside the winding up order. Otherwise the shareholders are unable to dispose of or purchase the shares as needed or the heirs are not able to get transmission of the shares of the deceased shareholders and the shareholders are thereby put to loss and suffering, whereas the company is under liquidation, the shareholders are unable to do anything for the amelioration of the Company and whereas the scheme for the reconstruction of the company is about to be filed in Court the shareholders resolve to have the winding up order of Court set aside."

9. The shareholders met again on 4-6-1967 for proposing a scheme to be placed before the Court so that this Court may be persuaded to set aside the order of winding up. At that meeting they unanimously resolved to constitute a committee of nine members consisting of Mohamed Hussain, Advocate, as President, and one Arumugham and others as members. They were to take charge of the company and run it. The committee was authorised to collect funds for meeting the expenses for carrying on the management. The rights of Jaya Jothi and Company should, however, be left intact till their dues were paid off. Arumugham, one of the members of the Committee so appointed, filed C. M. P. No. 8713 of 1967 with a prayer to set aside the order of winding up. We considered C. M. P. No. 11974 of 1966 and C. M. P. No. 8713 of 1967 on 4-8-1967 and passed an order pointing out, in the first place, that the meeting convened on 4-6-1967 was not quite in accordance with the statutory provisions and that a further meeting should be convened. We also pointed out that the resolution passed on 4-6-1967 could not deserve the name of a scheme which could be considered by the Court before possession was handed over to the shareholders. We invited schemes for the reconstruction of the company under Sections 391 and 392 of the Act.

10. Notification was accordingly made in the dailies and otherwise and Arumugham has filed C. M. P. No. 14419 of 1967 submitting what he calls a draft scheme which, in effect, is the same as what was resolved at the meeting on 4-6-1967. This it is stated that a meeting of the shareholders would be held under the Chairmanship of the Official Liquidator and at such a meeting nine directors would be elected. The names of the nine persons are also commended for the approval of the shareholders. On the nine directors thus being elected, the winding up order should be cancelled and the directors should be entrusted with the administration of the company and they

would have power to raise loans from banks or financiers or from shareholders to pay off the amount due to the lessees and other lawful dues.

11. Another person, Mohamed Ismail Rowther has filed a similar application, C. M. P. No. 14420 of 1967. Sri R. Ramamurthi Iyer appears for Arumugham and Mohamed Ismail Rowther and submits that under the provisions of Section 466 of the Act the winding up order should be stayed permanently and, in effect, should be cancelled.

12. Jaya Jothi and Company then filed C. M. P. No. 14730 of 1967 reiterating their allegations in the prior application, C. M. P. No. 11976 of 1966 praying for a charge and other incidental remedies which need not be considered here. They have stressed the fact that during the last three years they have sustained a loss of nearly rupees seven lakhs and that it is not possible to run the mill without any financial assistance from the Government or other sources. Their learned counsel Sri G. Ramanujam (Government Pleader) states that their attitude is neutral on the question of winding up; in other words, that it is immaterial to them whether the appeal is allowed or dismissed, and that all they want is that their rights should not be prejudiced, that a charge should be declared in their favour straightway for the advances made by them and that they are willing to walk out immediately if the amounts due to them are repaid. They would also show some substantial concession if payment was made immediately or within a short time.

13. At one of the previous hearings Sri R. Ramamurthi Iyer, the learned Counsel for Arumugham took an adjournment to find out whether any financier or banker would come forward to help the shareholders to pay off the reduced amount which the lessees are prepared to take. Sri Ramamurthi Iyer however states now that nobody is prepared to advance the huge amount which would be required, say, rupees ten lakhs, so long as the winding up order to be cancelled or at least to be permanently stayed, within the meaning of Section 466. He urges that the proposals put forward in C. M. P. Nos. 14419 and 14420 of 1967 should be sufficient to satisfy the Court before passing the order of setting aside the winding up order or permanently staying the winding up order.

14. The Official Liquidator has filed his report dated 11-1-1968 in reply to C. M. P. No. 14730 of 1967. We directed him to file a reply with reference to C. M. P. Nos. 14419 and 14420 of 1967, giving up a rough idea of the current income and expenditure position of the company. The Official Liquidator accordingly filed his re-

port dated 18-1-1968. We have passed orders in C. M. P. Nos. 11974 of 1966 and 14730 of 1967 declaring the charge in favour of Jaya Jothi and Company for the advances made by them (amounting roughly to Rs. 11,75,000) with interest on Rupees 8,66,600-96 at 7½ per cent, less any amount adjusted or paid. The report dated 18-1-1968 shows that the annual income of the company at present is Rs. 93,982-05, the bulk of which is made up of rentals paid by the lessees. Excluding the interest, but including the provision for income tax and other charges, the company will have a sum of Rs. 49,969-39. The interest payable to the lessees is about Rs. 63,900 per year and thus the amount available with the company for payment of interest is only Rs. 49,969-39, whereas the interest payable is Rs. 63,900. In other words, the present position is that the income of the company is not sufficient to pay interest in full, and it is, therefore, out of question to pay any portion of the indebtedness of Rupees 11,75,000. It is thus clear that so long as the lessees continue, as they are entitled to, the company cannot pay its debts, and it is clear that the company is unable to pay its debts within the meaning of Sec. 433 (e) read with Section 434 (c) even today. This means that the appeal is liable to be dismissed.

15. The argument of Sri Balasubramanyam has no validity now. The only inference which can be drawn from the fact that Jaya Jothi and Company were prepared to advance huge amounts even in April 1960 is that they themselves hoped that by becoming lessees they could earn substantial profits and there was sufficient security for the advances to be made by them. Their hopes were realised to a large extent because for at least three or four years they were earning good profits in view of the facts that the price of cotton which they had to purchase was comparatively low and that the price of yarn which they sold was high. The position, however, seems to be the reverse just now. Textile mills are working at a loss and many of them have closed down because cotton is not available at moderate prices. Egyptian cotton is not available at all. Nobody seems to be prepared to come forward today offering more advantageous terms to the company than those offered by Jaya Jothi and Company so far. The contention that Clause 17 of the compromise decree, of its own force, provides for an automatic permanent stay of the winding up proceedings on payment in full to the original creditors by the Official Liquidator, is untenable. Section 466 of the Companies Act contemplates a specific application to the Court for permanent stay of the winding up order. It may be noted that the decretal order embodying the compromise did not give a direction that on payment in full to the original creditors there would be an automatic stay of the winding up.

scale of Rs. 350-600 OS equal to Rs. 250 to 550 IG.

2. The petitioner is an allottee from the erstwhile State of Hyderabad to the New State of Mysore. At the time of allotment upon the Reorganisation of the States Act, i.e., 1-11-1956, he was holding the position of Mustanad Attiba on a pay scale of Rs. 205 to 450 OS, equivalent to Rs. 176 to 375 IG. After reorganisation, he was promoted as Inspecting Officer on 23-9-1958. The claim of the petitioner is that because the said promotion was the first promotion after he got allotted to this State, he was entitled to the pay scale attached to the post of Hakeem Class II of his parent State of Hyderabad as that would have been the post to which he would have been promoted had he continued in Hyderabad, because that was the post immediately next higher to his post and therefore the first promotional post with reference to him.

3. The protection of service conditions in respect of pay scales which he depends upon is one set out in paragraph 5 of the Official Memorandum dated 12th May 1957 which is extracted in the judgment of this Court reported in *N. A. Kulkarni v. State of Mysore*, (1965) 1 Law Rep. 93 at p. 96. The relevant portion reads as follows:—

"They have come to the conclusion that it would be equitable to allow every person affected by reorganisation the limited protection of drawing pay on promotion to a post one stage above the one held by him in a substantive capacity or on which he had officiated continuously for a minimum period of three years immediately before the date of reorganisation, on the scale of pay that would have been admissible to him on such promotion in his parent State before reorganisation if such scale is favourable than the scale attached to the post in the new or reorganised State to which he is allotted."

4. The argument of Mr. Rangaraj, learned counsel for the petitioner is that the position of Inspecting Officer to which his client has been promoted is the immediately superior promotional post in the State of Mysore above Mustanad Attiba, that the post immediately above the said position of Mustanad Attiba in the erstwhile State of Hyderabad was that of Unani Hakeem Class II on a pay scale of Rs. 250 to Rs. 550 IG. That the position of Mustanad Attiba was equivalent to that of senior Hakeem Class III of Hyderabad is not disputed. Nor is it now disputed, having regard to the provisions of the Cadre and Recruitment Rules of the Hyderabad Medical and Health Services, now produced as Anne-

xure A to the petitioner's affidavit of 7/8th August 1969, that recruitment to the post of Class II Hakeems was made to the extent of 50 per cent by promotion from Class III Hakeems.

5. The question, however, is whether the mere fact that the post of Hakeems Class II was the first promotional post above the post held by the petitioner on 1-11-1956 is by itself sufficient to entitle him to the pay scale attached to that post on being promoted as Inspecting Officer in this State. It appears to us that such a proposition does not flow from the paragraph extracted above. It will be seen that the essence of the paragraph is that the benefit of higher pay scale which a Government Servant would have got in his parent State had he continued there is not to be taken away from him for reason only of the fact that he has got allotted to another State under the States Reorganisation Act. The said protection is also limited to the first promotion in the new State. Before one could say that a pay scale is higher than another pay scale with reference to posts, there must first be an equivalence in the matter of functions and responsibilities of the posts. If post "A" is undoubtedly superior to post "B", the fact that the former post has a higher pay scale is the natural consequence of the difference between the two posts. Hence a person in the lower post cannot complain that a higher post carries higher salary; nor can he make any grievance of the fact that if he is promoted to the lower of the two posts, he is not paid the salary of the higher post. He can complain of prejudice only if the pay scale of a post to which he is promoted in the new State is lower than the pay scale of a similar or equivalent post in his parent State, to which he would have been promoted. If the post in the parent State which carries higher salary is a superior post whose functions and responsibilities are more important and heavier than those of the post to which he is promoted in the new State, he cannot complain of any prejudice at all. What the paragraph cited above proposes to do is to meet a grievance or to avoid a prejudice. If prejudice or grievance can arise only if the two posts are of equal importance and the salary of the post in the parent State is higher than the salary of the post in the new State, then, that is the only situation sought to be met by the said paragraph.

6. Before, therefore, we can accept the petitioner's contention that he is entitled to the pay scale of Rs. 250 to 550 IG attached to Class II Hakeems in erstwhile Hyderabad State, it must be shown that the functions and responsibilities attached to the said post are same as, or similar to, those attached to the post of Inspecting Officers in the new State of

Mysore. The matter does not appear to have been examined either by the petitioner or by the State Government from this point of view.

7. Hence, the only direction that we can issue, in the circumstances, is that the State Government do examine the question whether the post of Hakeems—Class II in erstwhile State of Hyderabad is a post equivalent to the post of Inspecting Officers of this State in the matter of functions and responsibilities attached to them and that if they find that there is such equivalence, they do give to the petitioner the benefit of the scale of pay Rs. 250 to Rs. 550 IG, attached to the post of Class II Hakeem in erstwhile Hyderabad State, with effect from the date of his promotion in this State as Inspecting Officer, i.e., 23-9-1958.

8. We make a direction accordingly.
Order accordingly.

AIR 1970 MYSORE 114 (V 57 C 30)
A. R. SOMNATH IYER AND AHMED
ALI KHAN, JJ.

K. N. Marularadhya, Petitioner v. The
Mysore State, Respondent.

Writ Petitions Nos. 2472, 2471, 2212, 1577, 1578, 1621, 1622, 1625, 1563, 1682, 1728, 1986, 2087, 2700, 2848, 3062, 2970, 3032, 3120 to 3153, 1623, 1624, 1626, 3022, 3024, 3812 to 3824, 3173, 4075, 4076, 3827, 3501 to 3515, 3833, 3834, 4208, 4209, 4213, 4244, 4218, 4219, 4207, 3270, 3325, 3095 to 3098, 2715 to 2717 and 3851 of 1968, D/-3-2-1969.

(A) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966) Sections 65, 3, 4 and 6 — Levy of market-fee — Conditions precedent — There should be Market area, Market and Market Yard.
(Para 6)

(B) Mysore Agricultural Produce Markets Act (16 of 1939 now repealed by Act 27 of 1966), Sections 3 (b), (d) and 4 — Notified area and Market — They do not have reference to same area — Notified area is Market area of new Act 27 of 1966 and Market is Market of new Act. (Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Sections 4 and 6) — (Civil P. C. (1908), Preamble — Interpretation of Statutes.)

The market and the notified area are defined separately by clauses (b) and (d) of Section 3. It is clear from Section 4 that market is a place within well-defined boundaries which have to be set out in the notification under sub-section (2). Similarly, a notified area is another place which is distinct from the area which constitutes the market, and so, the 'market' and the 'notified area' cannot

have reference to the same area. The notified area is the market area of the new Act 27 of 1966 and the market must necessarily be the market of the new Act.
(Para 12)

It is, however, clear from paragraph 2 to Section 5 of the repealed Mysore Act, 16 of 1939, that the provisions of the Act and the other statutory provisions which will be made under it shall be applied by the market committee in the notified area, and the clear meaning of that paragraph is that the notified area is the bigger area and that the market is the smaller area, else, neither the Act nor the bye-laws and the rules would operate in the market and a construction resulting in such consequence cannot be sound.
(Para 13)

(C) Mysore Agricultural Produce Markets Act (16 of 1939 now repealed by Act 27 of 1966), Ss. 17 and 6 and Preamble — Market Yard — Clear intendment of Act is that there should be Market Yard to which Rule 4 refers — Rule 4 is within rule-making power — (Mysore Agricultural Produce Markets Rules (1939), R. 4).

Although the Act did not speak in clear language about a market yard, the clear intendment of the Act was that there should be one.

It is abundantly clear that the premises set apart by the market committee "for purposes of purchase and sale of agricultural produce" to which explanation to S. 17 refers is no other than the premises which can be declared as a market yard.

Since the functioning of a market committee under the provisions of the repealed Mysore Act for purposes set out in that Act could not be performed satisfactorily or in accordance with the purposes of the scheme and the Act unless there was a market-yard in which the market committee could make available facilities such as godowns, warehouses, canteens and the like. It is not possible to say that the constitution of a market-yard to which Rule 4 refers was not authorised by the Act and that therefore that rule is without competence.
(Paras 15, 16)

(D) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Ss. 4, 6 and 15(1), Proviso (a) — Markets and Market areas — Effect of Section 15(1), Proviso (a) — Though called by different names under repealed Acts they should be deemed to be Markets and Market areas under Act of 1966.
(Paras 19, 22)

(E) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Sections 65, 4, 6 and 15(1), Proviso (a) — Levy of market-fee — Conditions precedent — There should be market yard — Non-existence of market yards under repealed enactments — Whether fee could be recovered under Act of 1966.

The imposition or recovery of a fee under S. 65 must be preceded by the bringing into existence of a market yard in which some of the services to which the Act refers have to be rendered by the market committee. If, therefore, there was no market-yard in existence when the market committees demanded the fee, the fee was not exigible.

(Para 24)

In those cases in which there were no market yards under the repealed enactments, the market fee could be demanded only from the date on which it became due after the establishment of the market yards, and not for any antecedent period under the new Act. The market fee which could be demanded with respect to those areas is the market fee which was exigible under the old Act the operation of which with respect to that matter was saved by clause (a) of the proviso to S. 154(1) of the new Act. Unless the market fee under the old Act is superseded by the imposition of a market fee or by anything done under the new Act, that fee could be recovered only if its exigibility is not inconsistent with the provisions of the new Act.

(Para 28)

(F) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65 — Market fee — Levy is on first sale by producer inside yard or outside market — Character of impost is that of fee and not that of tax — Section 65 is not unconstitutional — (Constitution of India, Arts. 14 and 265) — (Civil P. C. (1908), Pre-Interpretation of Statutes) — (Madras Commercial Crops Markets Act 1933 (20 of 1933), S. 11(1)) — (Bombay Agricultural Produce Markets Act (22 of 1939) S. 11.)

Under S. 65 the levy of the market fee is on the first sale by the producer inside the yard or outside the market as the case may be to a trader or any other person and that once the agricultural produce has been sold in that manner no market fee could be recovered from a buyer who buys the agricultural produce subsequently. AIR 1967 SC 973, Foil.

(Para 38)

If the fee is payable only once and on the first purchase such as referred to above the character of the impost is that of a fee and not that of a tax. If the impost is a fee and the levy is on the first purchase of the agricultural produce, it cannot be contended that Section 65 is for any reason unconstitutional. It is not an acceptable postulate that Section 65 authorises a levy of a fee from the buyer for services rendered to the buyer and others in circumstances in which that fee is recoverable only from the persons to whom services are rendered. It is only in a case in which the statutory provision empowers an illegal

levy that the Court can strike it down. But if it does not, the Court should not by stretching and straining its language so interpret it that it bestows power to do something illegal and declare the provision to be invalid on that ground.

(Paras 39, 41)

Section 65 does not authorise the recovery of a fee from every buyer in the areas to which it refers but empowers the levy of the fee and its collection "from the buyer in respect of agricultural produce". It is clear that the words "at such times as may be specified in the bye-laws" do not authorise a plurality of the levy but only speak of the intervals or the points of time at which the fee which is properly recoverable could be collected. Under that part of the subsection, the market committee has no more power than to state at what intervals or at what points of time the fee which is properly recoverable could be collected.

(Para 34)

The purchase in respect of which the fee could be levied or collected is the earliest purchase of the agricultural produce belonging to the producer. It will be seen from the provisions of the Act that the producer who brings his agricultural produce into the market could sell it only inside the yard and it is this sale which he must needs make inside the yard when he brings his produce inside the market. That is the topic of the impost to which Section 65 refers. It would be unreasonable to place upon statutory provision like Section 65 which provides for the levy of a fee, the construction that every buyer who purchases agricultural produce either inside the yard or outside the market could be made liable to pay the fee, in the absence of words in that section which justify that construction. In the absence of express provision that the fee would be recovered again and again Courts must lean to the construction that it could be recovered only once, and, if that construction is correct, it must necessarily follow that the occasion on which the fee could be collected is the occasion when there is a sale by the producer inside the yard or outside the market. The power to levy the fee gets exhausted when the agricultural produce has been sold by the producer to a trader or other person and when the fee has been levied on the purchase so made, there is no more power in the market committee to demand the fee repeatedly from each purchaser thereafter.

(Para 35)

When there is striking resemblance of the language of S. 65 of the new Act and that of Section 11(1) of the Madras Act and Section 11 of the Bombay Act in the sense that none of these three sections in express language authorises a plurality of the market fee with respect to the

same agricultural produce and if in the administration of the Madras and Bombay Acts and corresponding provisions were understood to mean that the market fee could be recovered only once and the legislature employed similar phraseology in enacting S. 65, it would be reasonable to say that the legislative intent in enacting S. 65 of the new Act was to create an impost which was similar to the impost created by the relevant sections of the Madras and Bombay Acts.

(Para 36)

(G) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65 and Preamble — Levy of Market fee — Validity — Pith and substance of subject-matter of Act falls within entries 26 and 28 of State List — Entry 65 in State List authorises Legislation in respect of fees regarding all matters in State List — Imposition of fee with respect to sales made in course of inter-State trade and commerce is only incidental to main legislation and hence within competence of State Legislature: AIR 1967 SC 973 Foll. (Constitution of India, Art. 246 and Sch. 7 List 1 Entries 92-A and 96 and Sch. 7 List 2 Entries 26, 28 and 65.) (Para 43)

(H) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 65 — Delegation of power to fix market fee — Legislature fixing only maximum fee recoverable — Held there was no delegation of power with respect to any essential legislative function and hence provision was valid — (Constitution of India, Art. 245.) (Para 44)

(I) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 2(1)(iii) — Agricultural Produce — Definition of — Authority to State Government to declare produce not enumerated in definition as agricultural produce — Delegation is not beyond bounds of permissive delegation. (Constitution of India, Art. 245.) (Para 46)

(J) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 10 and Preamble — Validity — Representation of agriculturists on first market committee — Having regard to purpose of Act provision is valid. (Constitution of India, Art. 14.) (Para 48)

(K) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966) S. 11 Proviso 4 — Validity — Composition of market committee — Provision that if persons belonging to any of categories specified in clauses (ii) to (vii) are not available, committee shall consist of persons of categories available — Provision is not void. (Para 49)

(L) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966) Sec-16 (1) (a) — Representation of agriculturists — Disqualification — Purpose of — Provision is valid.

The purpose of disqualification mentioned in S. 16 (1) (a) is to prevent the betrayal of the interests of agriculturists by a person who although he is himself an agriculturist has also an interest in the activity of the traders, commission agents or brokers. Moreover, a provision creating a disqualification to function on a statutory body like the market committee is fully within the competence of the Legislature and the restriction such as the one which S. 16(1)(a) incorporates is unexceptionable. (Para 49)

(M) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 41 and Preamble — Validity — Object of provision — Provision is valid.

Section 41 which provides that every Chairman and Vice-Chairman of the market committee shall be an agriculturist, does not, invite any reproach since its purpose is that the two important offices of the market committee should be filled only by agriculturists the protection of whose interests is the primary and dominant purpose of the Act. (Para 50)

(N) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Sections 66 and 67 — Validity — Purpose of sections is enforcement of Act — Power is confided to nominee of State Government and can be exercised only in proper case — There is no entrustment of unguided and uncanalised power without prescription of any standard — Provisions are valid. (Constitution of India, Art. 245.) (Paras 51, 53)

(O) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 76 — Purpose and validity — Purpose of provision is to stop undercover sales — Provision is valid.

The enforcement of the provisions of the new Act is possible only if the manner of the sale of agricultural produce is also regulated in manner provided by this section. The sales by tender system or by public auction or by open agreement or by the other methods specified in that section are the methods by which the sales generally take place, and when they take place in that way the parties will have the opportunity to offer their bids freely and in that event the producer could always expect to secure for his agricultural produce a reasonable price. It is clear that the principal purpose of this section is to stop sales which are ordinarily described as undercover sales so that a sale conducted in a clandestine and secret manner which operates to the prejudice of the agriculturists, is made impossible. Since the purpose of the new Act is to regulate the sales of agricultural produce throughout the area over which the market committee exercises its control, the regulation of even subsequent sales is what can

prevent circumvention or evasion of the provisions of the new Act so that sale which is really a sale between the producer and the buyer does not masquerade as a sale between a trader and a trader. (Paras 55, 57)

(P) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Sections 78, 2 (8), 85 and Preamble — Validity — Purpose of Act is to avoid exploitation of producer through middlemen — Provisions of S. 78 cannot be said to be unreasonable even though commission includes storage and insurance charges — Commission agent is only del credere agent — He does not incur any risk by being del credere agent. (Constitution of India Arts. 19(6) and 19(1)(g)) — (Contract Act (1872), S. 182).

The primary purpose of the Act is to regulate the activity of the marketing of the agricultural produce in such a way that there should be no exploitation of the producer through the instrumentality of middlemen such as commission agents and others. (Para 60)

Those services which are rendered by a commission agent are the usual services rendered by one like him, and while the nature of the services rendered by a commission agent are of the same quality and have the attributes as those which used to be rendered quite a long time ago when the price of agricultural produce was exceedingly low, it is in the knowledge of every one that during recent times there has been a remarkable rise in the price of agricultural commodities and it is that phenomenon which now earns for a commission agent for the same services which he used to render when the market with respect to agricultural produce was in an extremely depressed condition, a correspondingly large commission which is attributable exclusively to the rapid and enormous increase in the price of agricultural produce. It is that condition of the market concerning agricultural produce which makes it possible for the commission agent to secure for himself a large commission than he could have hoped to get at antecedent periods of time, and in that situation a commission of one and a half per cent which is what Section 78 fixes cannot be said to be unreasonable notwithstanding the fact that such commission includes storage and insurance charges. (Paras 61, 67)

When the provisions of Section 78 are judged by the standards laid down by the Supreme Court by which the reasonableness of these provisions should be assessed, they cannot be said to be unreasonable. AIR 1959 SC 300 and AIR 1960 SC 430, Foll. (Para 66)

Section 78 does no more than to constitute a commission agent a del credere agent, and that he is one is clear from

the definition contained in Section 2 (8). It will also be seen from the provisions of Section 85 that the commission agent does not really incur any risk by being fastened with the attributes of a del credere agent. (Para 69)

(Q) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Sections 85 and 86 — Validity — Classification made by S. 85 is reasonable — Provisions as to deposit are reasonable — Provisions are valid. (Constitution of India, Arts. 14, 19(6) and 19(1)(g).)

(Paras 72, 74)

(R) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 89 (1), (2) — Validity — Powers of market-committee to impose penalties — Appeal lies under sub-section (2) to Chief Marketing Officer — Provisions are valid. (Para 75)

(S) Mysore Agricultural Produce Marketing Rules (1968), R. 76 — Validity — Rule is repugnant to provisions of Proviso (ii) (b) to S. 8(1)(b) of 1966 Act — Rule is invalid to that extent. (Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 8(1)(b) Proviso (ii)(b)).

The effect of Proviso (ii)(b) to S. 8 (1)(b) is that no licence is necessary in the case of a person who purchases agricultural produce in the market outside the yard, from a trader for retail sale. But Rule 76 (1) forgets this exemption created in favour of a retail trader and enjoins even that retail trader to obtain a licence even in respect of his activity in respect of which an exemption is created. It is hardly necessary to make that rule since the licencing of the activity in the market area stands fully regulated by Section 8. So Rule 76(1) which is repugnant to the provisions of Section 8 has to be struck down and declared to be invalid to the extent of such repugnancy. (Para 77)

(T) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 8(1)(b) Proviso (ii) (b) — Purchase for retail sale — If trader makes purchase to which sub-clause refers, no license is necessary — License is not necessary even to make retail sale of goods so purchased. (Para 80)

(U) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Sections 148, 149, 154(1) Proviso (c), 10, 11 and 2(2) — Bye-laws made by old market-committees after coming into operation of 1966 Act — Validity — Under proviso (c) to S. 154(1) old market-committee has power to make bye-laws under S. 148 although no first bye-laws have been made under S. 149 — Old market committee acquires status of market-committee under Act of 1966 within meaning of S. 2(2) — Election of market committee under S. 11 must be preceded

by composition of nominated market committee under S. 10 — Such bye-laws made by old market-committees are valid.

Section 10(1) prescribes the composition of the first market committee and states that first market committee shall consist of the various categories of persons nominated by Government. So, the words "the first market committee" occurring in S. 149 have reference to the first nominated market committee to which Section 10 refers, and the necessity for the preparation of the first bye-laws by the Chief Marketing Officer of the first market committee arises only when that first market committee comes into being by the process of nomination to which Section 10 refers. (Para 84)

A first market committee conforming to that description stands constituted in that way only if an old market committee does not have the authority or the power to continue to function as the market committee even under Act of 1966. But if under proviso (c) to Section 154 of the 1966 Act it is the duty of the old market committee to 'exercise the powers conferred, perform the functions, and be subject to the liabilities imposed by the provisions' of the 1966 Act and the rules made thereunder until market committees are constituted under the provisions of the 1966 Act, the old market committee became thus charged with the duty to exercise powers and perform functions under the 1966 Act. And one of the powers that could be exercised and the functions that could be performed is the power to make a bye-law under Section 148. (Para 85)

It is of importance to observe in this context that Section 148 which bestows power to make bye-laws does not bestow it only on the second and subsequent market committees to which Section 11 refers. The repository of that power is the market committee which is defined by Section 2 (2) as a market committee constituted for a market area under the Act. If proviso (c) to Section 154 (1) says that an old market committee could exercise power and perform functions under the 1966 Act, that market committee acquires the status of a market committee established under the 1966 Act; if it does not, it cannot exercise the powers created by the 1966 Act or perform functions under it. That would be the true position notwithstanding the fact that unlike proviso (a) to Section 154 (1) which creates a legal fiction that certain things done under the old repealed Act 27 of 1966 must be deemed to have been done under the 1966 Act, proviso (c) to that sub-section only says that an old market committee shall exercise power and perform functions under the 1966 Act, and so the old market

committee acquires the power to make bye-laws under S. 148, although no first bye-laws have been made under Section 148. The words "and be subject to the liabilities imposed by the provisions of this Act" occurring in clause (c) of the proviso to Section 154 (1) cannot be understood as divesting the old market committee of the power to make bye-laws under Section 148 until first bye-laws are made under Section 149.

(Para 86)

Section 154 is a purely transitional provision as its language clearly discloses. The old market committee is of the nature of a care-taker committee which can function only for a temporary period until a new market committee comes into being in accordance with the provisions of the new Act. The only process by which a new market committee can so come into being is by the observance of the procedure prescribed by Sections 10 and 11 and under their provisions, the first step to be taken for the establishment of a new market committee is to bring into existence a nominated market committee under S. 10 which Government could, in the exercise of the power conferred by it. And, when the first market committee so comes into being, it produces two consequences: it displaces the old market committee, and it becomes necessary for the Chief Marketing Officer of the first new market committee to make the first bye-laws under Section 149, and there can be supersession of those first bye-laws only when the second market committee comes into existence under Section 11 and makes bye-laws under S. 148.

(Para 89)

The new Act contemplates the establishment of a market committee in a particular way. It is of significance to observe that Section 11 speaks of a second and subsequent market committee. Although that is what the marginal note says, Courts should not altogether overlook the description which that marginal note gives, and what is clear from the language of Section 11 is that the elected market committee which comes into being under it is the second market committee and the first market committee which is its predecessor is not other than the nominated market committee to which Section 10 refers.

(Para 90)

So what is clear is that the election of a market committee under Section 11 must necessarily be preceded by the composition of a nominated market committee under Section 10, and it is only by that process that an old market committee which continues to function under the proviso (c) to Section 154(1) can vacate office.

(Para 91)

That such is the scheme of the new Act is destructive of the contention that

the bye-laws made by the old market committee after the new Act came into force have no validity. The competence to make those bye-laws clearly flows from proviso (c) to Section 154(1) of the new Act although they perish when bye-laws are made by the first market committee under Section 149. (Para 92)

(V) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Sections 3 and 154(1)(a) — Scope — Notification under S. 5 of Madras Act must be deemed to be notification under Sec. 3 of 1966 Act as per S. 154(1)(a) — That agricultural produce under 1966 Act is called commercial crop under Madras notification is of no effect — Held that items 3 to 16 enumerated in bye-law 12(1) of Bye-laws made by Bellary market-committee were already declared as commercial crops under Madras Act and, therefore, Bye-law 12(1) was valid. (Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148) — (Madras Commercial Crops Markets Act (20 of 1933), S. 4 — Notification under.) (Para 95)

(W) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 148, Bye-laws under, Bye-laws made by Bellary market committee, Bye-law 12(2) — Validity — Bye-law 12(2) is authorised by Ss. 65 and 82 of 1966 Act and, therefore, within competence of market-committee. (Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Ss. 65 and 82.) (Para 96)

(X) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 2(2) — Agricultural produce—Meaning of — Jaggery is 'agricultural produce' within definition. AIR 1962 SC 97, Foll. (Para 101)

(Y) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 148, Bye-laws under, Bye-laws made by Bellary Market-committee, Bye-law 22 (14) and Sections 63 (2), 148, 131 — Validity — Market committee is not empowered to delimit number of functionaries who may work as assistants under traders etc., Section 148 or Section 131 does not confer such power — Bye-law 22(14) is invalid. (Para 105)

(Z) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 148, Bye-laws under, Bye-laws made by Bellary Market Committee, Bye-law 23 (11) (b) (i), Section 2 (37) and Preamble — Validity — Act does not empower market-committee to restrict purchases made by retailers — Bye-law is invalid.

There is no provision in the Act which creates power in the market committee to restrict the purchase made by the retailer. (Para 106)

Section 2 (37) which defines 'retail sale' empowers the market committee to

specify the quantity which could be sold at a retail sale to a consumer for domestic consumption. But neither the definition nor any other provision in the Act precludes a retailer from purchasing as much of agricultural produce as he desires to purchase subject, however, to the provisions of Section 85 which enjoins the obtaining of a licence of the appropriate classification. So bye-law 22 (11) (b) (i) of the Bellary Agricultural Produce Marketing Committee is invalid. (Para 107)

(Za) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 148, Bye-laws under, Bye-laws made by Bellary Market Committee, Bye-law 35 and Section 49 (2) — Validity — Power to regulate proceedings of market-committee clearly emanates from Section 49 (2) — Bye-law 35 is valid. (Para 108)

(Zb) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 148, Bye-laws under, Bye-laws made by Mysore Market Committee, Bye-law 23 (10) (b) (ii) and Section 85 (1)(iv) — Validity — Section 85(1)(iv) does not restrict turnover of trader to fifteen thousand rupees — Bye-law is invalid.

Bye-law 23 (10) (b) (ii) which says that the total quantity sold by a retail seller during the year shall not exceed fifteen thousand rupees is invalid. The Act does not confer any power on the market committee to impose that restriction upon the retailer. It is obvious that the market committee which made this bye-law has entirely misunderstood the provisions of Section 85 (1) (iv) which says that a trader whose purchase turnover of agricultural produce which he purchases for sale to consumers for domestic consumption exceed fifteen thousand rupees shall not be classified as a 'D' class trader. But that does not mean that the turnover of a trader could not exceed fifteen thousand rupees. All that it says is that if that happens, he gets into the higher class. Bye-law No. 23 (10) (b) (ii) must, therefore, be struck down.

(Zc) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 148, Bye-laws under, Bye-laws made by Mysore Market Committee, Bye-law 23 (10) (b) (i) — Validity — It should be understood to prescribe upper limit — It does not prohibit retailer from making sales of larger quantities so long as he does not claim for that transaction status of retail sale — Bye-law is valid. (Paras 111, 112)

(Zd) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 148, Bye-laws under, Bye-laws made by Mysore Market Committee, Bye-law 23 (15) and Section 76 — Validity —

Bye-law is authorised by Section 76 — It is valid.

Bye-law 23 (15) does no more than to incorporate a condition which is usually to be found in all auction sales and the power to make this bye-law is to be found in Section 76 of the Act. This bye-law is, therefore, valid. (Para 113)

(Ze) Mysore Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 148 — Bye-laws under Bye-laws made by Mysore Market Committee, Bye-laws 23 (10) (1) and 23 (2) (3) — Validity — Bye-laws are valid.

(Para 114)

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Shri V. S. Malimath, Advocate General for Respondents 2 & 3 in W.P. Nos. 2471 & 2472/68; for Respondent 1 in W.P. Nos. 2212 & 3062/68; 1577, 1578, 1621 to 1626, 1986, 2087, 3022, 3024, 3812 to 3824/68, 3175, 4075, 4076, 3827, 3501 to

3515, 3833, 3834, 4208, 4209, 4219, 4214, 4218, 4207, 4919, 3851, 3270, 2715 to 2717/68; for Respondents Nos. 1 & 2 in W.P. Nos. 1682/68; 1728, 2828, 3501 to 3515, 3325; for Respondents Nos. 1 & 3 in W. P. Nos. 1563/68, 2700, 2970, 3032, 3120 to 3153/68; for Respondents Nos. 2 & 3 in W.P. Nos. 3095 to 3098/68; Shri K. S. Puttaswamy for Respondent No. 1 in W.P. Nos. 2471 & 2472/68 and for Respondent No. 2 in W.P. No. 1986/68; Shri B. G. Sridharan for Respondent No. 2 in W.P. No. 2212/68; for Respondent No. 3 in W.P. No. 2828/68; for Respondent No. 2 in W.P. No. 3022/68; for Respondent No. 2 in W.P. 3173/68; Shri M. R. Achar for Respondent No. 2 in W.P. No. 3062/68; for Respondent No. 2 in W.P. No. 2700, 2970, 3032, 3120 to 3153/68; 3024/68; 3270, 3325/68; Shri T. S. Ramachandra for Respondent No. 2 in W.P. Nos. 1577, 1578, 1623 to 1625/68; Shri H. B. Datar for Respondent No. 2 in W.P. Nos. 1621, 1622 & 1625/68; Shri B. V. Krishnaswamy Rao for Respondent No. 2 in W.P. Nos. 1626/68, 1563/68; Shri B. K. Ramachandra Rao for Respondent No. 3 in W.P. No. 1728/68; for Respondent No. 2 in W.P. No. 3827/68; for Respondent No. 3 in W.P. Nos. 3501 to 3515/68; for Respondent No. 2 in W.P. Nos. 3833, 3834, 4208, 4209, 4219/68; for Respondent No. 1 in W.P. Nos. 3095 to 3098/68; Shri K. A. Swamy for Respondent No. 2 in W.P. No. 2087/88; Shri Murlidhar Rao for Respondent No. 2 in W.P. Nos. 3812 to 3824/68, 4214/68, 4218, 4207, 4919, 3851/68; Shri N. A. Mandgi for Respondent No. 2 in W.P. Nos. 4075, 4078/68; Shri S. G. Bhat for Respondent No. 2 in W.P. Nos. 3095 to 3098/68; Shri K. Jagannath Shetty for Respondent No. 2 in W.P. Nos. 2715 to 2717/68, for Respondents.

SOMNATH IYER, J.:— In these writ petitions, many common questions of law arise for decision. Those questions pertain either to the constitutionality or to the interpretation of the provisions of the Mysore Agricultural Produce Marketing (Regulation) Act, 1966 which came into force on May 1, 1968.

2. In the new State of Mysore which came into being under the provisions of the States Reorganisation Act on November 1, 1956, there were six laws operating with respect to the regulation of the marketing of Agricultural produce either on one species or of the other. They were: The Madras Commercial Crops Markets Act, 1933 (Madras Act XX of 1933) as in force in Bellary District; the Madras Commercial Crops Markets Act, 1933 (Madras Act XX of 1933) as in force in the district of South Kanara and the taluk of Kollegal; the Bombay Agricultural Produce Markets Act, 1939 (Bombay Act XXII of 1939) as in force in the districts of Dharwar,

Belgaum, Bijapur and North Kanara which were originally in the State of Bombay and which became part of the new State of Mysore; the Hyderabad Agricultural Market Act, 1339-F (Hyderabad Act II of 1339 Fasli) which was in force in the districts of Bidar, Gulbarga and Raichur; the Mysore Agricultural Produce Markets Act, 1939 (Mysore Act XVI of 1939) which was in force in the area of what is generally known as the former State of Mysore; and, the Coorg Agricultural Produce Markets Act, 1956 (Coorg Act VII of 1956) which was in force in the district of Coorg.

3. The Mysore Agricultural Produce Marketing (Regulation) Act, 1966, which will be referred to in the course of this judgment as the new Act, repealed all the six laws which were operating variously in the different areas to which we have already referred.

4. In these writ petitions, the constitutionality of quite a few provisions in the new Act is questioned. Those provisions are: Sections 2(1)(iii), 10, 11, 16(1) (a), 41, 65, 66, 67, 72, 75, 76, 78, 85 and 86. Among the rules made under the new Act in the exercise of the rule making power created by Section 146 of that Act, the only rule, the constitutionality of which was assailed, in the argument is Rule 76(1). In some cases, the validity of all the bye-laws made by some of the market committees was questioned, and in other cases, only some of the bye-laws made by those committees. It is not necessary to make an enumeration of those bye-laws in this part of the judgment since, to the arguments concerning those bye-laws we shall advert at the appropriate stage. In addition, the argument was maintained that quite apart from the constitutionality of Section 65 which authorises the levy of market fee by the market committee, the market committees could not, in the case of the petitioners before us, demand any market fee which could be imposed under the new Act since the stage at which such market fee could be demanded had not come into being under the provisions of the new Act.

5. Before proceeding to discuss the constitutionality of the various provisions to which we have referred or the validity or otherwise of the bye-laws and Rule 76(1), it would be convenient to discuss the argument maintained before us that none of the market committees which are parties to these writ petitions could demand from the petitioners before us any market fee under the new Act. It is indisputable that if the market fee authorised by Section 65 of the new Act cannot be demanded, what could be demanded is the market fee payable under the repealed enactment since, the operation to that extent of the repealed enactments

is preserved by Section 154 of the new Act which is the saving section.

6. The main ground on which it was contended before us that no market fee under the new Act could be demanded was that the condition precedent to the demand of that market fee, the existence of which is made indispensable by Sections 3, 4 and 6, does not exist in the cases before us although a contention was raised to the contrary by some of the Advocates before us. Those sections read:

"3. Notification of intention of regulating the marketing of specified agricultural produce in specified area:

(1) The State Government may, by notification declare its intention of regulating the marketing of such agricultural produce in such area, as may be specified in the notification. The notification may also be published in Kannada in a newspaper circulating in such area.

(2) The notification shall state that any objections or suggestions which may be received by the State Government within such period as shall be specified in the notification, not being less than thirty days will be considered by the State Government.

4. Declaration of market area and of regulation of marketing of specified agricultural produce therein:

After the expiry of the period specified in the notification issued under Section 3, and after considering such objections and suggestions as may be received before such expiry, the State Government may, by another notification, declare the area specified in the notification issued under Section 3 or any portion thereof to be a market area and that the marketing of all or any of the kinds of agricultural produce specified in the notification issued under Section 3 shall be regulated under this Act in such market area. A notification under this section may also be published in Kannada in a newspaper circulating in such area.

6. Markets, market yards, market sub-yards, sub-markets, and sub-market yards:

(1) (a) For every market area:—

(i) there shall be a market and
(ii) there may be one or more sub-markets;

(b) For every market:—

(i) there shall be a market yard, and

(ii) there may be one or more market sub-yards.

(c) For every sub-market there shall be a sub-market yard.

(2) (a) The Chief Marketing Officer shall, as soon as possible after the issue of a notification under Section 4, by a notification, declare any specified area in the market area to be a

market. He may also by the same notification or by any subsequent notification declare any other specified area in the market area to be a sub-market.

- (b) The Chief Marketing Officer shall by a notification under clause (a) also declare a specified place (including any structure, enclosure, open place or locality) in the market to be a market yard for the regulated marketing of the notified agricultural produce specified in the notification. He may also by the same notification or by any subsequent notification or notifications declare any other specified area or areas, as the case may be, (including any structures, enclosures, open place or locality) in the market to be a market sub-yard or sub-yards for the regulated marketing of the notified agricultural produce specified in the notification."

Section 65 reads:

"65. Levy of market fees:

(1) The market committee shall levy and collect market fees from the buyer in respect of agricultural produce brought by,— (i) any trader or other person in the yard; and (ii) any trader outside the market or sub-market in the market area.

At such rate as may be specified in the bye-laws (which shall not be more than thirty paise per one hundred rupees of the price of the agricultural produce) in such manner and at such times as may be specified in the bye-laws.

(2) For purposes of sub-section (1), all notified agricultural produce leaving a yard shall, unless the contrary is proved, be presumed to have been brought within such yard by the person in possession of such produce."

The scheme of these four sections which we have set out makes it clear that before it could be said that the market committee could levy or collect the market fee under the 65th Section, there should at least be a market area, a market and a market-yard. Among these areas, the market area is the biggest, the market is the next biggest and the market-yard is the smallest. Section 6 makes it clear that for every market area, there shall be a market, and that for every market, there shall be a market-yard. So, that for the purpose of Section 65, there should be a market area, a market and a market-yard whether or not there are sub-markets or market sub-yards or sub-market yards, is plain, and, that that is so was not disputed by Mr. Advocate General appearing for the State and by

the Advocates appearing for the fifteen marketing committees which are before us. In the pleadings before us, no one disputes that there is no market area or the market. The limited ground on which an argument is constructed that no market fee could be demanded under Section 65 is that there was and has been no market-yard such as the one to which Section 6 refers. This is the state in which we find the pleadings in the cases before us although at one stage during the argument of Mr. Srinivasan appearing for the petitioners in Writ Petition Nos 2471/68 and 2472/68 did make an endeavour to raise a contention that there was no valid notification under which any market was established under the provisions of the repealed Mysore Act. But, it was pointed out to him that he was precluded by raising any such contention since there was an admission in the affidavits produced along with the writ petitions that the markets such as what had to be established under the repealed Mysore Act had been established.

7. The importance of the absence of an allegation or a plea that there was no market area or a market under the repealed enactments consists of the fact that if the provisions of proviso (a) to Section 154(1) of the new Act are applicable, the establishment of a market area and a market or even a market yard, as the case may be, which came into being under the repealed enactments should be deemed to be the market area, market and market yard which may be established or declared or notified under the new Act. They could be so deemed to have been established only if the legal fiction which is created by that proviso is not inconsistent with the provisions of the new Act.

8. We should mention here that it is not controverted that the repealed Hyderabad Act, the Bombay Act and the Mysore Act did contain provisions for the establishment of areas corresponding to the market area, the market and the market-yards to which Section 6 of the new Act refers. It is equally clear that the repealed Madras Act contained provisions for the establishment of areas corresponding to the market area and the market of the new Act although it contained no provisions for the establishment of a market-yard such as the one to which the new Act refers.

9. The notified area of which Ss. 3 and 4 of the repealed Madras Act speak corresponds to the market area of the new Act, and, the market to which Section 4-A (2) refers corresponds to the market of the new Act. Similarly, the market of which Section 3 of the Hyderabad Act speaks is the market area of the new Act, and, the rules made under that Act contain provisions for the estab-

ishment of the areas corresponding to the market and the market-yard of the new Act; Rule 2(c) referred to the market to which Section 3 of that Act referred which is the same as the market area of the new Act; Rule 2(d) authorised market-yards for the sale and purchase of cotton, and, Rule 2(e) for the sale and purchase of grain; and Rule 2(f) authorised the establishment of a market proper which corresponds to the market of the new Act.

10. There were similar provisions in the repealed Bombay Act as it stood at the relevant point of time and they are Sections 4 and 4-A. It is undisputed that the market area to which Section 4 refers is the market area of the new Act, and that, the market and the market-yard to which Section 4-A refers correspond respectively market and the market-yard of the new Act.

11. The corresponding provision in the repealed Mysore Act is Section 4. The notified area to which the definition in Section 3(d) refers is, it is undisputed, what corresponds to the market area of the new Act, and that the notified area is what had to be notified by a notification under Section 4(2) of that Act. Section 4(1) also refers to a market the limits of which had to be defined under sub-section (2), and, again it is clear that the market to which those parts of S. 4 refer is what corresponds to the market of the new Act.

12. We do not accept the argument advanced by Mr. Srinivasan that the market to which Section 4(1) of the repealed Mysore Act refers, is the same as the notified area to which sub-sec. (2) refers and the reasons why we say so are firstly that the market and the notified area are defined separately by Section 3. Clause (b) of Section 3 says that a market means a market established under Sec. 4 and clause (d) which defines the notified area reads:

"(d) 'Notified area' means an area notified under Section 4."

Section 4 reads:

"4(1) The State Government may, after consulting the district board and such other local authorities as they deem necessary or upon a representation made by such local authorities, by notification in the official gazette, declare that any place shall be a market established under this Act for any agricultural produce.

(2) Every such notification shall define the limits of the markets so established, and may, for the purposes of this Act, include within such limits such local area as the State Government may prescribe."

One thing which is clear from Section 4 is that market is a place within well-defined boundaries which have to be set

out in the notification under sub-sec. (2). Similarly, a notified area is another place which is distinct from the area which constitutes the market, and so, the argument that the 'market' and the notified area' have reference to the same area, cannot be sound. If they are two different areas, one should be the area which corresponds to the market area of the new Act and the other is obviously what corresponds to the area of the market of that Act and so, the question arises whether the notified area is the market area, or, the market to which Section 4(1) refers is the market, and, since Mr. Srinivasan does not dispute that the notified area is the market area, the market must necessarily be the market of the new Act. That we can reach that conclusion by that process is what resolves a complication created by the somewhat inartistic language in which sub-section (2) of Section 4 of the repealed Mysore Act is worded. If that sub-section is literally understood, it may *prima facie* mean that the market is the bigger area and that the notified area is the smaller area, especially for the reason that that sub-section says that the notified area "may include" within the limits of the market area.

13. It is, however, not necessary for us to discuss the import of the word "include" occurring in sub-section (2) of Section 4 of the repealed Mysore Act since both Mr. Advocate General and Mr. Srinivasan asked us to say that the notified area is the market area. That they are right in making that submission is clear from paragraph 2 to Section 5 of the repealed Mysore Act which says that the provisions of the Act and the other statutory provisions which will be made under it shall be applied by the market committee in the notified area, and the clear meaning of that paragraph is that the notified area is the bigger area and that the market is the smaller area, else, neither the Act nor the bye-laws and the rules would operate in the market and a construction resulting in such consequence cannot be sound.

14. But, considerable argument was expended over the question whether the Mysore Act contains a provision for the establishment of a market-yard. Mr. Srinivasan pointed out to us that the expression "market-yard" did not occur in any part of the Act and that it occurred for the first time only in Rule 4 and his submission was that Rule 4 of the rules made under the repealed Mysore Act was beyond the competence of the State Government which under Section 6 of that Act was the repository of the power to make rules for purposes set out in that Section. Rule 4 as it stood amended defined a market-yard as an area which was part of the market declared

by notification under Section 4. And, it was maintained by Mr. Srinivasan that Section 6 did not authorise the rule by which a market yard could thus be brought into being.

15. But, it seems to us that although the Act did not speak in clear language about a market-yard, the clear intention of the Act was that there should be one. Section 17 of the Act contained a provision that there should be no private market inside the limits of a declared market or within such distance from the market as may be notified in official gazette, and the explanation to that Section which was in the nature of an exception to Section 17 stated that a person who sold his own agricultural produce "outside the premises" set apart by the Market Committee for purposes of purchase and sale of agricultural produce shall not be deemed to establish a private market in contravention of the provisions of Section 17. It is abundantly clear that the premises set apart by the market committee "for purposes of purchase and sale of agricultural produce" to which that explanation refers is no other than the premises which can be declared as a market yard.

16. Section 6 authorises Government to make rules for purposes of management and regulation of markets under the Act and Sections 5, 6 and 7 contain provisions for the management of the market, the issue of licences to many classes of persons including warehousemen and the specification of place at which the agricultural produce shall be weighed and measured and the like. Since the functioning of a market committee under the provisions of the repealed Mysore Act for purposes set out in that Act could not be performed satisfactorily or in accordance with the purposes of the scheme and the Act unless there was a market-yard in which the market committee could make available facilities such as godowns, warehouses, canteens and the like, it is not possible for Mr. Srinivasan to ask us to say that the constitution of a market-yard to which Rule 4 refers was not authorised by the Act and that therefore we should denounce that rule as one made without competence.

17. It will be seen from the discussion so far made that except under the repealed Madras Act which provided only for the establishment of areas corresponding to the market area and the market of the new Act, the remaining four laws contained provisions under which, areas which correspond to the market area, the market and the market-yard of the new Act could be established.

18. It will be recalled that in the affidavits produced in these writ petitions, there is no pleading that areas corres-

ponding to the market area and the market had not been established under the repealed enactments. The only controversy which the pleadings before us raise is one which pertains to the question whether market yards had also been established under the repealed enactments. So, the two questions which we should proceed to consider are firstly whether the areas established under the repealed enactments which correspond to the market area and the market of the new Act, could, under the proviso (a) to Section 154(1) of the new Act, be deemed to have been established under the corresponding provisions of the new Act, and secondly whether market-yards had also been established under any of the repealed enactments and whether those market yards could also be regarded as market yards established under the new Act.

19. We are of the opinion that the market areas and the markets established under the repealed enactments, although they were called by different names by those enactments, should be deemed to be market areas and the markets established under the new Act. Such, in our opinion, is the clear effect of clause (a) of the proviso to Section 154(1) of the new Act.

20. We do not accede to the argument that there is any element of inconsistency in the provisions of the new Act which can preclude the conclusion which we have reached. The only submission made to us in support of the argument that an element of inconsistency existed was that while the market of the new Act could be declared only by the Chief Marketing Officer under Section 6 of that Act, the market under the repealed Madras Act could be established only by the marketing committee and under the other repealed laws, only under a notification by the State Government, and that, that is the inconsistent feature of the new Act which does not save the old markets.

21. We can say that the provisions of the new Act are inconsistent with the legal fiction which is enjoined by clause (a) only if we find it possible to say that what was done under the old Act was not possible under the new Act by reason of the provisions of the one being inconsistent with the provisions of the other. But, if on the contrary a notification which could be made under the new Act declaring an area to be a market could also be made under the repealed enactments whoever may be the repository of the power to make that notification, and mere fact that the two designated authorities who could make the notifications are not identical, does not introduce the element of inconsistency. The element of inconsistency would exist only if there are provisions in the new Act which

make the notification similar to a notification under the repealed enactment impossible under its provisions. But, if on the contrary the notification under the repealed enactments whoever could make it, is also possible under the new Act the provisions of Clause (a) become manifestly applicable there being no inconsistency such as the one to which it refers.

22. That being the true position, we should, in our opinion, say that the market areas and the markets which came into being under the repealed enactments should be deemed to have been declared under Sections 4 and 6 of the new Act respectively and that they are the market areas and the markets for the purposes of the new Act.

23. But, the market committees functioning under the new Act could demand the market fee to which Section 65 refers only if in addition to the market area and the market there was also a market-yard the establishment of which is made imperative by Sec. 6 of the new Act. The fee which could be imposed and collected under that Section is a fee for services rendered by the market committee to the person from whom it could be claimed, and that that is so is also the case of the State Government and the market committees which are before us. It is also not controverted that the services in respect of which that fee could be demanded are rendered not only in the market area and the market but also in the market yard although for the petitioners the contention is that no service is rendered in the area outside the market.

24. However that may be, the imposition or recovery of a fee under Section 65 must be preceded by the bringing into existence of a market yard in which some of the services to which the Act refers have to be rendered by the market committee. If, therefore, there was no market-yard in existence when the market committees demanded the fee, the liability to pay which is repudiated by the petitioners before us, it is obvious that the fee was not exigible.

25. Mr. Advocate General and the Advocates appearing for the market committees did not controvert the correctness of this position. So, it becomes material to enquire whether market-yards were also in existence at the relevant point of time. They would be in existence if they had been created or established under the repealed enactments, for, in that event, they should be deemed to be market-yards established under the new Act as provided by S. 154.

26. But, it is admitted by the Advocate General on behalf of the State and by the Advocates appearing for the

market committees before us that among the areas with which we are concerned, market-yards had been established under the repealed enactments only in eight areas which were under the control of the agricultural market committees of Nippani in the district of Belgaum, the city of Mysore in the district of Mysore, Kumta and Sirsi in the district of North Kanara, Yadgir in the district of Raichur and Raichur and Dharwar. It is also admitted that by the decision rendered by this Court in Nagaiah Shetty v. Market Committee, (1965) 1 Mys LJ 766 the notification by which a market yard was established in Raichur was struck down and that the notification relating to Yadgir was similarly declared invalid in Bindraj Surajmal v. State of Mysore, (1968) 2 Mys LJ 57. It is also not disputed that in writ petitions Nos. 634 and 635 of 1965, this court made the pronouncement that the market-yard in Belgaum had not been properly established. The validity of the notification relating to the market-yard in Nippani is under impeachment in this court in writ petition No. 699 of 1966 and also in a second appeal. The resultant position, therefore, is that when the new Act came into force, there were no market-yards in Raichur, Yadgir and Belgaum since the notifications under which they were established were declared invalid. The question whether there was a market-yard in Nippani would depend upon the pronouncement of this Court in the writ petition and in the second appeal to which we have referred.

27. So, the market-yards which were established in the city of Mysore, in Kumta, Dharwar and Sirsi must be deemed to be market-yards established under the provisions of the new Act, and so, the challenge made with respect to the market fee demanded in these four areas cannot succeed on the ground that there was no market yard in those areas such as the one to which Section 6 of the new Act refers.

28. It is stated before us by Mr. Advocate General who has produced before us the relevant notifications that in the areas in which there were no market-yards under the repealed enactments, market-yards have been since established during the pendency of these writ petitions under Section 6 of the new Act on December 7, 1968 except in the area of Hospet in which the relevant notification is dated December 16/19, 1968. So, in those cases in which there were no market yards under the repealed enactments the market fee could be demanded only from the date on which it became due after the establishment of the market yards, and not for any antecedent period under the new Act. The market fee which could be demanded with respect to those areas

is the market fee which was exigible under the old Act the operation of which with respect to that matter was saved by clause (a) of the proviso to Section 154 (1) of the new Act. That proviso says that the fee levied under the old Act must be deemed to be the fee levied under the new Act unless and until superseded by anything done under the new Act and unless it is inconsistent with the provisions of the new Act. So unless the market fee under the old Act is superseded by the imposition of a market fee or by anything done under the new Act, that fee could be recovered only if its exigibility is not inconsistent with the provisions of the new Act, and, on the question whether there is any inconsistency such as the one to which clause (a) of the proviso refers, we abstain from making any pronouncement in these cases. The areas in which that situation obtains are: (a) the whole of the Bellary district, (b) the areas under the control of the Marketing Committee of Raichur and Yadgir, (c) the areas under the control of the Marketing Committee of Belgaum, and (d) the areas under the control of the Marketing Committees in Shimoga, Sagar, Bangalore, Nanjangud, Mulbagal and Madhugiri.

29. But, with respect to the areas under the control of the Marketing Committees of the City of Mysore, Kunta, Dharwar and Sirsi, the demand for the payment of the market fee cannot fall on the unavailable ground that no market-yards had been established in those areas under the repealed enactments. Since with respect to those areas, the only argument presented before us is that there were no market-yards in those areas and there is no challenge to the bye-laws made by the concerned market committees under which the imposition of market fee was made and there is no prayer that we should quash those bye-laws, the challenge to the impugned demand in those areas must be negatived.

30. With respect to Nippani, the question whether the market-yard was or was not established under the repealed Bombay laws is for adjudication in Writ Petition No. 699 of 1966. So, the question whether the market fee under the new Act can be demanded in that area by the market committee has to be decided in that case and we say nothing about it in these writ petitions.

31. Our conclusion that the market fee under the new Act cannot be recovered in the areas in which no market yards have been established under the repealed enactments is restricted only to the period antecedent to the date on which after the establishment of market-yards in those areas under the new Act on December 7, 1968, and in the case of Hospet on December 16/19, 1968, the

new market fee becomes properly exigible.

32. We are asked by the petitioners who carry on trading operations in those areas to say that on the question whether the notifications by which market-yards are established under the new Act are not in accordance with law, liberty should be reserved for them to agitate that matter if they so desire since those notifications were made during the pendency of these writ petitions. On the validity of these notifications, we say nothing in these writ petitions since that question was not and could not be discussed in the matters before us.

33. The discussion so far made takes us to the consideration of the question whether the provisions in the new Act such as those to which we have referred and the bye-laws and the rules made under them could be declared to be either unconstitutional or invalid. It would be convenient, in the context of the discussion already made, to investigate, in the first instance, the sustainability of the argument with respect to Section 65 of the new Act which we have already extracted. The argument constructed on the language of this Section was that although under the provisions of the Act the market committee is under a duty to render service both to the buyer and to the producer as also to the commission agent, the imposition of liability to pay the fee on the buyer to the exclusion of the other two categories of persons to whom services are rendered is unsustainable and invites the reproach that it makes a hostile discrimination against the buyer. It is common ground that the fee of which this Section speaks is a fee for services rendered by the market committee, and it is obvious that a fee could be demanded by the market committee only if it rendered those services between which and the fee there is necessary correlation. The argument which was advanced at one stage by Mr. Srinivasan was that the fee to which Section 65 refers is not really a fee but a tax which could be recovered again and again on the occasion of each sale inside the yard and outside the market. The postulate placed before us was that an impost which could be recovered on a plurality of occasions with respect to the same agricultural produce in that way cannot conform to the description of a fee but can only be a tax. On the question whether Section 65 authorises the recovery of a fee at a plurality of points with respect to the same agricultural produce, the Advocates appearing for the market Committees are not themselves in agreement although Mr. Advocate General appearing for the State asks us to place the interpretation that the fee could be recovered again and again on

the occasion of each sale. Considerable argument was expended on both sides over the question as to whether any service was rendered to the successive purchasers either inside the yard or outside the market such as would enable the Market Committee to make successive claims for the payment of the fee. But, the question whether Section 65 does authorise a fee at more than one point should depend on the construction which we should place on its language having regard to the scheme and the purpose of the Act.

34. When we proceed to understand the provisions of that section in that way, it would be observed that that section does not authorise the recovery of a fee from every buyer in the areas to which it refers but empowers the levy of the fee and its collection "from the buyer in respect of agricultural produce". Although at one stage an argument was constructed in support of the plurality of the impost on the words "at such times as may be specified in the by-laws" with which sub-section (1) of this section concludes, it is clear that those words do not authorise a plurality of the levy but only speak, as rightly submitted by Mr. Advocate General, of the intervals or the points of time at which the fee which is properly recoverable could be collected. We have no doubt in our mind that those words speak of the collection at the point of time at which these collections could be made. Under that part of the sub-section, the market committee has no more power than to state at what intervals or at what points of time the fee which is properly recoverable could be collected.

35. On a careful consideration of the matter we lean to the conclusion that the purchase in respect of which the fee could be levied or collected is the earliest purchase of the agricultural produce belonging to the producer. It will be seen from the provisions of the Act that the producer who brings his agricultural produce into the market could sell it only inside the yard and it is this sale which he must needs make inside the yard when he brings his produce inside the market. That, is the topic of the impost to which Section 65 refers. It would be unreasonable to place upon statutory provision like Section 65 which provides for the levy of a fee, the construction that every buyer who purchases agricultural produce either inside the yard or outside the market could be made liable to pay the fee, in the absence of words in that section which justify that construction. In the absence of express provision that the fee would be recovered again and again, we must lean to the construction that it could be recovered only once, and, if that construction is

correct, it must necessarily follow that the occasion on which the fee could be collected is the occasion when there is a sale by the producer inside the yard or outside the market. The power to levy the fee gets exhausted when the agricultural produce has been sold by the producer to a trader or other person and when the fee has been levied on the purchase so made, there is no more power in the market committee to demand the fee repeatedly from each purchaser thereafter.

36. The language of Section 65 of the new Act is remarkably similar to the language of Section 11(1) of the repealed Madras Act and Sec. 11 of the repealed Bombay Act. Section 11 (1) of the Madras Act reads:

"11(1) The Market Committee shall subject to such rules as may be made in this behalf, levy fees on any commercial crop or produce brought and sold in the notified area at such rates as it may determine."

Section 11 of the Bombay Act reads:

"11. The market committee may subject to the provisions of rules subject to such maxima as may be prescribed levy fees on the agricultural produce brought and sold by licensees in the market area."

Neither the Madras Act nor the Bombay Act stated that the fee could be levied only on the first purchase and not on the purchases made from the purchaser who had already purchased the agricultural produce from the producer. But, it is admitted by Mr. Achar appearing for the market committee of the Bellary district and Messrs. Ramachandra Rao and Mandagi appearing for the market committees of the old Bombay area that under the Bombay and Madras Acts, the market committees were collecting the market fee only once when there was a sale of an agricultural produce by the grower to the trader or some other person, and that the subsequent transaction by the purchasers who made such purchases to others were not subject to any market fee. When there is, as we have already observed, striking resemblance of the language of Section 65 of the new Act and that of Section 11 (1) of the Madras Act and Section 11 of the Bombay Act in the sense that none of these three sections in express language authorises a plurality of the market fee with respect to the same agricultural produce and if in the administration of the Madras and Bombay Acts the corresponding provisions were understood to mean that the market fee could be recovered only once and the legislature employed similar phraseology in enacting Section 65, it would be reasonable for us to say that the legislative intent in enacting Section 65 of the new Act was

to create an impost which was similar to the impost created by the relevant sections of the Madras and Bombay Acts.

37. The view that we take receives support from the decision of the Supreme Court in *Krishna Coconut Co. v. E. G. C. & T. M. Committee*, AIR 1967 SC 973 in which there was a discussion of the provisions of S. 11(1) of the repealed Madras Act. The pronouncement of the Supreme Court makes it clear that that section authorised the recovery of the market fee only when there was a sale of the agricultural produce by the producer and not when there were subsequent sales. In the context of that discussion Shelat, J., said this:

"The Legislature had thus principally the producer in mind who should have a proper market where he can bring his goods for sale and where he can secure a fair deal and fair price. The Act thus aims at transactions which such a producer would enter into with those who buy from him. The words "brought and sold" used in Section 11 (1) aim at those transactions whereunder a dealer buys from a producer who brings to the market his goods for sale."

There is no reason why we should not understand the words of Section 65 in the same way in which they were explained by the Supreme Court since the purpose of the new Act is the same as the purpose of the Madras Act and there is a great similitude between the language of Section 11 (1) and that of Section 65. It would be unreasonable for us to make a departure from the enunciation made by the Supreme Court in that situation when we interpret Section 65 of the new Act. That enunciation receives further support from another part of the judgment of the Supreme Court in which Shelat, J., said:

"If the fee was levied on sales effected by the appellants with their customers its levy would not be valid under Section 11 (1) and would also be repugnant to Article 286 where goods were delivered outside the State."

38. The conclusion which emerges from this discussion is that under Section 65 the levy of the market fee is on the first sale by the producer inside the yard or outside the market as the case may be to a trader or any other person and that once the agricultural produce has been sold in that manner no market fee could be recovered from a buyer who buys the agricultural produce subsequently. This conclusion negatives the argument advanced on behalf of the petitioners and also maintained by Mr. Advocate General and on behalf of some of the market committees before us.

39. It will be recalled that the contention advanced for the petitioners that the market fee was recoverable under its

provisions from every buyer who purchases the agricultural produce either in the yard or outside the market had for its purpose the denunciation of Section 65 on the ground that the impost is really a tax and not a fee. But no one disputes that if the fee is payable only once and on the first purchase such as the one to which we have referred, the character of the impost is that of a fee and not that of a tax. If the impost is a fee and the levy is on the first purchase of the agricultural produce, it is difficult to understand how it could be contended that Section 65 is for any reason unconstitutional. We do not accept the postulate that that section authorises a levy of a fee from the buyer for services rendered to the buyer and others in circumstances in which that fee is recoverable only from the persons to whom services are rendered.

40. It is not necessary for us to investigate the question whether in a given case where services are rendered to two groups of persons the fee could be recovered only from one group to the exclusion of the other. If Section 65 says that the market fee could be recovered from the buyer, it means that that fee which could be recovered from the buyer under its provisions is the fee properly recoverable from him having regard to the measure of the services rendered by the market committee to him and the correlation between those services and the fee which he is called upon to pay.

41. We do not accept the interpretation which was suggested to us that Section 65 authorises the market committee to recover from the buyer a fee which can be recovered from someone else or that the market committee could under its provisions render services to someone else but recover the fee from the buyer even if it does not render services to him. The petitioners cannot ask us to suggest an interpretation which introduces into the levy an element of illegality although the language of the section does not so introduce it, and then ask us to quash the statutory provision on the ground that it authorises an illegality. It is only in a case in which the statutory provision empowers an illegal levy that we could strike it down. But if it does not, we should not by stretching and straining its language so interpret it that it bestows power to do something illegal and declare the provision to be invalid on that ground.

42. But it was contended that even so, the legislative power to make a legislation authorising the recovery of the market fee resided in Parliament and not in the Legislature of the State. Dependence was placed in support of this contention on entries 92-A and 96 of the Union List and we were asked to say

that since in a case where an Inter-State sale takes place of agricultural produce, the imposition of a market fee with respect to such inter-State sale would relate to a topic in respect of taxes on the sale or purchase of goods in the case of inter-State trade or commerce within the meaning of entry 92-A of the Union List, a fee in respect of the matter which is within entry 92-A, as stated in entry 96, could be authorised by legislation made by Parliament and not by the State.

43. But the answer to this submission is that the pith and substance of the topic of the subject matter of the Mysore Agricultural Produce Marketing (Regulation) Act, 1966, is what falls within entries 26 and 28 of the State List. Entry 26 relates to trade and commerce within the State and entry 28 speaks of markets and fairs. It may be that a legislation made within the field of these legislative entries with respect to trade and commerce within the State and to markets and fairs may also provide for the imposition of a market fee. But if the legislation is otherwise within the field of entries 26 and 28, that part of the legislation which authorises the imposition of a fee with respect to sales made in the course of inter-State trade and commerce would only be incidental to the main legislation, and so within the competence of the State Legislature. And since entry 65 of the State List authorises a legislation in respect of fees in respect of all the matters in the State List, a fee with respect to matters set out in items 26 and 28 could be authorised by a legislation made by the State. The argument to the contrary does not receive any support from the decision of the Supreme Court in AIR 1967 SC 973 in which the restricted enunciation made was that the interpretation which was sought to be placed on Section 11 of the Madras Act that the market fee authorised could be recovered from every successive buyer if accepted would amount to a contravention of the provisions of Article 286 of the Constitution.

44. The last submission which could be noticed by us in the context of the present discussion is that there was an impermissible delegation by the Legislature of the power to fix the market fee recoverable under the Section since the Legislature had specified only the maximum fee that could be recovered. It is clear that there is no substance in this criticism since the delegation is not open to the reproach that it is a delegation of power with respect to any essential legislative function.

45. Before concluding this branch of the discussion, we should observe that we do not in the course of this judgment embark upon a discussion of the question whether, as contended for the petitioners

any services are rendered by the market committee outside the area of the market and in the remaining area of the market area. That is a question which can properly arise for adjudication only in a proper case in which both parties produce the necessary materials in the context of a demand which is challenged.

46. We now proceed to discuss the other provisions in the new Act with respect to each of which the argument advanced was that it was unconstitutional and therefore invalid. It was submitted to us that the first provision which was so assailed was the definition in Section 2 (1) (iii) of the new Act which defines 'Agricultural Produce'. It was said that since this definition authorised the State Government by notification to declare a produce not enumerated in the definition as agricultural produce for the purposes of the new Act, there was unauthorised delegation of legislative power. It is clear that there is no substance in this argument since, as explained by the Supreme Court in Mohd. Hussain v. State of Bombay, AIR 1962 SC 97 such delegation is not beyond the bounds of permissive delegation.

47. The next fascicle of Sections is what comprises Sections 10, 11, 16 (1) (a) and 41. Section 10 which prescribes the composition of the first market committee states that seven members of the committee out of fifteen shall be agriculturists and that there shall be two traders and one commission agent and so on. It was said that excessive representation was made available to the agriculturists.

48. But, in our opinion, the argument overlooks the purpose of the new Act which is to protect the interests of the agriculturists against exploitation by a middleman and others, and it is indisputable that in any given area the strength of the agriculturists cannot but be commensurate with the proportion which Section 10 incorporates.

49. Section 11, it was said, contained an objectionable fourth proviso which says that if persons of the categories specified in any category of clauses (ii) to (vii) are not available, the committee shall consist only of persons of the category available. This proviso is similar to the first proviso to Section 10 (1) and it is difficult to understand how any one can quarrel with these provisos. If a member belonging to any particular category is unavailable, how any one could suggest that persons belonging to the available categories should not take their place, is not easy to comprehend. Section 16 (1) (a) speaks of a disqualification and says an agriculturist who is a partner or a Director of a firm or a body corporate, or a member of a joint family which does business as a trader, commis-

sion agent or broker, shall not be qualified to be a representative of the agriculturists. The purpose of this disqualification is to prevent the betrayal of the interests of agriculturists by a person who although he is himself an agriculturist has also an interest in the activity of the traders, commission agents or brokers. Moreover, a provision creating a disqualification to function on a statutory body like the market committee is fully within the competence of the Legislature and the restriction such as the one which Section 16 (1) (a) incorporates is in our opinion unexceptionable.

50. Section 41 which provides that every Chairman and Vice-Chairman of the market committee shall be an agriculturist, does not, in our opinion, invite any reproach since its purpose is that the two important offices of the market committee should be filled only by agriculturists the protection of whose interests is the primary and dominant purpose of the new Act.

51. The criticism levelled against Section 66 that it authorises the market committee to insist on the production of accounts and confers power of entry, inspection and seizure, appears to us to be groundless. The power exercisable under this Section is confined to an officer or a servant of the committee empowered by the State Government and the power to make a seizure or an entry could be exercised only when he has reason to suspect the evasion of the provisions of the Act.

52. Section 67 authorises an officer or servant of a market committee empowered in that behalf by the State Government to stop a vehicle or other conveyance and keep it stationary so that its contents could be examined.

53. The purpose of Sections 66 and 67 is the enforcement of the new Act and since the power is confided to a nominee of the State Government and the power could be exercised as the statutory provisions themselves indicate, only in a proper case, it cannot be said that there is entrustment of unguided and uncanalised power without the prescription of any standard.

54. Sections 72 and 75 are subject to some criticism in some of the affidavits of the writ petitions. But, no one presented any argument in support of that challenge, and so it is not necessary for us to discuss that matter.

55. The next Section to which we should advert is Section 76 which directs the sale of agricultural produce in one of the many manners specified in that Section. That Section states that the sale shall take the pattern of a tender system or a public auction or by open agreement or by sample or by reference to a known standard or in such other

manner as may from time to time be directed by the market committee with the previous approval of the Chief Marketing Officer. It does not appear to us that the provision of this Section can be subjected to any reasonable criticism since the enforcement of the provisions of the new Act is possible only if the manner of the sale of agricultural produce is also regulated in manner provided by this Section. The sales by tender system or by public auction or by open agreement or by the other methods specified in that section are the methods by which the sales generally take place, and when they take place in that way the parties will have the opportunity to offer their bids freely and in that event the producer could always expect to secure for his agricultural produce a reasonable price. It is clear that the principal purpose of this section is to stop sales which are ordinarily described as under-cover sales so that a sale conducted in a clandestine and secret manner which operates to the prejudice of the agriculturists, is made impossible.

56. But it was said that while it may be possible for the legislature to control in that way a sale by a producer, it was unmeaning for the legislature to introduce a legislative provision for the regulation of sales thereafter at stages where the protection of the interests of the producer is no longer necessary or possible.

57. But since the purpose of the new Act is to regulate the sales of agricultural produce throughout the area over which the market committee exercises its control, the regulation of even subsequent sales is what can prevent circumvention or evasion of the provisions of the new Act so that sale which is really a sale between the producer and the buyer does not masquerade as a sale between a trader and a trader.

58. We now proceed to discuss Section 78 about which there was considerable debate during the argument. That Section prescribes the maximum commission payable to a commission agent and says that it shall be the duty of the commission agent to pay storage charges and insurance charges without adding those charges to the commission fixed by the market committee.

59. The argument advanced before us was that the prescription of a maximum one and a half per cent commission which shall include the insurance and storage charges payable by the commission agent is an invasion of the fundamental right guaranteed by Article 19 of the Constitution to carry on a business, trade or profession as a commission agent and that the prescription of such a low commission as one and half per cent of the price with the liability to pay storage charges and insurance charges can have

no other consequence than the elimination of the commission agent and the complete paralysation of his activity in the profession of a commission agent. It was submitted to us that the imposition of the condition that storage charges and insurance charges shall be payable by the commission agent is an unreasonable restriction not falling within Clause (6) of Article 19, and that the prescription of the maximum commission in that way overlooks the possibility of a commission agent in a given case being fastened with the liability to pay excessive storage and insurance charges if he is to keep the goods entrusted to his custody by the producer for a longer time than the period during which another commission agent is constrained to keep them. Mr. Rama Jois appearing for one of the petitioners produced before us a statement of accounts in that context, and, according to him, a commission agent whose business turnover is of the magnitude of five lakhs would not get a commission exceeding Rs. 1,000 during the whole year.

60. But it should be remembered that the primary purpose of the new Act is to regulate the activity of the marketing of the agricultural produce in such a way that there should be no exploitation of the producer through the instrumentality of middlemen such as commission agents and others.

61. A commission agent is defined by Section 2(8) of the new Act which says that a commission agent is a person who on behalf of his principal and in consideration of a commission keeps the goods of his principal in his custody and sells the same making himself liable to the seller for their price. Those services which are rendered by a commission agent are the usual services rendered by one like him, and while the nature of the services rendered by a commission agent are of the same quality and have the attributes as those which used to be rendered quite a long time ago when the price of agricultural produce was exceedingly low, it is in the knowledge of every one that during recent times there has been a remarkable rise in the price of agricultural commodities and it is that phenomenon which now earns for a commission agent for the same services which he used to render when the market with respect to agricultural produce was in an extremely depressed condition, a correspondingly large commission which is attributable exclusively to the rapid and enormous increase in the price of agricultural produce. It is that condition of the market concerning agricultural produce which makes it possible for the commission agent to secure for himself a large commission than he could have hoped to get at antecedent periods of time, and we should hesitate to say

that in that situation a commission of one and a half per cent which is what Section 78 fixes can be said to be unreasonable notwithstanding the fact that such commission includes storage and insurance charges.

62. No one has placed before us any material as to what those insurance and storage charges amount to, save in the affidavit produced on behalf of the State by Mr. Advocate General in which it is stated that the aggregate of the insurance and storage charges does not exceed 5 paise per cent of the price. If what is stated in that affidavit is accepted, it should follow that the percentage varies between 2 per cent and 5 per cent so that what remains for the commission agent which he can call his own varies between 1 per cent and 1.3 per cent.

63. But it is really not necessary to depend upon this material which is produced on behalf of the State since on behalf of the petitioners it was contended that the affidavit which incorporates all this information was produced only during the course of argument and at a late stage when the petitioners themselves had no opportunity to produce any material by way of rebuttal.

64. However that may be, the petitioners themselves have produced no materials which might have assisted the investigation of the question as to whether what remains in the hands of the commission agent after he pays the storage and insurance charges was so inconsiderable as to justify the view that the prescription of the commission by Section 78 is unreasonably low.

65. In AIR 1959 SC 300, Arunachala Nadar v. State of Madras the Supreme Court explained the purpose of the Madras Act in these words:—

"Shortly stated, the Act, Rules and the Bye-laws framed thereunder have a long term target of providing a net work of markets wherein facilities for correct weighment are ensured, storage accommodation is provided, and equal powers of bargaining ensured, so that the growers may bring their commercial crops to the market and sell them at reasonable prices. Till such markets are established, the said provisions, by imposing licensing restrictions, enable the buyers and sellers to meet in licensed premises, ensure correct weighment, make available to them reliable market information and provide for them a simple machinery for settlement of disputes. After the markets are built or opened by the marketing committees, within a reasonable radius from the market, as prescribed by the Rules, no licence is issued; thereafter all growers will have to resort to the market for vending their goods. The result of the

implementation of the Act would be to eliminate, as far as possible, the middlemen and to give reasonable facilities for the growers of commercial crops to secure best prices for their commodities." (P. 305)

A similar enunciation was made in *Narendra Kumar v. Union of India*, AIR 1960 SC 430 in which the Supreme Court in the context of the question whether the provisions of the Essential Commodities Act imposed an unreasonable restriction observed:

"It must therefore, be held that clause 3 of the Order even though it results in the elimination of the dealer from the trade is a reasonable restriction in the interests of the general public." (P. 437)

66. When the provisions of Section 78 are judged by these standards by which we should assess the reasonableness of these provisions it appears to us that it is impervious to the criticism to which it was subjected,

67. The fact that one commission agent is constrained to keep the goods of his grower in his custody for a longer time than another, and that in consequence the storage and insurance charges in his case are higher, is what is attributable to fortuitous circumstances, and the statement of accounts on which Mr. Rama Jois depended can hardly be of any assistance to his contention since the argument advanced on its basis assumes that all the expenditure shown in that statement was made only over the commission agent's business to which it refers, and that the activity of a commission agent with respect to that turnover extended over the entire period of 12 months. It surely could not have been so. It is also obvious that the turnover relating to areca to which that statement refers although it was to the tune of five lakhs was in respect of a small quantity of areca measuring 600 quintals, and with respect to that transaction even if the commission earned by him was only Rs. 1,000 the petitioner in that case could make no reasonable complaint about it.

68. It was submitted that the imposition by Section 78 on the commission agent, of the liability to pay the value of the goods sold by him whether or not be recovered their price from the buyer, amounted to an unreasonable restriction.

69. We do not agree. Section 78 does no more than to constitute a commission agent a *del credere* agent, and that he is one is clear from the definition contained in Section 2 (8). It will also be seen from the provisions of Section 85 that the commission agent does not really incur any risk by being fastened with the attributes of a *del credere* agent.

70. We now go to Sections 85 and 86. Section 85 makes a classification of

traders and they are made to fall within four categories. "A" class traders could purchase agricultural produce anywhere in the market area, while the 'B' class traders would do so only in the yard. The area in which the 'C' class traders could make their purchase is the area outside the market and in the market area, while the 'D' class traders are those who make purchases in the market area for a sale to consumers for domestic purposes. Sub-section (2) of Section 85 directs these traders to make deposits or to furnish security or bank guarantee in the various sums enumerated in that sub-section, and this deposit or security is necessary only in the case of a trader who wishes to make a purchase on credit.

71. Mr. Srinivasan who did not contend that the classification made by Section 85 was a reasonable classification, made a restricted submission that the imperfection in the section was that it did not put the trader who purchased goods outside the yard but inside the market, into a distinct classification. It was also contended that the market committee rendered no services outside the yard, and that the imposition of a licence fee such as the one prescribed by Section 72 of the new Act is unsupportable.

72. We do not think that the classification made by Section 85 invites any acceptable criticism. It has made, in our opinion, a reasonable classification of the traders and the deposit of the security to which sub-section (2) refers rests also upon a similar classification. That apart of Section 85 (2) which says that a trader who wishes to purchase goods on credit must deposit the sum of money referred to by it or furnish security as provided therein, is what, in our opinion protects the interests of the commission agent to whom Section 85 refers.

73. On the question as to whether any services are rendered to any of the traders to which Section 85 refers and particularly to the traders functioning outside the yard, it is not necessary for us to make any investigation in this case in which this question does not arise.

74. We do not think that anything can be said about Section 86 which merely provides that a person functioning as the commission agent shall furnish security or bank guarantee to the extent of Rupees 500. The insistence on such security, it is obvious, is reasonable since the commission agent is liable to pay the producer the value of the goods whether he recovers it from the buyer or not.

75. We see nothing objectionable in the provisions of Section 89 which confers power on the market committee to impose penalties for contravention of the statutory provisions especially since from

the decision of the committee, an appeal could be preferred to the Chief Marketing Officer. On the question as to how Section 89 has to work in actual practice, we say nothing in this case.

76. What we have said so far pertains to the challenge made to the provisions of the new Act. In some of the writ petitions, there is a challenge to some of the other provisions of the new Act. But since no argument was presented with respect to that matter by any one, we negative the contentions pertaining to those matters.

77. The only rule the validity of which was assailed in the course of argument is R. 76 (1). That rule reads:

"No person shall operate in the market area as a trader or commission agent in notified agricultural produce except under and in accordance with a licence granted by the committee under this rule."

This rule is, in our opinion, clearly repugnant to proviso (ii) to Section 8 (1) (b). Clause (b) of Section 8 (1) says that no person shall use any place in the market area for the marketing of the notified agricultural produce, or operate in the market area or in any market therein as a trader, commission agent, broker, processor, weighman, warehouseman, or in any other capacity in relation to the marketing of the notified agricultural produce except under a licence granted by the market committee. To this prohibition which Cl. (b) incorporates, there is more than one exception, and the exception with which we are concerned is the exception created by proviso (ii) (b) to Section 8 (1) (b), and the effect of that sub-clause is that no licence is necessary in the case of a person who purchases agricultural produce in the market outside the yard, from a trader for retail sale. But R. 76 (1) forgets this exemption created in favour of a retail trader and enjoins even that retail trader to obtain a licence even in respect of his activity in respect of which an exemption is created. It was hardly necessary to make that rule since the licencing of the activity in the market area stands fully regulated by Section 8. So we strike down R. 76 (1) which is repugnant to the provisions of Section 8 and we declare it to be invalid to the extent of such repugnancy.

78. Before departing from this rule, we should notice an argument advanced by Mr. Raghuramachar in Writ Petition No. 3827 of 1968 in which the petitioner is a retail trader who complains that the concerned market committee has asked him to obtain a licence under Section 8 although he is not bound to take one. So the petitioner asks us to quash the direction by the market committee that he should take a licence in respect of the entire retail trade carried on by him. Mr. Raghuramachar asserts that the petitioner

is only a retail trader who makes purchase from traders outside the yard and that he makes retail sales of the goods so purchased only to purchasers who require them for domestic consumption and that there is an unreasonable restriction on the part of the market committee that he should obtain a licence even for that activity.

79. The impugned direction by the market committee which does not bear any date calls upon the petitioner to take out a licence without the specification of the particular activity in respect of which such licence is necessary. So it becomes necessary for us to examine the question whether the petitioner is or is not right in his contention that in respect of the activity which he says he is carrying on, a licence is not necessary.

80. Now sub-clause (b) of Cl. (ii) of the proviso to Section 8 (1) (b) makes it necessary for a trader to purchase agricultural produce in the market and outside the yard from a trader if he makes that purchase for retail sale. So, the clear meaning of the words "from a trader for retail sale" occurring in this sub-clause is that if he makes a purchase to which that sub-clause refers, no licence is necessary. And it is equally clear that even to make a retail sale of the goods so purchased, it is unnecessary for the retail trader to obtain a licence. We do not accept the argument advanced on behalf of the market committees which are before us that the exemption is created only in respect of the purchase and not in respect of the retail sales to which that sub-clause refers. The interpretation suggested would lead to the incongruity that a retail trader is under no obligation to take a licence to make purchases for retail sale, but a licence becomes necessary when, for the implementation of the purpose for which he makes a purchase, he makes a retail sale. We should understand the exemption in a reasonable way and should not read it in a manner which defeats its purpose. The words "for retail sale" reinforce the view that the retail sales to which the sub-clause refers could also be made without obtaining any licence such as the one to which Section 8 refers. So, if the petitioner is a person who makes a purchase of agricultural produce from a trader outside the yard but inside the market and makes retail sales of the produce so purchased, it is unnecessary for him to obtain a licence to make those retail sales. So we issue a direction that the market committee shall make a suitable modification of its direction.

81. We should now turn to the impugned bye-laws, and we restrict our discussion to the bye-laws about which an argument was presented before us. But before we do so, it would be necessary for us to notice an argument which was

directed against the entire body of the bye-laws made by each market committee, after the new Act came into force. The argument that those bye-laws were wholly invalid was constructed on Sections 148 and 149 of the new Act. The stress of the argument was that even in the case of old market committees which acquired the power to function under proviso (c) to Section 154 (1) of the new Act, the preparation of the first bye-laws under Section 149 was obligatory and that the bye-laws made by these old market committees which were not preceded by the preparation of the first bye-laws under Section 149 were beyond their competence.

82. Section 148 says that a market committee by adherence to the procedure prescribed by it shall have the power to make bye-laws for the regulation of the business and the conditions of trading in the market area generally and with respect to the specific matters enumerated in sub-section (2). But Section 149 says that the first bye-laws on the establishment of a market shall be made by the Chief Marketing Officer in consultation with the Chairman of the first market committee after his nomination to that office. It further enjoins that those bye-laws shall take into consideration the local conditions. Sub-section (1) proceeds to state that those first bye-laws so made shall be deemed to be the bye-laws made by the market committee, until superseded or amended by bye-laws made under Section 148.

83. The argument maintained was that the impugned bye-laws were not preceded by the preparation of the first bye-laws to which Section 149 refers and that they have therefore, no efficacy.

84. But this argument overlooks the provisions of Section 10 and proviso (c) to Section 154 (1) of the new Act. Section 10 (1) prescribes the composition of the first market committee and states that that first market committee shall consist of the various categories of persons nominated by Government. So, the words "the first market committee" occurring in Section 149 have reference to the first nominated market committee to which Section 10 refers, and the necessity for the preparation of the first bye-laws by the Chief Marketing Officer of the first market committee arises only when that first market committee comes into being by the process of nomination to which S. 10 refers.

85. A first market committee conforming to that description stands constituted in that way only if an old market committee does not have the authority or the power to continue to function as the market committee even under the new Act. But if under proviso (c) to Sec. 154 of the new Act it is the duty of the old

market committee to 'exercise the powers conferred, perform the functions, and be subject to the liabilities imposed by the provisions' of the new Act and the rules made thereunder until market committees are constituted under the provisions of the new Act, the old market committee whose bye-laws are challenged before us became thus charged with the duty to exercise powers and perform functions under the new Act. And one of the powers that could be exercised and the functions that could be performed is the power to make a bye-law under Section 148.

86. It is of importance to observe in this context that Section 148 which bestows power to make bye-laws does not bestow it only on the second and subsequent market committees to which Section 11 refers. The repository of that power is the market committee which is defined by Section 2 (2) as a market committee constituted for a market area under the Act. If proviso (c) to Section 154 (1) says that an old market committee could exercise power and perform functions under the new Act, that market committee acquires the status of a market committee established under the new Act; if does not, it cannot exercise the powers created by the new Act or perform functions under it. That would be the true position notwithstanding the fact that unlike proviso (a) to Section 154 (1) which creates a legal fiction that certain things done under the old Act must be deemed to have been done under the new Act, proviso (c) to that sub-section only says that an old market committee shall exercise power and perform functions under the new Act, and so the old market committee acquires the power to make bye-laws under Section 148, although no first bye-laws have been made under Section 149. We do not accept the argument advanced by Mr. Jagannatha Setty that the words "and be subject to the liabilities imposed by the provisions of this Act" occurring in Cl. (c) of the proviso to Section 154 (1) can be understood as divesting the old market committee of the power to make bye-laws under Section 148 until first bye-laws are made under Section 149.

87. Any other view would lead to the anomalous position that the old bye-laws which did not fit into the provisions of the new Act could not operate after the new Act came into force, while the old market committee which is charged with the duty to perform functions under the new Act will have no machinery for such enforcement. It is precisely for overcoming a difficulty which the old market committee might encounter in that way until a new market Committee is established under the provisions of the new Act that proviso (c) to Section 154(1) of the new Act incorporates a provision that old market committees though constituted

under the old Act shall perform functions and exercise powers under the new Act. The postulate that the old market committee can so function but that it would have no power to make bye-laws under Section 148 without which such functioning becomes impossible, cannot have the support of reason.

88. But it was however urged that even so, the displacement of the old market committee; can happen only when a first market committee is nominated under Section 10. Mr. Advocate General in answer to this postulate which Mr. Srinivasan placed before us contended that the provisions of Section 10 are applicable only to a market area which was not in existence under the provisions of the repealed Act and which did not continue under the new Act and that a nominated market committee under its provisions was quite unnecessary in a case in which the old market area continued under the new Act and the old market committee commenced to function under its provisions.

89. We do not read Section 10 in that way. Section 154 is a purely transitional provision as its language clearly discloses. The old market committee is of the nature of a care-taker committee which can function only for a temporary period until a new market committee comes into being in accordance with the provisions of the new Act. The only process by which a new market committee can so come into being is by the observance of the procedure prescribed by Sections 10 and 11 and under their provisions, the first step to be taken for the establishment of a new market committee is to bring into existence a nominated market committee under Section 10 which Government could, in the exercise of the power conferred by it. And, when the first market committee so comes into being, it produces two consequences: it displaces the old market committee, and it becomes necessary for the Chief Marketing Officer of the first new market committee to make the first bye-laws under Section 149, and there can be supersession of those first bye-laws only when the second market committee comes into existence under Section 11 and makes bye-laws under Section 148.

90. The argument placed before us by Mr. Advocate General that in all cases where there is an old market committee the constitution of a first market committee under Section 10 is wholly unnecessary is, in our opinion, unacceptable. The new Act contemplates the establishment of a market committee in a particular way. It is of significance to observe that Section 11 speaks of a second and subsequent market committee. Although that is what the marginal note says, we should not altogether overlook

the description which that marginal note gives, and what is clear from the language of Section 11 is that the elected market committee which comes into being under it is the second market committee and the first market committee which is its predecessor is no other than the nominated market committee to which Section 10 refers.

91. So what is clear is that the election of a market committee under Section 11 must necessarily be preceded by the composition of a nominated market committee under Section 10, and it is only by that process that an old market committee which continues to function under the proviso (c) to Section 154(1) can vacate office.

92. That such is the scheme of the new Act is destructive of the contention that the bye-laws made by the old market committees after the new Act came into force have no validity. In our opinion, the competence to make those bye-laws clearly flows from proviso (c) to Section 154(1) of the new Act although they perish when bye-laws are made by the first market committee under Sec. 149.

93. We now proceed to consider the validity of the bye-laws made by the three market committees whose bye-laws were challenged before us. They are the market committees of Bellary, Mysore and Yadgir. With respect to the Bangalore bye-laws, no one has presented any argument, and so we refrain from discussing the validity of any of those bye-laws.

94. The Bellary bye-laws whose validity is challenged are bye-laws 12(1) and (2), 23(1) (b) (i), 22 (14) and 35. Bye-law 12(1) enumerates the categories of agricultural produce in respect of which market fee is payable. There is a catalogue of 16 items in that bye-law, and Mr. Venkanna's argument was that there was no notification under the Madras Act which could be deemed to be a notification made under the new Act, declaring items 3 to 16 of bye-law 12(1) as commercial crops. It was urged that the only 2 items of commercial crops which were declared as commercial crops are items 1 and 2, namely, cotton and groundnuts, and that there was no power in the market committee of Bellary to introduce into the enumeration of agricultural produce under the new Act, items or species of commercial crops which had not been declared under the Madras Act to be such.

95. It is clear that until a notification is made under Section 3 of the new Act, the only agricultural produce the marketing of which could be regulated in the Bellary District under the new Act is the notified agricultural produce under Section 5 of the Madras Act and that notification should be deemed to be a

notification under Section 3 of the new Act as stated by proviso (a) to S. 154(1) of the new Act. If the crop notified under Section 5 of the Madras Act, is agricultural produce as defined by the new Act, the fact that the notification under the Madras Act called it a commercial crop does not impede the operation of that proviso. We do not also accept the argument of Mr. Venkanna that items 3 to 16 were not declared as commercial crops under the Madras Act. It is seen from a notification made by the Government of the new State of Mysore under Section 4 of the Madras Act on August 19, 1959 that items 3 to 16 enumerated in bye-law 12 (1) had already been declared as commercial crops under the Madras Act, in addition to cotton and groundnuts which had been declared to be commercial crops even by the Government of the Madras State even before the Bellary District became part of the State of Mysore as early as on November 15, 1949.

96. This is not a case in which Mr. Venkanna can challenge the validity of bye-law 12(1) on the ground that the market committee exceeded its power in introducing into the enumeration, agricultural produce which had not been already declared as agricultural produce or its equivalent under the repealed Madras Act. Since the enumeration in bye-law 12(1) had already been made under the repealed Madras Act, that enumeration which should be deemed under Section 154 to be an enumeration made under the new Act is unexceptionable. Clause (2) of bye-law 12 which makes the duty of the commission agent to collect the market fees from the buyer before he delivers the goods to him, is clearly authorised by Sections 65 and 82 of the new Act and was therefore within the competence of the market committee.

97. Before considering the validity of the next bye-law, we should notice the argument that jaggery which is item 12 in bye-law 12(1) is not an agricultural produce and so could not have been included in the enumeration. The argument presented was that jaggery does not fall within the definition of agricultural produce which Section 2 of the new Act incorporates. The relevant portion of that definition which is an inclusive definition reads:

"agricultural produce" includes,—

(i) live-stock or poultry,
(ii) by the labour of any member of one's family, culture, animal husbandry, apiculture, horticulture, pisciculture, forest produce, and....."

98. It was contended that jaggery is an industrial product and not an agricultural product since what grows on the land on which agricultural operations are carried on is sugar-cane and that jaggery

is the product manufactured by industrial processes which are carried on subsequently.

99. Now, jaggery was a notified commercial crop under the repealed Madras Act and the Notification by which it was so declared should be deemed to be a notification under the new Act unless it could be said that the notification under the Madras Act is inconsistent with the provisions of the new Act. That inconsistency could exist only if it could be said that although jaggery may be a commercial crop for the purposes of the repealed Madras Act, it is not agricultural produce as defined by Section 2 of the new Act.

100. The main ground on which it was submitted to us by Messrs. Venkanna and Rangaswamy that jaggery is not agricultural produce within the meaning of the definition was that jaggery is in all respects entirely different from sugar-cane, and when sugar-cane loses its identity when it is crushed in a mill and jaggery is produced out of the juice it exudes, it could no longer be said that jaggery which is produced in that way was agricultural produce which the land produced.

101. Now, sugar-cane, it is not disputed, is agricultural produce. Jaggery which is manufactured out of sugar-cane is stated in the dictionary as coarse brown sugar made out of sugar-cane. Although sugar which is contained in the sugar-cane is in the form of sugar-cane when the land grows it, what is really grown on the land is sugar in the form of sugar-cane and if that sugar is expelled from the cane and it becomes jaggery, it is far too unreasonable for any one to suggest that the agricultural produce grown on the land is something very much different from jaggery which is manufactured by that process. So, jaggery is, in our opinion, agricultural produce within the meaning of the definition of agricultural produce which the new Act incorporates. It not only falls within the main definition for the reason that sugar-cane is agricultural produce as it is ordinarily understood, both in the popular sense, as well as by men of business and in the commercial world, but also for the reason that the inclusive part of the definition says that all produce whether processed or not of agriculture, animal husbandry or horticulture is also agricultural produce. Even if sugar-cane can be understood as some cane which is grown on land, then, it will be a product of horticulture and if jaggery is the product of some kind of processing and jaggery which gets so manufactured by processing is a product of horticulture or agriculture, as the case may be, it is agricultural produce within the meaning of the definition in the new Act.

102. So, if jaggery was called a commercial crop in the notification under the Madras Act, it means no more than that it is a crop which has a special value in the commercial world. It does not follow that it is not agricultural produce provided it conforms to the definition of agricultural produce which the new Act incorporates.

103. That that is so is clear from the enunciation made by the Supreme Court in AIR 1962 SC 97, which emphasised the similarity between the provisions of the Bombay Act and those of the Madras Act. And so, no argument could be constructed to the contrary on the fact that the crop the purchase and sale of which is regulated by the Madras Act is called a commercial crop.

104. So, if under the Madras Act jaggery became a notified commercial crop, and jaggery is agricultural produce within the meaning of the definition under the new Act, the notification under the Madras Act should be deemed to be a notification made under Section 3 of the new Act declaring the intention of the State Government to regulate the marketing of jaggery under the provisions of the new Act. It is by that process that jaggery which by its own attributes falls within the definition of agricultural produce which the new Act contains became notified agricultural produce for the purposes of the new Act.

105. We are of the opinion that bye-law 22(14) and bye-law 23(11)(b)(i) are not valid bye-laws. Bye-law 22(14) authorises the market committee to determine how many assistants shall work under the traders, commission agents and brokers. Although Mr. Achar appearing for the Bellary market committee asserted that Section 63(2)(iv) of the new Act authorised the market committee to make the determination to which bye-law 22(14) refers, it is clear that no such power is bestowed by the Act. Section 63(2) does no more than to empower the market committee to supervise the conduct of the market functionaries and not to delimit the number of functionaries who may work as assistants under a trader, commission agent or broker. So we declare that Bellary bye-law 22(14) to be invalid. There is nothing in Section 148 or 131 which creates that power either.

106. Bye-law 23 (11) (b) (i) is clearly repugnant to the provisions of the Act. It says that the quantity of agricultural produce purchased by a retailer shall not exceed three quintals for each transaction in respect of some categories and five quintals in respect of others. There is no provision in the Act which creates power in the market committee to restrict the purchase made by the retailer in that way.

107. Section 2 (37) which defines 'retail sale' empowers the market committee

to specify the quantity which could be sold at a retail sale to a consumer for domestic consumption. But neither the definition nor any other provision in the Act precludes a retailer from purchasing as much of agricultural produce as he desires to purchase subject, however, to the provisions of Section 85 which enjoins the obtaining of a licence of the appropriate classification. So we strike down bye-law 22 (11) (b) (i) of the Bellary Agricultural Produce Marketing Committee, as invalid.

108. Bye-law 35 which prohibits the publication of the proceedings of the market committee, except with the authority of the market committee, is in our opinion quite a good bye-law, since the power to so regulate the proceedings clearly emanates from Section 49(2) of the Act.

109. Among the bye-laws made by the Mysore Agricultural Produce Market Committee, the challenge is to bye-laws 23(10)(b)(i) and (ii), 23(15), 23(20) (1) and 23(2)(3). We are of the opinion that the only bye-law which invokes the condemnation of invalidity is bye-law 23(10)(b) (ii). The others are, in our opinion, good bye-laws.

110. Bye-law 23 (10)(b)(ii) is similar to bye-law 23 (11) (b) (i) of the Bellary Market Committee. This bye-law says that the total quantity sold by a retail seller during the year shall not exceed fifteen thousand rupees. The Act does not confer any power on the market committee to impose that restriction upon the retailer. It is obvious that the market committee which made this bye-law has entirely misunderstood the provisions of Section 85(1)(iv) which says that a trader whose purchase turnover of agricultural produce which he purchases for sale to consumers for domestic consumption exceed fifteen thousand rupees shall not be classified as a 'D' class trader. But that does not mean that the turnover of a trader could not exceed fifteen thousand rupees. All that it says is that if that happens, he gets into the higher class. So we strike down bye-law No. 23(10)(b) (ii).

111. Though bye-law No. 23(10)(b)(i) is awkwardly worded it is in our opinion a good bye-law, for it should be understood to prescribe the upper limit of the quantity which a retail trader could sell to a consumer for domestic consumption in order to impress upon the transaction the character of a retail sale so that in respect of that retail sale the trader could earn the exemption which is created by Proviso (ii)(b) to Section 8(1)(b) of the new Act.

112. Mr. Ramachandra Rao appearing for the market committee asks us to explain this clause of the bye-law in that way. We make it clear that it does not

prohibit the retailer from making sales of larger quantities so long as he does not claim for the transaction the status of a retail sale as defined by the Act or the exemption which is created by the Act.

113. Bye-law 23(15) regulates the acceptance of bids and preserves to the seller the option to refuse the highest bid. That bye-law does no more than to incorporate a condition which is usually to be found in all auction sales and the power to make this bye-law is to be found in Section 76 of the Act.

114. Bye-law 23(10)(1) says that the market shall be open during specified hours and 23 (2) (3) says that no licensed market functionaries shall transact any business or do anything in connection therewith except during the hours of trading on working days. It is difficult to make any complaint against this provision in the bye-law.

115. Bye-laws 2(4) and 2(5)(B) are the two bye-laws of Yadgir market committee which were challenged in the writ petition presented by Mr. Jagannatha Shetty, who, however, tells us that this challenge no longer survives in view of the notifications which were made during the pendency of these writ petitions and so we say nothing about it.

116. What remains for us to observe is that what we have said about the market fees in cases where the yards were not in existence when the new Act came into force, but were only established during the pendency of these writ petitions, is equally applicable to the license fee to which Section 72 of the new Act refers. So, during the period antecedent to December 7, 1968, when the yards were established in those areas and during the period prior to December 16/19, 1968, when they were established in the Hospet area, the license fee which was payable was the license fee prescribed by the bye-laws under the old Act.

117. These writ petitions succeed to the extent indicated and fail in other respects.

118. No costs.

Order accordingly.

AIR 1970 MYSORE 138 (V 57 C 31)

A. R. SOMNATH IYER, J.

Smt. Neelawwa Kom Annappa Enape and another, Appellants v. Smt. Chinnawwa Maruti Enape, Respondent.

Regular Second Appeal No. 322 of 1965, D/- 31-7-1969, against the judgment of Civil J., Bijapur, D/- 20-2-1965.

Civil P. C. (1908), O. 41, R. 11 and S. 96 — Summary disposal of appeal without calling for the record — Procedure to be followed only where perusal is unnecessary for disposal of appeal — Questions

of fact in serious controversy — First appeal cannot be disposed of summarily.

Although R. 11 of O. 41 of Civil P. C. authorises the appellate Court to dispense with a requisition for the record, such summary disposal even without the assistance of record is permissible only in a case in which the questions arising for adjudication in the appeal are such that a perusal of the evidence produced by the parties is unnecessary to assist such disposal. Where the question involved is a pure question of law and the view taken by the lower Court is so unexceptionable that it would be hardly necessary to send for the record, or to notify the respondent. Disposal without the record may also be possible where the facts are not in dispute and the disposal of the appeal is possible without reference to the evidence adduced, then, a summary disposal in exercise of the power conferred will be justified. But, when a first appeal presents a serious controversy on facts, its summary disposal without notice to the respondent is a misuse of R. 11 of O. 41 of Civil P. C. (Paras 7, 9 & 11)

S. G. Bhat for V. S. Malmath, for Appellants; Amble for C. M. Desai, for Respondent.

JUDGMENT:— This is a defendants' appeal which arises out of a suit brought by the plaintiff for partition and separate possession of a half share in the suit property. Plaintiff and defendant 1 are sisters and defendant 2 is the husband of defendant 1. The case for the plaintiff was that she became entitled to a half share in the suit property under the gift deed Exhibit 43 executed by her father in her favour and in favour of the defendant 1. The suit was resisted both on the ground that the gift was not acted upon and also on the ground that since the condition subject to which it was made was not fulfilled it was revoked. There was also a plea of adverse possession and relinquishment.

2. The important questions which arose from those pleadings were presented by as many as seven issues which were formulated by the court of first instance. The first issue covered the question whether the gift deed did not come into operation; the second related to the question whether the plaintiff relinquished her claim in favour of defendant 1; the third issue related to adverse possession; the fourth issue was whether defendant 2 was the tenant of defendant 1 and her father and the fifth was whether that lease was binding on the plaintiffs, and the other issues were the general issues.

3. On all these issues, the Munsiff recorded findings in favour of the plaintiff, and there was an appeal by defendants 1 and 2 to the Civil Judge who summarily dismissed the appeal under Rule 11 of Order 41 of the Code of Civil Procedure

without even sending for the record. So the defendants appeal.

4. Mr. S. G. Bhat appearing for the defendants made the complaint that the Civil Judge should not have been too much of a hurry to dispose of the appeal which raised so many complicated questions of law and fact without even a perusal of the record. I think that this complaint is reasonable.

5. The serious question of fact presented by the appeal was whether the gift deed in favour of the plaintiff was not acted upon. Although there was no issue with respect to revocation there was a discussion of that matter by the Munsiff, probably for the reason that the issue concerning relinquishment also involved the plea of revocation.

6. With respect to both these questions, both parties adduced evidence which was discussed by the Munsiff and the findings of fact recorded by the Munsiff on those matters were assailed before the Civil Judge in the memorandum of appeal produced before him.

7. Although Rule 11 of Order 41 of the Code of Civil Procedure authorises the appellate Court to dispense with a requisition for the record, such summary disposal even without the assistance of record is permissible only in a case in which the questions arising for adjudication in the appeal are such that a perusal of the evidence produced by the parties is unnecessary to assist such disposal. So it may be possible for an appellate Court to desist from sending for the record if the question involved is a pure question of law, and the view taken by the Court of first instance is so unexceptionable that it would be hardly necessary either to send for the record or to notify the respondent. Similarly a disposal without the record may also be possible where the facts are not in dispute or where the correctness of the conclusions on a question of fact reached by the Court of first instance is not assailed.

8. But when a finding on a question of fact is impeached it is the plain duty of the first appellate Court, whose finding on a pure question of fact is normally impervious to criticism in second appeal, to send for the record, unless the effect of the evidence stated in the judgment under appeal is undisputed or appears irrefutable from materials such as may be produced by the appellant.

9. And when an appeal presents a serious controversy on facts, its summary disposal without notice to the respondent is a misuse of Rule 11 of Order XLI of the Code of Civil Procedure.

10. In the present case the question which the Civil Judge had to decide in appeal was whether the gift deed was or was not acted upon by the parties. In

regard to that question, the Civil Judge observed in Para 5 of his judgment that there was "ample evidence" on record to show that the gift deed Exhibit 43 had been acted upon by the parties. It is seen from the proceedings of the Civil Judge, that the appeal was presented on January 29, 1965 and he dismissed it summarily on February 20, 1965, and he did so even without sending for the record. If the record was not before the Civil Judge, it is difficult to understand how he found it possible to say that there was "ample evidence" on record to show that the gift deed Exhibit 43 has been acted upon by the parties. The evidence produced in the case was not before him, and what the Civil Judge himself stated in his judgment demonstrated the necessity for the scrutiny into the evidence concerning Exhibit 43.

11. Resort to a summary dismissal should be restricted to an appeal which is so obviously devoid of substance or merit that the issue of notice to the opposite side would be an unmeaning formality. But the appeal before the Civil Judge was not one such.

12. So, I allow the appeal and set aside the decree of the Civil Judge and remit it to him for fresh disposal according to law. Court-fee paid on the appeal shall be refunded.

13. No costs.

Appeal allowed.

AIR 1970 MYSORE 139 (V 57 C 32)

A. R. SOMNATH IYER AND
B. M. KALAGATE, JJ.

H. H. Dodda Gangadharaiah, Appellant
v. V. H. Channabasavaiah and another,
Respondents.

Misc. First Appeal No. 103 of 1965, D/-
24-6-1969, against order of Dist. J., Kolar,
D/- 24-4-1965.

(A) Succession Act (1925), S. 230 — Executor applying for probate — Executor subsequently applying for withdrawal of probate petition stating that he had renounced executorship — Renunciation complete and could not be retracted — Court had no power to allow retraction from renunciation — Objection by a caveator to the renunciation had no relevance.

A person claiming to be the Executor under a Will applied for probate. On a caveat being produced by his elder brother, the executor applied under S. 230 of the Succession Act for withdrawal of the application for probate, stating that he had renounced his executorship. The same was opposed by the caveator. The executor then filed a memo stating that he did not press the application for with-

drawing the probate petition. The court allowed the memo.

Held, that the renunciation of executorship became complete when the application under his signature was made and the opposition to such renunciation or withdrawal from the probate proceedings by the caveator had no relevance or materiality and the court had no power to allow the executor to retract from the renunciation. S. 230 was an express statutory provision on the subject and excluded the application of the Common Law principles. AIR 1929 Bom 33, Dist.; AIR 1962 Cal 131, Ref.; AIR 1931 Lah 746, Foll. (Paras 4 to 6)

(B) Succession Act (1925), Ss. 299 and 230 — Executor first applying under S. 230 for withdrawal from probate proceedings — Caveator opposing withdrawal — Executor filing a memo that he did not press the withdrawal application — Caveator again opposing the Memo — Court allowing prayer in the memo — Caveator, an aggrieved party and could therefore appeal under S. 299 — Further, every order made by District Judge under the Act was appealable under S. 299.

(Para 9)

Cases Referred: Chronological Paras

(1962) AIR 1962 Cal 131 (V 49), In the goods of Meghraj Kothari 7

(1931) AIR 1931 Lah 746 (V 18) = 133 Ind Cas 286, Gadodia V. Raghubir Dayal v. Gopi Devi Memari 8

(1929) AIR 1929 Bom 33 (V 16) = ILR 53 Bom 172, Manchera, In re 6

C. Nagaraja Rao, for Appellant; E. S. Venkataramiah, for Respondent No. 1; B. S. Puttasiddalah, for Respondent No. 2.

SOMNATH IYER, J.:— On June 24, 1960 an application was presented to this Court in Civil Petition No. 282 of 1960 for the grant of a probate of a will, stated to have been executed, on May 14, 1958 by a certain Chikkachannananappa. That application stood transmitted to the Court of the District Judge of Kolar, and Doddagangadharalah who is the appellant before us produced a caveat on August 29, 1960. He repudiated the genuineness of the will and opposed the grant of the probate.

2. The application for a probate had been presented by Channabasavalah who is respondent before us, and he claimed to be the executor under the will.

3. On August 31, 1963 Channabasavalah made an application to the District Judge under Section 230 of the Succession Act. In that application to which he affixed his signature, he made a statement that he had renounced his executorship under the will and sought permission of the Court to withdraw his application for probate.

The relevant part of that application reads:

"2. The respondent who is the petitioner's elder brother, objects for the grant of Probate to him.

3. The petitioner has now been advised that under law, it is unnecessary to obtain a probate of the said will and further as the petitioner's health has been seriously impaired of late, he has now been advised to refrain from undertaking any serious tasks entailing physical or mental strain (vide medical certificate enclosed).

4. The petitioner therefore renounces his Executorship under the will and seeks permission of this Hon'ble Court to withdraw the petition for Probate." But his application was opposed by Doddagangadharalah, the caveator. In his statement of objections, he set out the reasons for his opposition.

4. When the matter was posted for a consideration of the question arising out of the renunciation of Channabasavalah from the executorship, a memo was produced on April 24, 1965 by Channabasavalah in which he stated that he did not press his application under Section 230 of the Succession Act and that his application under that section might accordingly be dismissed. But this application for withdrawal from the application was again opposed by Doddagangadharalah. But the District Judge allowed the application for withdrawal, and it is against the order made in that way that this appeal is preferred under Section 299 of the Succession Act.

Section 230 of the Succession Act under which there was a renunciation of his executorship by Channabasavalah, reads:

"230. Form and effect of renunciation of executorship. — The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor."

This section makes it clear that when Channabasavalah made an application on August 31, 1963 under his signature and he stated in that application that he had renounced his executorship, that renunciation became complete and opposition to such renunciation or withdrawal from the probate proceedings, by Doddagangadharalah had no relevance or materiality. Whether Doddagangadharalah opposed the renunciation or not, the renunciation became complete and irrevocable when the executor in writing intimated the court under his signature that he had renounced his executorship.

5. So it is clear that he could not subsequently retract from the renunciation which had become effective in that way. It was therefore not possible for the District Judge to permit Channabasavalah

to retract from the renunciation on the ground that Doddagangadharaiiah had resisted the renunciation.

6. We do not accede to the argument presented by Mr. Venkataramiah that the District Judge had the power to allow retraction from renunciation. The decision in *Manchersha*, in re, AIR 1929 Bom 33, on which he depended in support of his postulate was a case in which the question concerned renunciation from the position of an administrator, which, as Rangnekar, J. pointed out, stood regulated by the practice and procedure of the Probate Division of the High Court of Justice in England, as provided by the Rules of the High Court of Bombay in its original jurisdiction. But that is not how the renunciation of executorship stands regulated, since Section 230 which is an express statutory provision on that subject excludes the application of either the common law principles to which there was an appeal by Mr. Venkataramiah or the rules analogous to those on which the decision of the High Court of Bombay rested.

7. The decision of the High Court of Calcutta in *In the goods of Meghraj Kothari*, AIR 1962 Cal 131, can be of no assistance to Mr. Venkataramiah since Mallick, J. made it very clear in the course of his judgment that he would not decide the question of law which was presented by the case before him since on the facts he came to the conclusion that there was no renunciation in fact by the executors.

8. A correct statement of the law, if we may say so with great respect, was made by the High Court of Lahore in *Gadodia v. Raghubir Dayal*, AIR 1931 Lah 746, which reads:

"It is true that in England renunciation may be filed and recorded in the Registry, and that until that is done retraction is possible. There is however no such provision in the Indian law. S. 230 shows that a renunciation once made in the presence of the Judge, or by a writing signed by the renouncing person, is final and precludes him from ever thereafter applying for probate of the will." (P. 748)

9. We do not find any substance in the submission of Mr. Venkataramiah that the appellant Doddagangadharaiiah is not an aggrieved party and that this appeal is therefore not maintainable. When the District Judge made the order under appeal, he overruled the opposition to withdrawal from the application presented by Channabasavaiah under Section 230 of the Succession Act and allowed retraction. So whatever might have been the antecedent stand taken by Doddagangadharaiiah, at the stage when the order under appeal was made, he resisted

the prayer for retraction, and if he failed in that resistance and an order was made overruling it, the appellant is clearly one who could appeal from the order so made by the District Judge. Moreover, under Section 299 of the Succession Act, every order made by a District Judge under the Act shall be subject to appeal to this Court, and that being so, the objection as to maintainability must fail.

10. So we allow this appeal and set aside the order made by the District Judge.

11. Since the renunciation by the executor in the case before us became complete, we make a direction that the probate proceedings in the Court below shall be closed.

12. Mr. Venkataramiah asks us for a direction that since the probate proceedings in the Court below stand terminated by our order made in this appeal, there should be a direction to the receivers appointed by this Court in M.F.A. No. 2 of 1962 to hand over possession of the estates to the persons by whom their possession was delivered to them.

13. The order by which the receivers were appointed was made in M.F.A. No. 2 of 1962, and there should be an order by this Court terminating their appointment. It is clear however that if the receivers appointment is terminated as it should now be terminated, the receivers must hand over possession of the management of the estates in their possession to the persons by whom they were delivered to them. We make an order accordingly subject to a proper accounting to be done by the receivers to this Court before they are discharged in which event alone they could get a discharge from their office. Such possession will be delivered within six weeks from this date. The receivers will by then produce upto-date accounts.

14. All outstanding interlocutory applications on which orders have not been so far made do not any longer survive, and so they are dismissed.

Appeal allowed.

AIR 1970 MYSORE 141 (V 57 C 33)

B. VENKATASWAMY, J.

Srinivasa Rao, Petitioner v. Baburao and another, Respondents.

Civil Revn. Petn. No. 99 of 1967, D/- 31-5-1968.

(A) Civil P. C. (1908), O. 43, R. 1 (s) and O. 40, R. 1 — Order for appointment of a receiver not actually naming a receiver — Appeal against, lies if there is a degree of finality about it. AIR 1915 Bom 41 & AIR 1920 All 149 & AIR 1938 Nag 540 & AIR 1958 Assam 171 and AIR 1932 Cal 194, Dissented from.

LM/AN/G204/69/GDR/M

An order for appointment of a receiver without actually appointing any one by name would be appealable under O. 43, Rule 1 (s) C.P.C., provided there is a degree of finality about it. AIR 1915 Bom 41 & AIR 1920 All 149 & AIR 1933 Nag 540 & AIR 1958 Assam 171. Dissented from. AIR 1918 Mad 1147 (FB) & AIR 1923 Lah. 48 & AIR 1938 Lah 10 & AIR 1922 Pat 577 & AIR 1932 Pat 360 & AIR 1956 Tra Co 264, Rel. on. (Para 20)

The scheme of Order 43 in making certain orders appealable is of a two-fold character. In a number of cases an appeal has been allowed from all kinds of orders passed under a certain rule, while in other cases the right of appeal has been limited only to certain specific orders passed under a certain rule. Reference in this connection may be made to Order 43, Rule 1 (v) and Rule 1 (t). In these rules appeal has been allowed against the certain specific orders but not against all the orders that could be made under these rules. Order 40, Rule 1 falls in the category of cases where all orders made under it have been made appealable and it has not been said that the only order appealable is the one appointing a receiver. Whenever an order can be brought within the purview of Order 40, Rule 1 it at once becomes appealable under the provisions of Order 43, Rule 1 (s). AIR 1950 F.C. 140, Rel. on. (Para 21)

On a fair reading of the entire Rule 1 of O. 40, C.P.C. particularly sub-clauses (a) and (d) together it would follow that the orders or directions that might be issued under sub-clause (d) of that Rule could be issued sometime subsequent to the actual appointment of a receiver by name. At any rate, there is nothing in Order 40, Rule 1 itself prohibiting the making of such separate and independent orders. It is no doubt true that ordinarily directions envisaged under sub-clause (d) of that Rule are issued along with the warrant of appointment. But, it is also possible for such directions to be issued as and when they become necessary and after a lapse of sometime subsequent to the issuance of warrant of appointment. In such a situation, it may not be reasonable to conclude that any such subsequent directions are part of the earlier order of appointment of a receiver. Nor would it be reasonable to hold that they are not orders which are appealable under Rule 1 (s) of Order 43, C.P.C. Once this position is reached, it follows that any order made under R. 1 of Order 40 would become appealable. (Para 18)

(B) Civil P. C. (1908), O. 40, R. 1 — Power to appoint receiver — Principles to be followed by Court in exercise of.

The question of appointing a receiver is a matter resting in the discretion of the Court. A receiver should not be appoint-

ed unless the party has an excellent chance of succeeding in the suit. The plaintiff himself must show that there is some emergency or danger or loss that may be caused to the right involved in the suit. An order appointing a receiver shall not be made if it has the effect of depriving a defendant of de facto possession. However, the position would be different if the property is shown to be 'in medio' that is to say, in the enjoyment of no one. The Court should always look into the conduct of the parties who seek for the appointment of a receiver. AIR 1955 Mad 430, Followed. (Para 23)

A, claiming to be the legatee under a will executed by the deceased, sued for a decree declaring his title to the suit schedule properties and for an injunction. B also filed a suit in the same Court in respect of the same properties and for similar reliefs claiming to have been adopted by the deceased. In both the suits temporary injunctions were granted. In regard to the injunction granted in favour of B the same was made absolute after a decision in an appeal before the District Judge. Although A had secured a temporary injunction in his favour in his own suit he filed an application for the appointment of a receiver under R. 1, O. 40, C.P.C. The trial Court allowed the application and granted the relief prayed for. As regards acts of waste and damage attributed to B no basis had been afforded for the entertainment of such belief by A. In these circumstances, the trial Court who dealt with the matter of the appointment of a receiver came to the conclusion that the properties were 'in medio'.

Held, that the order of temporary injunction in favour of B, which was confirmed by the District Court was prima facie proof that B was in possession of the properties. If, in these circumstances the District Judge interfered with the order of appointment of a receiver, it could not be said to be an improper exercise of jurisdiction by the appellate Court. (Para 24)

Cases Referred: Chronological Paras

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| (1967) 1967-2 Mys LJ 637=12 Law Rep 549, Channiah v. R. T. A. | 7 |
| (1965) 1965-1 Mys LJ 342=1 Law Rep 653, Iswara Shastri v. Rama Krishna Shastri | 23 |
| (1965) 1965-2 Mys LJ 548=4 Law Rep 401, Bore Gowda v. K. Channegowda | 23 |
| (1964) 1964-1 Mys LJ 551, Saraswati Bai v. Kamala Bai | 23 |
| (1962) AIR 1962 SC 199 (V 49)=1962-2 SCR 747, Hira Lal Patni v. Kall Nath | 7 |
| (1960) AIR 1960 All 573 (V 47)=1960 All LJ 314, Mula v. Babu Ram | 2 |

- (1958) AIR 1958 Assam 171 (V 45).
Ramchandra Dey v. Jhumarmal Jain 6, 8, 12
- (1957) AIR 1957 Punj 312 (V 44)=
59 Pun LR 591, Bipal Lal v. I. T. Commr. 23
- (1956) AIR 1956 Tra Co 264 (V 43)=
ILR (1956) Tra Co 163, K. P. Thampi v. Ram Kurup 6, 16
- (1955) AIR 1955 Mad 430 (V 42),
Krishnaswamy v. Thangavelu 23
- (1954) AIR 1954 SC 340 (V 41)=
1955 SCR 117, Kiran Singh v. Chaman Paswan 7
- (1950) AIR 1950 FC 140 (V 37)=
1949 FCR 667, Rayarappan v. Madhavi Amma 21
- (1938) AIR 1938 Lah 10 (V 25)=
176 Ind Cas 919, Manohar Lal v. Kishan Lal 6
- (1938) AIR 1938 Nag 540 (V 25)=
ILR (1938) Nag 174, Raje Gopal-
rao v. Raje Devidas 6, 9
- (1932) AIR 1932 Cal 194 (V 19)=
35 Cal WN 1141, Kshitish Chandra
Achariya Choudhary v. Raja
Jankinath Roy 8
- (1932) AIR 1932 Pat 360 (V 19)=
13 Pat LT 525, Nrisingha Charan
v. Rajniti Prasad Singh 6
- (1927) AIR 1927 Mad 130 (V 14)=
ILR 50 Mad 130 (FB), Latchmanan
Chettiar v. Commr., Corporation
of Madras 7
- (1926) AIR 1926 Cal 593 (V 13)=
ILR 53 Cal 319, Sripati Datta v.
Babhuti Bhushan Batta 21
- (1923) AIR 1923 Lah 48 (V 10)=
72 Ind Cas 569, Firm Raghubir
Singh v. Niranjana Singh 6
- (1922) AIR 1922 Pat 577 (V 9)=
ILR 1 Pat 625, Gobind Ram v.
Ganesh Ram 6, 14
- (1920) AIR 1920 All 149 (V 7)=
ILR 42 All 227, Mohd. Askari v.
Nisar Hussain 6
- (1918) AIR 1918 Mad 1147 (V 5)=
ILR 40 Mad 18 (FB), Palaniyappa
v. Palaniappa 6, 8, 13
- (1915) AIR 1915 Bom 41 (V 2)=
29 Ind Cas 504, Narbada Shankar
Mugatram Vyas v. Kevaldas Raghu-
nath Das 6, 13
- Murlidhar Rao, for Petitioner; K.
Jagannatha Shetty, for Respondents.

tion. The suit was filed against the respondent herein as also one Narayana Rao. The second respondent Paddamma and one Gundamma were the widows of one Subba Rao. Subsequent to the death of Subba Rao, the two widows are said to have divided the properties inherited by them and continued to be in separate possession and enjoyment of their respective shares till the death of the widow Gundamma on 14-8-1965. The present petitioner claiming to be the legatee under a will executed by the said Gundamma has filed this suit. The first respondent Babu Rao also filed a suit O. S. No. 89/1 of 1965 in the same Court in respect of the same properties and for similar reliefs on 1-9-1965 claiming to have been adopted by Gundamma. The suit of the present petitioner was filed on 21-8-1965. In both the suits temporary injunctions were granted. In regard to the injunction granted in favour of the first respondent, who is the plaintiff in O. S. No. 89/1/1965, it transpired that the same was made absolute after a decision in an appeal before the learned District Judge, Gulbarga. A subsequent petition before the Court under Section 115, C.P.C. was also dismissed, thus sustaining the order of injunction granted in favour of the first respondent in respect of the very properties involved in the present suit. The petitioner before this Court having been unsuccessful in his attempts to resist the grant of an injunction in O. S. No. 89/1/65 filed by the first respondent herein, filed an application for the appointment of a receiver under Rule 1, O. 40, C.P.C. In O.S. No. 165/1 of 1965 the trial Court allowed the application and granted the relief prayed for. The third defendant therein namely, Babu Rao preferred an appeal before the learned Civil Judge, Gulbarga, against that order for appointment of a receiver. The appellate Court set aside the order made by the trial Court and dismissed the application for the appointment of a receiver. Aggrieved by this order, the plaintiff has approached this Court in the present revision petition.

3. Sri B. Murlidhar Rao, the learned counsel appearing for the petitioner, formulated the following two propositions:

1. That the order for appointment of a receiver without appointing any person by name was not appealable within the meaning of Rule 1 (s) of O. 43, C. P. C. and as such the decision in appeal would be one without jurisdiction.

2. That, at any rate, the order for appointment of a receiver was one falling purely within the judicial discretion of the trial Court and as such should not have been interfered with in appeal in the absence of material pointing to an abuse of such discretion.

ORDER:— The petition is directed against an order made in Misc. C. A. No. 31/5/1966, on 21-12-1966 by the learned Civil Judge, Gulbarga. The said appeal was preferred by the first respondent herein against an order of appointment of a receiver made in O. S. No. 165/1 of 1965, by the learned Munsiff, Shorapur.

2. The few facts necessary for the disposal of the petition are as follows:—
The petitioner is the plaintiff in O. S. No. 165/1 of 1965. He has sued for a decree declaring his title to the suit schedule properties and for an injunc-

4. Before advertising to the submission made at the Bar, it would be convenient, to refer to the order in question and also the relevant provisions of the Code of Civil Procedure.

5. The order of appointment of a receiver which is in question here, runs thus:

"(a) for the reasons aforesaid the petition filed by Srinivasa Rao on 12-11-1965 under the provisions of Order 40, Rule 1 of the Code of Civil Procedure is hereby allowed.

(b) Accordingly the subject matter of the suit shall be taken in the custody of this Court through a Receiver who is going to be appointed.

(c) A practising lawyer of this Court shall be appointed as Receiver after consulting the counsel appearing for both the sides."

The relevant provisions of the Code of Civil Procedure are as follows:—

"Order 40, R. 1. Appointment of Receivers—(1) Where it appears to the Court to be just and convenient, the Court may by order—

(a) appoint a receiver of any property whether before or after decree;

(b) x x x x

(c) x x x x

x x x x

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rent and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

Order 43, R. 1. Appeals from orders.—An appeal shall lie from the following orders under the provisions of Sec. 104, namely:—

x x x x

(s) an order under Rule 1 or Rule 4 of Order XL."

6. In support of the first of the above propositions Sri Murlidhar Rao the learned counsel appearing for the petitioner relied on several decisions of the High Courts of Bombay, Allahabad, Nagpur, Calcutta and Assam. In particular, he invited attention to the cases reported in *Narbadashankar Mugatram Vyas v. Kevaldas Raghunathdas*, AIR 1915 Bom 41; *Mohamed Askari v. Nisar Hussain*, AIR 1920 All 149; *Raje Gopalrao v. Raje Devidas*, AIR 1938 Nag 540 and *Ram Chandra Dey v. Jhumarmal Jain*, AIR 1958 Assam 171. The Calcutta decision referred to by him is one reported in *Kshish Chandra Achariya Choudhry v. Raja Janakinath Roy*, AIR 1932 Cal 194. Sri K. Jagannatha Shetty, the learned counsel appearing on behalf of the respondents, placed strong reliance on certain

decisions of the High Courts of Madras, Patna, Lahore and Travahcore and Cochin in support of the contrary view. The decisions relied on by him are: *Palaniyappa v. Palaniappa*, AIR 1918 Mad 1147 (FB); *Firm Raghbir Singh v. Narijan Singh*, AIR 1923 Lah 48; *Manohar Lal v. Kishan Lal*, AIR 1938 Lah 10; *Gobind Ram v. Ganesh Ram*, AIR 1922 Pat 577; *Nrisingha Charan v. Rajniti Prasad Singh*, AIR 1932 Pat 360 and *K. P. Thampy v. Ram Kurup*, AIR 1956 Trav-Co 264.

7. Before attempting an analysis of the case law cited in support of the respective contentions as aforesaid it is necessary briefly to refer to an argument by Sri Jagannath Shetty. His submission was that the petitioner should not be heard on the question of maintainability of the appeal, the order in which is in question here, in the absence of any such plea having been raised during the hearing of that appeal. It was further contended that the appellate Court was not suffering from any inherent lack of jurisdiction to hear the appeal as appeals directed against appointment of a receiver did lie to that Court under O. 43, Rule 1 (s), C.P.C. Hence in the absence of a specific objection to the exercise of jurisdiction by the appellate Court during the hearing of the appeal by the present petitioner, he should be deemed to have waived his right in that regard. He also submitted that the petitioner after having taken a chance of a decision in the appeal, which according to him was not maintainable and in not having objected to the exercise of jurisdiction by the appellate Court, should be deemed to have acquiesced in the proceedings in question. For all these reasons it was contended that it would not be open to the petitioner to raise that question for the first time in the revision petition. In support of the above submission Sri Shetty relied on the decisions in AIR 1962 SC 199; AIR 1960 All 573; AIR 1927 Mad 130 (FB) and *Channiah v. R.T.A.*, 1967-2 Mys LJ 637. In opposition Sri Murlidhar Rao relying on a decision in *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340, submitted that a decree made by the appellate Court in the appeal, which was not maintainable was a nullity and that its invalidity could be set up whenever and wherever it was sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether pecuniary or territorial, or whether it was in respect of the subject matter of the action, would strike at the very authority of the Court to pass any decree, and such a defect could not be cured even by consent of parties. This question would call for a decision only in the event of this Court coming to the conclusion that the appeal before the learned Civil Judge was not maintainable

the University for his mark sheet in the impugned examination and was supplied on 11-10-68, the marks which he secured at the Second P. U. Arts Examination held in July 1968. The said mark sheet goes to show that the petitioner had passed in all the papers, and the petitioner contends that the impugned order of cancellation of his result and the penalty of debarring him from appearing at the subsequent examinations until 1970 be cancelled, and on the basis of the marks secured by him the University be called upon to publish his result.

4. The nature of jurisdiction to be exercised by the Court in such cases came up for examination in some recent decisions of the Supreme Court. In AIR 1966 SC 875 H. S. & I. E. Board U. P. v. Baleswar Prasad, Mr. Justice Gajendragadkar, as he then was, spoke for the Court thus,—

"In dealing with petitions of this type, it is necessary to bear in mind that educational institutions like the Universities or appellant no. 1 (the Board of Education) set up Enquiry Committees to deal with the problem posed by the adoption of unfair means by candidates, and normally it is within the jurisdiction of such domestic Tribunals to decide all relevant questions in the light of the evidence adduced before them. In the matter of the adoption of unfair means, direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. This problem which educational institutions have to face from time to time is a serious problem and unless there is justification to do so, Courts should be slow to interfere with the decisions of domestic Tribunals appointed by educational bodies like the Universities. In dealing with the validity of the impugned orders passed by Universities under Art. 226, the High Court is not sitting in appeal over the decision in question, its jurisdiction is limited and though it is true that if the impugned order is not supported by any evidence at all, the High Court would be justified to quash that order. But the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. Enquiries held by domestic Tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves, and in holding such enquiries, the Tribunals must scrupulously follow rules of natural justice; but it would, we think, not be rea-

sonable to import into these enquiries all considerations which govern criminal trials in ordinary Courts of law."

The analysis that can be drawn as a guide on examination of a number of Supreme Court decisions touching upon the question of disciplinary jurisdiction over candidates taking examinations is that the educational authorities should be left without interference from Courts and other outside agencies in administering their affairs as long as they act in compliance with the rules of natural justice. As and when the Supreme Court has come to examine such a case, it has always indicated that the jurisdiction in such matters should not be extended, and it should always be a sound rule of discretion to allow the domestic Tribunals set up by such educational institutions to deal with the students so long they act in accordance with their rules and regulations. In AIR 1954 SC 217 Vice-Chancellor v. S. K. Ghosh, Mr. Justice Bose, speaking on behalf of the Court, said,—

"... but it is not the function of Courts of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question is entrusted by the law."

In AIR 1966 SC 707, Principal, Patna College v. K. S. Raman, the Court again indicated,—

"... matters falling within the jurisdiction of the educational authorities should normally be left to their decision, and the High Court should interfere with them only when it thinks it must do so in the interests of justice."

In our opinion, this is the correct approach in matters of disciplinary jurisdiction exercised by educational institutions, and the Court should not extend its jurisdiction over such matters unless in the facts of a given case on examination of materials it comes to the view that the procedure adopted has been contrary to natural justice and the cause of justice, which is paramount, warrants interference.

5. It has often been said that the rules of natural justice are not embodied rules, and the question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend, to a great extent, on the facts and circumstances of the case under examination, the constitution of the Tribunal and the rules under which it functions. It is admitted that there is no particular rule or regulation which the Mal-practices Committee of the Berhampur University is to follow in the matter of holding the enquiry into the mal-practices adopted by candidates taking the different examinations under it. But

it is settled law by now that in exercise of such jurisdiction a duty is cast on the committee to act judicially. A portion of the decision in AIR 1962 SC 1110, Board of High School v. Ghanshyam Das Gupta, may be quoted for convenience where Wanchoo J., as he then was, spoke thus,—

"Though therefore there is nothing express one way or the other in the Act or the Regulations casting a duty on the Committee to act judicially, the manner of the disposal, based as it must be on materials placed before it, and the serious effects of the decision of the Committee on the examinee concerned, must lead to the conclusion that a duty is cast on the Committee to act judicially in this matter particularly as it has to decide objectively certain facts which may seriously affect the rights and careers of examinees, before it can take any action in the exercise of its power under Rule 1 (1). We are therefore of opinion that the Committee when it exercises its powers under R. 1 (1) is acting quasi-judicially and the principles of natural justice which require that the other party, (namely, the examinee in this case) must be heard, will apply to the proceedings before the Committee."

The Court in the said decision further indicated in another part of the judgment,—

"But where quasi-judicial duties are entrusted to an administrative body like this it becomes a quasi-judicial body for performing these duties and it can prescribe its own procedure so long as the principles of natural justice are followed and adequate opportunity of presenting his case is given to the examinee."

In another recent decision in AIR 1969 SC 198, Suresh Koshy v. University of Kerala, the Court extracted with approval the dictum in the case of Russell v. Duke of Norfolk, 1949-1 All ER 109, where Tucker, L. J. observed,—

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

6. We now proceed to examine the facts of this case in order to find out whether the Mal-practices Committee of

the University has followed a procedure keeping with the principles of natural justice, and whether the petitioner had been given a reasonable opportunity of presenting his case before the said Committee to exonerate himself of the allegations made in the notice to show cause dated 2-9-68. Admittedly, the petitioner did not accept the allegations, and while refuting the same he imputed bias and mala fide against the invigilator. The counter affidavit, as extracted above, goes to show that the allegations of the petitioner were in fact enquired into by the Mal-practices Committee. But, as the materials on record show, the petitioner was not allowed to participate in such proceedings in which the enquiry by the Mal-practices Committee was conducted. In the facts of the present case, the allegations against the invigilator are directly connected with the conduct of the petitioner as to whether he is or is not guilty of the charges against him, and if the Mal-practices committee exonerated the invigilator from the allegations made against him without giving the petitioner an opportunity to participate in such enquiry so as to present his case, the canon of natural justice cannot be said to have been satisfied.

The petitioner came forward with a case that he had got the particular paragraph, which was the answer to question No. 1 (d) in the English Paper II, by heart. It was proper for the University Authorities or the Committee to give an opportunity to the petitioner to appear before them at the enquiry. If he had been given that opportunity, it is quite possible that the petitioner might have impressed the members of the Committee about the justness of his defence. For instance, if the invigilator had been examined by the Committee in presence of the petitioner, the petitioner might have been in a position to put certain questions to the invigilator and ultimately be successful in bringing on record materials to justify his allegations against the invigilator. It is not for us to make surmises in the matter. If the authorities concerned had acted in such a manner and had given the petitioner reasonable opportunity of presenting his case, the conclusions arrived at by the appropriate authorities in the matter could not be questioned and the Court would be left with no jurisdiction to interfere in the matter. But, on examination of the materials placed by the petitioner and the counter-affidavit of the authorities of the University, we find that a reasonable opportunity has not been given to the petitioner to present his case, and the conclusions have been arrived at by the Committee and ultimately by the University Authorities against the petitioner after keeping

him out of the picture. Such a decision is not in keeping with the rules of natural justice as adopted by the Courts in India.

7. Mr. Palit appearing for the petitioner wanted us to quash the punishment and to declare the result of the petitioner on the basis of the marks secured by him. It is not for this Court to declare the result of the examination of the petitioner. The alleged mal-practice against the petitioner has to be enquired into in a proper way, and it is open to the University Authorities to dispose of the matter after instituting a proper enquiry. We must, therefore, leave the matter to the University even after quashing the final order passed by them on 12-12-68, and allow the University Authorities to dispose of the charges made against the petitioner in the show cause notice dated 2-9-68.

8. In the result, the writ application is allowed and a writ of certiorari be issued quashing the order dated 12-12-68. It is open to the University Authorities to continue the proceedings against the petitioner on the basis of the charges framed on 2-9-68 and to dispose of the same in accordance with law. Such proceedings, if taken up, however, should be closed within three months from the date of the order. We make no order as to costs of this case.

9. G. K. MISRA, C. J.: I agree.

Application allowed.

AIR 1970 ORISSA 67 (V 57 C 29)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Pradiplal Ghose, Petitioner v. Registrar, Utkal University Vani Bihar, Bhubaneswar, Opposite Party.

Original Jurisdiction Case No. 77 of 1965, D/- 18-8-1969.

(A) Education—Utkal University Regulations, Vol. 2, Chap. II-A, Regns. 2 (1), 9 (1) and (2) and 14 (1) — Choice of optional subjects in Pre-university Classes is entirely the right of candidate — University syndicate has no right to change optional subject — Fourth optional cannot be equated to any of the three main optionals — Excess marks obtained over minimum in fourth optional subject shall be added to aggregate for determining division.

The University Syndicate has no option to change the optional subject offered by the candidate in Pre-university classes after he has selected the same in con-

formity with the Regulations. Regulations 2 (1), 9 (1) and 14 (1) clearly lay down that the choice of the optional subjects is entirely the right of the candidate provided those optional subjects are available in the particular College where the candidate is studying.

(Paras 5, 7)

The subject selected by the candidate as the fourth optional must always be treated as the fourth optional and the Syndicate has no jurisdiction to treat it as one of the main optionals. The three main optional subjects and the fourth extra optional subject are altogether different in their legal character and implication after the candidate exercises his choice and one cannot be substituted for the other. The question of a fourth optional subject is not the subject-matter of Regulation 14. That arises on account of Regulation 9 (2). The fourth optional cannot be equated to any of the three main optionals, and hence in view of Regulation 9 (2) the excess of marks obtained over the minimum in fourth optional subject shall be added to the aggregate and the aggregate so obtained shall determine the candidate's division and place in the list.

(Paras 6, 8, 9)

(B) Constitution of India, Art. 226 — Resolution of University Syndicate contrary to University Regulations — Question in dispute not capable of two views — High Court can interfere in exercise of its jurisdiction under Art. 226. AIR 1966 SC 707, Disting. (Para 9)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 707 (V 53) = (1966) 1 SCR 974, Principal, Patna College v. K. S. Raman 9

P. Palit, K. C. Panda and L. Sahoo, for Petitioner; D. Sahu, for Opposite Party.

G. K. MISRA, C. J.: The petitioner appeared in the Pre-University Examination (Science) under the Utkal University in March, 1964, from Khallikote College Berhampur. English, Modern Indian Language (M. I. L.) and General Knowledge were the Compulsory subjects in which he had to appear. For optional subjects he selected Mathematics, Physics and Chemistry. He offered Economics as the fourth or the extra optional subject. The Registration number of the petitioner in the Utkal University was 5859 of 1963 and his Roll number for the Examination was 793.

2. The petitioner secured the following marks in the Pre-University Examination as appears from the true copy filed by the Registrar of the Utkal University

Name — Sri Pradiplal Ghose

Roll — 793.

1.	English Paper I	... 34	99
	English Paper II	... 45	
	College marks	... 20	
2.	General Studies		60
	Humanities	... 23	
	-do- Science	... 23	
	College marks	... 14	44
3.	M. I. L. (Oriya)	... 34	
	-do- College marks	... 10	
4.	Mathematics	... 53	75
	College marks	... 17	
5.	Physics, Theory	... 43	
	College marks	... 8	64
	Practical marks	... 10	
	College marks	... 3	
6.	Economics	... 44	55
	College marks	... 11	
7.	Chemistry, Theory	... 31	
	College marks	... 8	53
	Practical	... 11	
	College marks	... 3	
Total ... 800		418 (sic)	= 21

According to the Calendar of the Khalikote College, for the year 1963-64, containing the courses of study prescribed by the Utkal University a student in the Pre-university Classes can opt for three principal optional subjects as indicated hereunder.

"Combinations of optionals available in this College

(a)

(b) Pre-University Science (256 seats)

1. Mathematics, Physics and Chemistry (Can offer Biology or Geology or Economics as fourth optional).

2. Biology, Physics and Chemistry (Can offer Mathematics or Geology as fourth optional)

3. Physics, Chemistry, Geology (Should offer Biology as fourth optional or can offer Mathematics as fourth optional)."

The petitioner, at the time of his admission in the College opted for the first group—Mathematics, Physics and Chemistry—as his principal optional subjects and Economics as fourth optional subject. He accordingly attended lectures.

In the Pre-University Examination form prescribed by the Utkal University, the petitioner indicated Mathematics, Physics and Chemistry as his principal optional subjects and gave Economics as the fourth optional. Column no. 10 of the Pre University Examination form prescribed by the Utkal University runs thus "10. Subjects in which he/she desires to be examined:

Part I. Compulsory Subjects. Part II. Optional Subjects.

1. _____ 5. _____
2. _____ 6. _____
3. _____ 7. _____
4. _____ Extra Optional Subjects.

The form thus makes a clear distinction between optional subjects and extra-optional subjects.

According to the petitioner he secured 420 marks in the aggregate out of 700 and should have been declared to have passed in the First Division, for which 60 per cent in the aggregate is required. The University treated Economics as one of the main optional subjects of the petitioner and Chemistry as the fourth extra optional subject, contrary to the Regulations of the Utkal University and the choice of the petitioner. The minimum pass marks in Chemistry are 32 per cent while that in Economics is 30. As Chemistry was treated as the fourth optional subject 32 marks were deducted from the marks secured in Chemistry by the petitioner and the total aggregate secured by the petitioner was indicated to be 418 and not 420. As a result of this action of the University acting contrary to the Regulations, the petitioner was declared to have passed in the Second Division. The action of the University is contrary to law and is in illegal exercise of jurisdiction. The petitioner, therefore, prays that the order of the University declaring the petitioner to have passed in the Second Division should be quashed by a writ of certiorari, and a writ of mandamus should be

issued directing the University to declare him to have passed in the First Division, after recalculating the aggregate correctly.

3. Though notice was served on the opposite party more than four years back, no counter was filed until the matter was heard on 8-8-69. As we were prima facie satisfied with the contention of the petitioner, we gave the University an opportunity to file a counter-affidavit and apprise us of the true facts. The counter was filed by the Deputy Registrar of the Utkal University on 12-8-69. The substance of the counter may be stated as hereunder, in brief:

In 1964, a question arose as to whether a student passing in the three compulsory subjects in Part I and any three optional subjects in Part II of Regulation 14 (1) of Chapter II-A of Utkal University Regulations, Volume II, shall be declared to have passed the Pre-University Examination. The question arose in the context of a case where a candidate passed in the three compulsory subjects mentioned in Part I of Regulation 14 (1) and in three out of the four optional subjects. In that particular case, he passed in two out of the three main optional subjects and failed in the third, but passed in the fourth optional subject. The question was whether he should be declared to have passed the Pre-University Examination. The Syndicate accepted the legal advice of the then Advocate General that failure in one of the main optional subjects would not be a bar to the candidate passing the Examination, as the aforesaid Regulation did not make any distinction between the three main optional subjects and the fourth optional subject. A true copy of the Resolution which the Syndicate passed on the basis of this legal advice, has been filed in this Court as Annexure I to the counter may be extracted in full:

"RESOLUTION NO. 1397 OF THE SYNDICATE DATED 20-5-64.

Considered the recommendations of the Board of Conducting Examiners for the annual Pre-University Examination of 1964 and in this connection considered the opinion of the Advocate-General on the interpretation of the Regulations regarding the fourth optional subject—

Resolved — 1. That the opinion of the Advocate-General on the interpretation of the Regulations regarding fourth optional subject be accepted;

2. That for the purpose of determining the fourth optional subject

(a) in case of candidates passing in four optional subjects, the subject in which he has secured the lowest number of marks should be treated as his fourth optional subject.

(b) in case of a candidate who has passed in three optional subjects and failed in one of the subjects in which he has failed should be treated as the fourth optional subject

3. That the results of the Annual Pre-University Examination of 1964 be referred back to the respective Boards of Conducting Examiners for reconsideration in the light of this decision of the Syndicate."

On the basis of this Resolution the Syndicate examined the case of the petitioner and treated Chemistry where he secured the lowest marks as his fourth optional subject though the petitioner all through offered Economics as the fourth optional subject. A further stand has been taken by the Registrar of the Utkal University, in his counter affidavit, that even assuming that the Syndicate took a wrong view of the matter, the High Court should not interfere with its discretion.

4. The issue arising in the case falls within a narrow compass. The question is whether the Syndicate acted contrary to the Regulations and in illegal exercise of jurisdiction in treating Chemistry as the fourth optional subject though it was never so offered by the petitioner and despite the fact that the petitioner completed the lectures in the College and appeared in the University Examination with Chemistry as a principal optional and Economics as the fourth optional.

The relevant Regulations on the point throwing light may be noticed. Regulation 2 (1) in Chapter II-A so far as relevant runs thus:—

"2 (1) Any registered student of the University may be admitted to the Pre-University Examination if he has completed, in one or more colleges for the purpose of such examination in the subject which the candidate offers, a regular course of study for not less than one academical year after passing the Matriculation Examination"

5. This Regulation prescribes the qualifications for admission to the Examination, as would appear from the marginal note. The conditions precedent prescribed therein are twofold; firstly the candidate must have completed the course in one or more colleges for not less than one academical year. The petitioner fulfilled this condition by studying for one academical year in the Khallikote College. The second condition is that the candidate must offer the subjects and in those subjects he must have undergone a regular course of study for not less than one academical year. The requirements therefore, are that the candidate is to select his own subjects as prescribed by the Regulations and complete the

lectures. Emphasis must be placed on the expression "in the subject which the candidate offers". Though the University has prescribed various subjects to be selected as optionals the different Colleges might not make provision for those optionals; and where a particular optional subject is not provided for in a particular college, the candidate who takes to a course of study in that College cannot obviously select that particular optional subject even though the courses of study prescribed by the University have allowed that particular subject to be taken as an optional. All this indicates that the candidate's decision is determinative as to the subject he chooses to appear in a particular examination, provided that subject has been specified in the courses of study prescribed by the University and he has completed a course of lectures therein in the College. The Regulation gives a fair indication that the Syndicate has no option to change the optional subject offered by the candidate after he has selected the same in conformity with the Regulations.

Regulations 9 (1), 9 (2) and 14 (1) run thus:—

"9 (1) in order to pass the Pre-University Examination, a candidate must obtain—

(a) in each of the subjects in which no practical examination is held: 30%

(b) in each of the subjects in which a practical examination is held

(i) in the theory papers 30%

(ii) in the Practical 40%

(c) in the aggregate 33%

(2) If a candidate has passed in the Compulsory subjects, the three Optional subjects and also in the aggregate, the marks, if any, which he obtains in excess of the minimum required for passing the fourth optional subject shall be added to his aggregate and the aggregate so obtained shall determine his division and his place in the list".

"14 (1) The subjects for the Pre-University Examination and the maximum marks in each subject shall be as follows. (Subject to Clause (3) of the Regulation).

Part I (Compulsory)

(i) English	...	Two papers	100 marks in each paper
(ii) One of the following Modern Indian Languages: Oriya, Hindi, Bengali, Telugu, Urdu and Tamil	One paper	100 marks
If the mother-tongue of a candidate is a language not included in the above list, he shall have an alternative paper in English of a higher standard than is required in subject (i).			
(iii) General knowledge including the landmarks in World History, Indian Constitution, Civic and General Science	One paper	100 marks

Part II—Optional

(iv), (v) and (vi). Three of the following subjects:—			
(a) Mathematics	One paper	100 marks	
(b) Chemistry	Theory	80 marks	
	Practical	20 marks	
(c) Physics	Theory	80 marks	
	Practical	20 marks	
(d) Biology	Theory	80 marks	
	Practical	20 marks	
(e) Geology	Theory	80 marks	
	Practical	20 marks	
(f) Geography	Theory	80 marks	
	Practical	20 marks	
(g) Psychology	Theory	80 marks	
	Practical	20 marks	
(h) Education	Theory	80 marks	
	Practical	20 marks	
(i) Domestic Science	Theory	80 marks	
	Practical	20 marks	

(j) One of the following languages— One paper 100 marks

- (i) Sanskrit
- (ii) Persian
- (iii) Oriya
- (iv) Hindi
- (v) Bengali
- (vi) Urdu
- (vii) Telugu
- (viii) Tamil
- (ix) French
- (x) German and
- (xi) Russian

- | | | |
|------------------------------------|-----------|-----------|
| (k) Economics | One paper | 100 marks |
| (l) History | One paper | 100 marks |
| (m) Elements of commerce | One paper | 100 marks |
| (n) Fine Arts | One paper | 100 marks |
| (i) Drawing and painting | | |
| (ii) Music (Vocal or Instrumental) | | |

- | | | |
|-------------------------------|-----------|------------|
| (o) Logic | One paper | 100 marks |
| (p) Civics and Administration | One paper | 100 marks. |

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6. It would appear from a scrutiny of the aforesaid Regulations that the minimum pass mark in Economics is 30 per cent as no practical examination is held in that subject. In Chemistry 80 marks have been awarded to Theory and 20 to Practical. By virtue of Regulation 9 (1) (b) read with Regulation 14 (1) Part II (b) the minimum pass mark which a candidate has to secure in Chemistry Theory is 24 (30 per cent of 80) and in Chemistry Practical is 8 (40 per cent of 20), making a total of 32 for both taken together. It is on account of this difference that in the minimum pass marks between Economics and Chemistry that the point in issue arises. If Economics is taken as the fourth optional subject, by virtue of Regulation 9 (2) only 25 marks (that is 55 marks actually secured by the petitioner in Economics minus 30, the minimum pass marks in that subject) are to be added to the aggregate while, if Chemistry is taken as the fourth optional subject 21 marks (53 marks actually secured by him in that subject minus 32, the minimum pass mark in that subject) are to be added to the aggregate.

Regulation 9 (2) makes it clear that the excess of marks obtained over the minimum in fourth optional subject shall be added to the aggregate and the aggregate so obtained shall determine the candidate's division and place in the list. If Economics is taken as the fourth optional subject the aggregate marks of the petitioner come to 420 and he would be placed in the First Division; but if Chemistry is taken as his fourth optional subject, the aggregate comes to 418 and he would be placed in the Second Division, as declared by the University.

7. As already discussed the Regulations clearly lay down that the choice of the optional subjects is entirely the right of the candidate provided those optional subjects are available in the particular College where the candidate is studying.

8. Mr. Sahu placing reliance on Regulation 14 (1), Part II, contends that no distinction has been made in the 16 optional subjects indicated in that Part as to which would be the principal optional subject and which would be the fourth or extra optional subject; and as such it was open to the Syndicate to treat any of the four optional subjects offered by a candidate as the fourth optional subject. This contention is wholly fantastic and cannot stand scrutiny. Regulation 14 (1), Part II, merely enumerates the various optionals; it does not deal with the fourth optional. The operative part of Regulation 14 (1) says that the subjects of the Pre-University Examination and the maximum marks in each subject "shall be as follows subject to Clause (3) of the Regulation". The Regulation indicates the three compulsory subjects and also shows, under Part II that three of the various subjects mentioned therein would be selected as optional subjects. Once three out of the subjects have been selected by the candidate as optional subjects as indicated in the Regulation, it is not open to the University to say that those three subjects could not have been his optionals but some other subject mentioned therein which he might have offered as his fourth optional subject would be treated as such optional subject. The question of a fourth optional subject is not the subject-matter of Regulation 14. That arises on account of Regn. 9 (2).

The fourth optional cannot be equated to any of three main optionals: The choice of the fourth optional subject (which is in the nature of an extra optional subject) is given for a limited purpose, namely that the extra marks obtained in that subject over the minimum pass marks are to be added to the aggregate provided that the candidate has passed in the three Compulsory subjects and in the main optional subjects and the aggregate. If the candidate has failed in any one of the Compulsory subjects or in any one of the main optional subjects, and the aggregate he falls in the Examination and the question of adding excess marks obtained in the fourth optional subject does not arise. If the candidate secures only the minimum pass marks in the fourth optional subject, no part of it would be added to the aggregate marks. Failure in the fourth optional subject will not affect his success in the Examination if he passes in the three Compulsory subjects and in the three main optional subjects and the aggregate. The aforesaid analysis arises out of the construction of Regulation 2 (1) and Regulation 9 (2) read together. No other view is conceivable. The legal advice on which the Syndicate relied was wholly misconceived. Mr. Palit contended that the legal advice was given to suit a particular case. We express no view thereon. It is sufficient to say that we are satisfied that the Resolution of the Syndicate based on the legal advice was contrary to the Regulations.

9. Placing reliance on AIR 1966 SC 707, *Principal, Patna College v. K. S. Raman*, Mr. Sahu contends that the High Court, in exercise of its jurisdiction under Articles 226 and 227, should not interfere where the question involved is one of interpreting a Regulation and the matter is capable of two constructions. As I have already said, the question here is not capable of two views and the only tenable view is that the subject selected by the candidate as the fourth optional must always be treated as the fourth optional and the Syndicate has no jurisdiction to treat it as one of the main optionals. The three main optional subjects and the fourth extra optional subject are altogether different in their legal character and implication after the candidate exercises his choice and one cannot be substituted for the other. The Supreme Court decision has no application to this case.

10. In the result, the decision of the Syndicate declaring the petitioner to have passed in the second Division is quashed. A writ of mandamus be issued directing the opposite party to re-calculate the aggregate marks of the petitioner in the light of the law as laid down in this

judgment and to re-publish the results of the Examination in accordance with such re-calculation, assigning to him his proper Division and place in the list of successful candidates.

The writ application is allowed with costs. Hearing fee Rs. 100/- (one hundred only).

11. R. N. MISRA, J.:— I agree.

Application allowed.

AIR 1970 ORISSA 72 (V 57 C 30)

G. K. MISRA, C. J. AND

R. N. MISRA, J.

Shiba Prasad Sahoo, Petitioner v. State Transport Authority, Opp. Party.

O. J. C. No. 702 of 1969, D/- 27-8-1969.

(A) Motor Vehicles Act (1939), Section 57 (2) — Application for grant of permit — Non-mention of date from which permit is sought to be effective — Application is not invalidated.

An application for grant of permit under Section 57 (2) of the Act is not invalid merely because there is no express specification of the date from which a permit is sought to be effective.

Sub-section (2) clearly contemplates two alternatives. The intending operator can apply for a stage carriage permit at any time at least six weeks before he desires the permit to be effective, or he may apply within the time prescribed by the Transport Authority for making such applications in a case where applications are called for. The incorporation of six weeks in Section 57 (2) with reference to the first alternative is made only to ensure sufficient time for the Transport Authorities to satisfy the procedural requirements which are conditions precedent for grant of a permit and for no other purpose. Non-mention of the date does not invalidate the application, and an application without specification of the date continues, nevertheless, to be an application under Section 57 (2) of the Act. AIR 1959 All 253, Rel. on. (Paras 4, 5)

(B) Motor Vehicles Act (1939), Sec. 57 (2) — Orissa Motor Vehicles Rules (1940), Rules 54, 52-E and 57 — Application for grant of permit — There being no vacancy, Secretary, State Transport Authority refusing to accept application under Rule 54 — Direction to apply afresh when called for — Omission to apply in terms of applications — Held, Secretary not being competent to refuse application, there was no proper disposal of application and it was still pending.

Once applications for permits are made, the Authority has to dispose them of in a manner prescribed by law. It is not open to it to ignore those applications

merely because it has subsequently decided to call for applications in respect of the very routes. AIR 1952 All 437, Rel. on. (Paras 7, 8)

On 17-3-69 the two applications from the petitioner had been received, but by then there was no vacancy on the routes and as such the Secretary of the State Transport Authority, in exercise of powers under Rule 54 of the Orissa Motor Vehicles Rules, declined to accept the said applications and the petitioner was duly informed a few days thereafter that he should apply afresh when applications are invited, and his applications received on 17-3-69 were filed in the office of the State Transport Authority. The petitioner did not apply in terms of the directions.

Held, the said applications were not validly disposed of and were still pending before the State Transport Authority.

(Para 7)

On a plain reading, of Rule 54, even if all the conditions indicated therein are satisfied, it is the Transport Authority itself and not the Secretary who is competent to decline to receive applications. Both the Rules 52-E and 57 do not provide for the Authority to finally dispose of the applications to inhere in the Secretary, and that power vests only in the Transport Authority itself. Therefore, it follows that the two applications of the petitioner had not been disposed of in accordance with law and must be taken to be pending to be disposed of by the Authority. (Para 7)

Cases Referred: Chronological Paras

- (1959) AIR 1959 All 253 (V 46) =
ILR (1959) 1 All 413, Tara Singh
v. S. T. A. Tribunal 5
(1952) AIR 1952 All 437 (V 39) =
ILR (1952) 1 All 159, Makhan
Lal v. State of U. P. 8

S. C. Parija and N. C. Mohanty, for Petitioner; D. P. Mohapatra, Standing Counsel, for Opp. Party.

R. N. MISRA, J.:— There are two Inter-State stage carriage routes (1) Sambalpur to Ranchi, and (2) Rourkela to Ranchi, on which the State Transport Service had been operating their buses. The petitioner came to know that the State Transport Service was about to withdraw from the said routes and therefore, made two separate applications to the State Transport Authority, opposite party before us, for grant of stage carriage permits to him on the said two routes. These applications were received in the office of the Secretary, State Transport Authority, on 17-3-69. On 22-3-69, the State Transport Authority decided to fill up the routes by invitation of applications and on 26-4-69, advertisements in terms of Section 57 of the Motor Vehicles Act (hereinafter to be

referred to as the Act) were published inviting applications from intending operators on or before 15-5-69. After the applications were received, they were duly notified on 27-5-69, under Section 57 (3) of the Act fixing 30-6-69 as the last date for receipt of objections.

The petitioner found that his applications referred to above had not been notified and therefore, made a request to the Secretary of the State Transport Authority to notify his applications. The petitioner was informed by the Secretary on 15-7-69 to the effect that he had already been informed earlier that he should apply afresh after the routes were advertised and as he had not applied as directed, he could not claim his applications to be notified.

2. The petitioner has thereupon come before us in this application under Articles 226 and 227 of the Constitution challenging the action of the opposite party in refusing to notify his applications, and wants us to issue a writ to quash the notifications of the other applications under Section 57 (3) of the Act and for a direction that his applications may be notified and disposed of in accordance with law.

3. The opposite party in its counter affidavit has stated that on 17-3-69 the two applications from the petitioner had been received, but by then there was no vacancy on the routes and as such the Secretary of the State Transport Authority, in exercise of powers under Rule 54 of the Orissa Motor Vehicles Rules, declined to accept the said applications and the petitioner was duly informed a few days thereafter that he should apply afresh when applications are invited, and his applications received on 17-3-69 were filed in the office of the State Transport Authority. The petitioner did not apply in terms of the directions and therefore there were no applications pending consideration before the State Transport Authority, which could be asked to be notified under Section 57 (3) of the Act. It is also contended that the applications of the petitioner did not come within the purview of Section 57 (2) of the Act, and as such are not entitled to any consideration.

4. Section 57 of the Act lays down the procedure in applying for and granting permits. Sub-sections (2) and (3) of that section, which are material for our present purpose, may be extracted below:

"(2) An application for a stage carriage permit or public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates for the receipt of such applications, or such dates,

(3) On receipt of an application for a stage carriage permit or a public carrier's permit, the Regional Transport Authority shall make the application available for inspection at the office of the authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, not being less than thirty days from such publication, on which, and the time and place at which, the application and any representations, received will be considered."

Sub-section (2) clearly contemplates two alternatives. The intending operator can apply for a stage carriage permit at any time at least six weeks before he desires the permit to be effective, or he may apply within the time prescribed by the Transport Authority for making such applications in a case where applications are called for. Mr. Parija appearing for the petitioner contends that the petitioner's applications are covered within the first alternative referred to above, while Mr. Mohapatra for the Transport Authority argues that the petitioner's applications are (not?) in accord with either of the alternatives, and as such cannot be deemed to be applications under S. 57 (2) of the Act. Mr. Mohapatra contends that no date was indicated in the applications made by the petitioner as to with effect from which the permits, if granted, were to be effective, and therefore the first alternative does not cover these applications. Admittedly, there was no invitation of applications by the State Transport Authority by 17-3-69.

5. Mr. Parija has invited our attention to the statutory form prescribed for applying for a permit under section 57 (2) of the Act. On a reference to the said application form, we do not find any provision therein to specify the date with effect from which a permit is to be effective. We are of the view that the incorporation of six weeks in Section 57 (2) with reference to the first alternative is made only to ensure sufficient time for the Transport Authority to satisfy the procedural requirements which are conditions precedent for grant of a permit and for no other purpose. Non-mention of the date does not invalidate the application, and an application without specification of the date continues, nevertheless, to be an application under Section 57 (2) of the Act. We find support for this view of ours in AIR 1959 All 253, *Tara Singh v. S. T. A. Tribunal*, where Gurtu J. on difference between two Hon'ble Judges of the said Court, said,

"The relevant sections and rules now having been set out it remains for me to consider whether either the relevant sec-

tions or the relevant rule or the relevant form demand that a specific date from which the permit is to be effective is required to be specified in the application for a permit desired under the 1st part of Section 57 (2).

It will be apparent from a consideration of the material provisions herein before quoted that there is no express provision requiring the specification of a date. The argument, however, which has been advanced before me is that the language of Section 57 (2), first part, which is to the effect that an application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, clearly demands, that the date when the permit shall take effect should be specifically mentioned.

On the other hand, the contention is that the six weeks' period mentioned in sub-section (2), first part, has been mentioned in order to make it clear that no right to receive a permit will in any case accrue to an applicant until six weeks have expired from the date of his application. It seems to me that there is substance in the latter contention. Moreover, it seems to me that when a person avails himself of such a provision as is contained in Section 57 (2), first part, and applies for a permit then, in the absence of anything to the contrary in his application, it must be presumed that he is desirous of obtaining a permit which would take effect on the expiry of six weeks from the date of his application. For if such a person desired that his permit should take effect at some remoter period beyond six weeks it is likely that he would mention it and in view of Section 57 (2) he could not mention a date from which the permit should be effective which was within six weeks of the making of the application for he would have no such right.

In my view, therefore, having regard to the fact that neither in the rules nor in the form framed nor in Section 46 of the Motor Vehicles Act is it indicated that there should be a specific mention of the date from which it is desired that the permit should take effect, in the absence of specification of any date, it should be assumed that the applicant desires the permit to be effective on the expiry of the six weeks' period indicated in Section 57 (2), first part of the Act. One is entitled to presume that if a person has made an application under section 57 (2) of the Act and has not specified the date when he desires the permit to take effect then he is clearly intending that the permit to be granted to him should take effect at the end of the period

of six weeks from the date of his application.

Therefore, in my view, the application dated 18-8-1951, was not invalid application merely because there was no express specification of the date therein. There is a clear specification by implication."

6. We, therefore, hold that the two applications of the petitioner were valid ones and come within the first alternative of Section 57 (2) of the Act as referred to above.

7. It has now to be considered whether the said applications have been validly disposed of or are still pending before the State Transport Authority. It is not disputed by the learned Standing Counsel for the Transport Authority that once applications for permits are made, the Authority has to dispose them of in a manner prescribed by law. He however contends that the intimations given on 11-4-69 and 15-4-69 were the orders of the State Transport Authority by which they were disposed of. As such there are no valid and alive applications which the State Transport Authority has yet to consider. Mr. Mohapatra seeks to place reliance on Rule 54 of the Orissa Motor Vehicles Rules, 1940 in support of the action of the Secretary. Rule 54 may be extracted for convenience:

"54. Refusal to accept applications for permits, power of — When a Regional Transport Authority has in exercise of its powers under the Act imposed a limit upon the number of permits of any class which may be granted for a specified route or a specified area and has already granted such number of permits of that class the Authority may decline to receive further applications for such permits in respect of any such route or area".

On a plain reading, even if all the conditions indicated therein are satisfied, it is the Transport Authority itself and not the Secretary who is competent to decline to receive applications. It is conceded that the Secretary has not been authorised to act on behalf of the Transport Authority so far as exercise of power under Rule 54 is concerned. But the learned counsel for the Transport Authority seeks support from Rule 57 and contends that the applications are addressed to the Secretary and under Rule 52-E of aforesaid Rules, he is to scrutinise them and therefore he is competent to refuse to accept them. We find no support for this contention either in Rule 52-E or Rule 57. Both these rules do not provide for the Authority to finally dispose of the applications to inhere in the Secretary, and we find that that power vests

only in the Transport Authority itself. Therefore, it follows that the two applications of the petitioner have not been disposed of in accordance with law and must be taken to be pending to be disposed of by the opposite party.

8. The Transport Authority is bound to dispose of the said applications on a legal process. It is not open to it to ignore these two applications, merely because it has subsequently decided to call for applications in respect of the very routes. This aspect of the matter came up for examination before a Division Bench of the Allahabad High Court in AIR 1952 All 437, Makhani Lal v. State of Uttar Pradesh, Sapru J. speaking for the Court said,

"The learned Senior Standing Counsel on behalf of the State has, on the basis of the affidavit filed by the Secretary of the Regional Transport Authority, tried to show that in these cases the Regional Transport Authority has been acting strictly in accordance with law as laid down in the Motor Vehicles Act. The stand taken by him is that under subsection (2) of section 57, Motor Vehicles Act, 1939 there can be two alternative dates for the presentation of applications for permits. The first alternative date is a date, at least six weeks prior to the date on which the applicant desires his permit to take effect. The second alternative date is a date which the Regional Transport Authority may fix for the presentation of all such applications. It was contended by the learned Senior Standing Counsel that in this case the Regional Transport Authority acted under the second alternative clause and fixed 15-7-1950, accordingly as the date on which all applications for permits were to be presented. In adopting this course, it appears that the Regional Transport Authority went wrong for two reasons: Firstly, if any one had already presented an application which could be considered to comply with the requirements of the first alternative mentioned in Section 57 (2), Motor Vehicles Act, it was incumbent on the Regional Transport Authority to consider that application and it was not competent for it to ignore that application simply because it subsequently decided to fix a date for the presentation of applications under the second alternative."

9. We however express no views as to whether the applications of the petitioner are otherwise valid in law so as to require disposal on merit in terms of the procedure laid down in section 57 of the Act. If, upon examination, the State Transport Authority is satisfied that the said applications are otherwise valid and are maintainable, the said applications

are bound to be notified and disposed of in accordance with the procedure prescribed under the Act along with other applications for the two routes in question.

10. Mr. Mobapatra for the Transport Authority had raised a preliminary objection that the present application relating to two separate routes was not maintainable. We find that it is a technical objection. In the facts of the present case, where the parties are the same and the matter in issue is also absolutely similar and on account of inclusion of a dispute relating to two separate applications no confusion has been brought into the case, we do not propose to entertain the technical objection raised by Mr. Mohapatra, and accordingly we have overruled the same.

11. We issue a writ of mandamus commanding the opposite party to treat the applications of the petitioner received on 17-3-69 to be pending before it and direct that the same be disposed of at an early date in accordance with law. The writ application is allowed with costs. Hearing fee of Rs. 100/- (rupees one hundred).

12. G. K. MISRA, C. J.: I agree.

Petition allowed.

AIR 1970 ORISSA 76 (V 57 C 31)

B. K. PATRA

AND S. ACHARYA, JJ.

Rameshwar Lal and another, Petitioners
v. Jogendra Das, Opposite Party.

Civil Revision No. 26 of 1966, D/- 12-8-1969, from order of Dist. J. Cuttack, D/- 29-10-1965.

(A) Civil P. C. (1908), S. 115 — Appellate order under S. 17 of the Payment of Wages Act — Revision to High Court under S. 115 Civil P. C. lies — Appellate authority under S. 17 of that Act is 'Court' — The "authority" hearing application under S. 15 of the Act is not 'Court' but a persona designata — (Payment of Wages Act (1936), Ss. 15 and 17).

Though an order passed by the appropriate authority on an application under S. 15 of the Payment of Wages Act is not directly revisable by High Court under S. 115 of Civil P. C. for the reason that the authority is not a 'Court' but only a persona designata, the appellate order by the Court of Small Causes or the District Court as the case may be passed in an appeal under S. 17 of the above Act from the original order by the authority under S. 15 of the Act is revisable, they being civil courts subordinate to the High Court. AIR 1945 Nag 244 & AIR 1951 Cal 29, Foll.; AIR 1958 Orissa 123 & AIR 1944 Nag 283 and AIR

1946 All 276 & AIR 1950 All 80 (FB), Dist. (Para 3)

(B) Payment of Wages Act (1936), S. 1 — Object of the Act.

The Act is intended to regulate the payment of wages to certain classes of persons employed in industries and the object is to provide for a speedy and effective remedy to the employees in respect of their claims arising out of illegal deduction or unjustified delay made in paying the wages to them.

(Para 5)

(C) Payment of Wages Act (1936), Sections 15, 17, 2 (vi), 18 and 22 — Claim for retrenchment compensation in an application under S. 15 — Retrenchment not being disputed or indisputable — Authority under S. 15 and appellate authority under S. 17 can entertain claim — Retrenchment compensation falls within the definition of 'wages' in S. 2 (vi) — (Industrial Disputes Act, 1947, S. 25-F) — (Civil P. C. (1908), S. 115 — Concurrent finding of fact — Finding by authorities under Ss. 15 and 17 that it was a case of retrenchment — High Court will not in revision differ from the finding).

In cases where retrenchment itself is not disputed or is clearly indisputable, there can be no doubt that a claim for retrenchment compensation as per Section 25F of the Industrial Disputes Act can be entertained by the Authority under Section 15 of the Payment of Wages Act or the appellate Court under Section 17 of the Act as retrenchment compensation comes within the definition of 'wages' under S. 2 (vi) of the Payment of Wages Act. (Para 6)

"Wages" as defined in S. 2 (vi) has a wide meaning and includes within it any benefit to which a workman is entitled to, on termination of service, either under the contract of employment or under any law or an award or a settlement. Under S. 15 the Authority has to decide all claims arising out of deductions from wages or delay in payment of wages of persons employed including all matters incidental to such claims. The orders which the Authority is entitled to make are comparatively wide. They are not limited to merely giving necessary directions for the payment of money to the employee, but also to the making of orders imposing penalty upon the employer for illegal deductions or non-payment. Section 17 provides for appeal from the order of the Authority. Section 18 confers on the Authority all powers under Civil P. C. for purposes of taking evidence and enforcing attendance of witnesses and compelling production of documents. Section 22 bars the jurisdiction of Civil Courts in all matters which can be decided by the Authority under the Act. Though the remedy is

thus to some extent a summary one, and though the special Act ousting the jurisdiction of civil courts has to be construed strictly, the statute should not be so narrowly construed as to oust the jurisdiction of the authority concerned. The question of retrenchment compensation raised in an application under S. 15 of the Payment of Wages Act would be one connected with the matter in issue and it would be necessary to decide it for giving relief to the applicant. (Para 5)

In a case, where both the Authority under S. 15 and the appellate court under Section 17 have held on consideration of the evidence on record that the termination of service of the applicant was by way of retrenchment:

Held, that the Authority and the appellate court had jurisdiction to entertain the claim and grant relief to the applicant on that basis. It was not open to the High Court in revision against the order of the appellate court to differ from the finding that the termination was by way of retrenchment. AIR 1963 Mys 128 & (1968) 70 Bom LR 704, Foll.; AIR 1969 SC 590, Dist.

(Para 6)

(D) Civil P. C. (1908), Preamble and S. 9—Special statutes ousting jurisdiction of Civil Court — Statutes to be strictly construed — It does not mean narrow construction as will oust the jurisdiction of such statutory authority. (Para 5)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 590 (V 56) =
- 1969 Lab IC 867 = (1969) 2 SCJ 108, Payment of Wages Inspector, Ujjain v. Surajmal Mehta 5
- (1968) 70 Bom LR 704 = ILR (1969) Bom 51, A. Rahim Hajubhai Shaikh v. Shiraj Kasim Nadar 6
- (1963) AIR 1963 Mys 128 (V 50) = 40 Mys LJ 968, Manager Codialabail Press v. K. Monappa 6
- (1958) AIR 1958 Orissa 123 (V 45) = 24 Cut LT 272, Labangalata Dei v. Sk. Azizullah 2
- (1951) AIR 1951 Cal 29 (V 38) = ILR (1951) 2 Cal 371, Jogendra Nath Chatterjee & Sons v. Chandreswar Singh 3
- (1950) AIR 1950 All 80 (V 37) = ILR (1951) 1 All 121 (FB), H. C. D. Mathur v. E. I. Rly. Administration 2
- (1946) AIR 1946 All 276 (V 33) = ILR (1946) All 248, Triloki Nath v. Krishna Sugar Mills Ltd. 2
- (1945) AIR 1945 Nag 244 (V 32) = ILR (1945) Nag 587, Debidutt Dube v. Central India Electrical Supply Co. Ltd. 3
- (1944) AIR 1944 Nag 288 (V 31) = ILR (1944) Nag 531, Turabali v. Sorabji 2

D. P. Mohanty, for Petitioners; A. C. Mohanty, for Opposite Party.

PATRA, J.:— This application in revision is directed against an appellate order of the District Judge, Cuttack under Section 17 of the Payment of Wages Act, 1936 (hereinafter referred to as the Act). The petitioners here are proprietors of a Gurakhu factory situate in Telenga bazar, Cuttack and the opposite party was serving under them in the factory. While so working opposite party is said to have met with an accident which disabled him from attending to his work with effect from 9-1-1961. After undergoing treatment when he wanted to join his duties, the petitioners refused to employ him any further. The opposite party therefore, made an application under Section 15 of the Act before the Additional District Magistrate, Cuttack, who is the appropriate authority appointed under Section 15 of the Act, claiming arrears of wages for the months of November and December, 1960 and 8 days of the month of January, 1961 at the rate of Rs. 55/- per month and alleging that it is a case of retrenchment, he also claimed a month's wages in lieu of notice besides retrenchment compensation of Rs. 247-50 p.

The Addl. District Magistrate reduced the retrenchment compensation claim to Rs. 220/- and allowed the other items of claim as prayed for by the opposite party. The petitioners filed an appeal before the District Judge which was dismissed and it is against that order that the petitioners have come up in revision.

2. At the outset it is contended by the opposite party, that this revision petition is not maintainable on the ground that the authorities appointed under the Payment of Wages Act are not courts and much less subordinate to the High Court. In support of this contention, he placed reliance on decisions of this Court and other High Courts, namely, Labangalata Dei v. Sk. Azizullah, AIR 1958 Orissa 123; Turabati v. Sorabji, AIR 1944 Nag 288; B. Triloki Nath v. Lord Krishna Sugar Mills, Ltd., AIR 1946 All 276 and H. C. D. Mathur v. E. I. Rly. Administration, AIR 1950 All 80 (FB). In all these cases, the revision applications were filed directly against the orders passed by the authority appointed under Section 15 of the Act. In the Orissa case cited above, Barman J. held that a Commissioner appointed under the provisions of the Payment of Wages Act is not a Court subordinate to the High Court under Section 115, C. P. C. Hence, a revision application does not lie to the High Court from an order under Section 15 of that Act passed by the Commissioner. In the Nagpur case also, the order that was challenged

in revision was one passed under Section 15 of the Act by the "authority" mentioned therein and Bose, J. held that the authority is a "persona designata" and not a regular civil Court subordinate to the High Court within the meaning of Section 115, C. P. C. The same view was expressed by Division Bench of Allahabad High Court in AIR 1946 All 276 which is also a case in which a revision was filed against an order passed by the authority under Section 15 of the Act and this view was reiterated subsequently by the Full Bench of Allahabad High Court in AIR 1959 All 80. It was canvassed before their Lordships that the authority constituted under Section 15 of the Act is a Court. Referring to this contention their Lordships observed that —

"The word 'Court' is not a term of art having a fixed meaning: it indicates a large number of entirely divergent things. So far as a Court of law, in the wider sense of the word, is concerned, any person or a body of persons, called upon to decide any question of right in accordance with judicial principles and which is a "tribunal which exercises jurisdiction by reason of the sanction of the law" is a Court. It does not, however, follow from this that every such tribunal is a Court of civil jurisdiction, to which alone Section 115, C. P. C. applies. x x x x x. The conclusive test is provided by Section 22 which excludes the jurisdiction of 'Courts' in respect of matters entrusted to the jurisdiction of the authority under Section 15. Clearly, therefore, the Legislature intended that the authority constituted under Section 15, Payment of Wages Act, should not be a Court. The fact that Section 18 of the Act directs that the authority should have certain powers of civil Courts and that it should be treated as a Civil Court for the purpose of Sec. 195 and Chap. XXXV, Criminal Procedure Code, would not lead to the inference that the authority is a civil Court. x x x x x. The authority created under Section 15, Payment of Wages Act, is not subject to the appellate jurisdiction of the High Court. That section, therefore, does not give the High Court jurisdiction to interfere with the orders of the authority. Hence the authority invested with jurisdiction under the Payment of Wages Act is not a Court subordinate to the High Court within the meaning of Section 115, C. P. C."

3. The present revision application is directed not against an order of the authority under Section 15 of the Act but against the appellate order passed by the District Judge in exercise of his powers under Section 17 of the Act. Section 17 of the Act so far as is material may be quoted:

"17. Appeal — (1) An appeal against an order dismissing either wholly or in part an application made under sub-section (2) of Section 15, or against a direction made under sub-section (3) or sub-section (4) of that section may be preferred, within thirty days of the date on which the order or direction was made, in a presidency-town before the Court of Small Causes and elsewhere before the District Court".

It may be noticed that the appeal under the section has to be filed before the District Court and not before a District Judge. If a District Judge as distinguished from a District Court had been invested with this jurisdiction such authority could be called a persona designata as distinguished from a Court. But it cannot be contended that a District Court can be designated as persona designata just because it has been invested with jurisdiction under a special Act. A District Court being a civil Court subordinate to the High Court Sec. 115, C. P. C. clearly applies to orders passed by such Court.

In *Debidutt Dube v. Central India Electrical Supply Co. Ltd.*, AIR 1945 Nag 244, an appeal was filed against an order passed by the authority under Section 15 (1) of the Act in the District Court at Jabulpore. As against this order passed by the District Court in appeal, a revision was filed in the High Court, and in this case, a preliminary objection was raised that no revision lay against an order passed by the District Court under Section 17 of the Act. Repelling this contention it was held that the District Court decides a "case" within the meaning of Section 115, C. P. C., when it decides an appeal under Section 17 of the Act and the High Court, therefore, has power to revise an order passed by the District Court in appeal under Sec. 17 of the Act. In *Jogendranath Chatterjee and Sons v. Chandreswar Singh*, AIR 1951 Cal 29, an appeal against an order passed under S. 15 of the Act was filed in the Court of Small Causes and against the order passed by that Court a revision application was filed in the High Court. A preliminary objection was taken that no revision under Section 115, C. P. C. lay in as much as Section 17 of the Act provides that the decision of the authority appointed under the Payment of Wages Act shall be final subject to an appeal and that inasmuch as an appeal had already been filed and decided, the unsuccessful party had no further remedy. Repelling this contention, their Lordships held that all that the word "final" in S. 17 of the Act means is that no further appeal would lie from the decision of the Appellate Court, but that the Court of Small Causes being subordinate

to the High Court, by virtue of the provisions of Section 115, C. P. C., the High Court has power to revise the order passed by the Court of Small Causes.

Having regard, therefore, to the provisions of the Act and the authorities on the subject, we are clearly of opinion that the revision application is maintainable.

4. Now coming to the merits of the case, it is no more in dispute that the opposite party was employed under the petitioners and that wages for the months of November and December, 1960 and 8 days of January, 1961 were due to the opposite party. The petitioners state that there is no evidence to show that the place where they are manufacturing Gurakhu is a factory within the meaning of the Factories Act. But no such specific contention was raised by them in their written statement and at any rate, the finding of fact recorded by the learned District Judge is that it is a factory.

The only point which was urged with some amount of vehemence on behalf of the petitioners is that the cessation of employment of opposite party is not due to retrenchment, and that, in any case, it was beyond the jurisdiction of the authorities under the Act to investigate into the question whether or not it is a case of retrenchment and to award retrenchment compensation and wages in lieu of notice. It is argued on behalf of the opposite party that it has been admitted by the petitioners in the written statement that this is a case of retrenchment and, that, therefore, the authorities were perfectly justified in awarding retrenchment compensation.

5. Our attention was invited to the petition filed by the opposite party and the written statement filed by the petitioners and on perusing the same, we are satisfied that the contention of the opposite party that he was retrenched had not been admitted by the petitioners in the written statement. The averment on this point is contained in paragraphs 5 and 6 of the petition. In paragraph 6 of the written statement filed by the petitioners it is definitely averred that the allegations contained in paragraph 6 of the petition are all false and imaginary. It is true, that in paragraph 6 of the petition, the opposite party had also mentioned about his claim for arrears of wages and the denial made by the petitioners in para 6 of their written statement also referred to this claim. But it is not disputed that the claim relating to arrears of wages is a matter which is within the purview of the authorities under the Act. The question, therefore, is where in an application under Section 15 of the Act, the worker contends that he was

retrenched from employment, and as such he is entitled to retrenchment compensation etc., and this claim is disputed by the employer on the ground that it is not a case of retrenchment, whether it is within the jurisdiction of the authorities concerned to investigate into this claim and give relief to the workman.

It is submitted on behalf of the opposite party that the authority under the Act has jurisdiction to determine any question that incidentally arises, namely, which is integrally connected with and necessary to be decided in considering the question whether there is non-payment of wages or illegal deduction of wages and that the matter relating to retrenchment is one such incidental question. In fact, Section 15 (1) which is quoted below provides for investigation into matters which are incidental to such claim.

"15. Claim arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims.—

(1) The State Government may, by notification in the Official Gazette, appoint a presiding officer of any Labour Court or Industrial Tribunal, constituted under the Industrial Disputes Act, 1947 or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State or any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area, including all matters incidental to such claims.

* * * * *

In order to have a clear appreciation of the nature and extent of the jurisdiction of the authority, we have necessarily to look to the scheme of the Act. The Act is intended to regulate the payment of wages to certain classes of persons employed in industries and the object is to provide for a speedy and effective remedy to the employees in respect of their claims arising out of illegal deduction or unjustified delay made in paying the wages to them. The definition section defines words and phrases used in the Act. "Wages" is defined by Sec. 2 (vi). It has a wide meaning and includes within it any benefit to which a workman is entitled to, on termination of service, either under the contract of employment or under any law or an award or a settlement. It includes within it a large number of benefits which but for the wide definition may not be included in "Wages". Section 4 fixes wage period,

Section 5 prescribes time of payment of wages and Section 7 specifies deductions which can be made from wages. Under Section 15, the Authority has to decide all claims arising out of deductions from wages or delay in payment of wages of persons employed including all matters incidental to such claims. The orders which the Authority is entitled to make are comparatively wide. They are not limited to merely giving necessary directions for the payment of money to the employee, but also to the making of orders imposing penalty upon the employer for illegal deductions or non-payment. By Section 17 a right of appeal is given against the decision of the Authority to the Court of Small Causes in the Presidency Towns and elsewhere to the District Court. Under Section 18, the Authority has got all powers under the Civil Procedure Code for the purpose of taking evidence and of enforcing attendance of witnesses and compelling production of documents. Section 22 bars the jurisdiction of Civil Courts in all matters which can be decided by the Authority under the Payment of Wages Act. It would thus be noticed that the remedy is to some extent a summary remedy and to the extent to which the jurisdiction can be exercised by the Authority, the jurisdiction is taken away from the civil Court. It is well settled that where a statute creates special jurisdiction taking away the jurisdiction of the civil Court, the Statute ought to be strictly construed. However, even though the Statute has to be construed strictly, it does not and cannot mean that the very intention of the Legislature should be defeated by placing an unduly narrow construction on such provision in order to oust the jurisdiction of the authority concerned.

5A. Clear cases of deductions from wages the quantum of which is not disputed or delay in payment of wages present no difficulty. It is the expression "incidental to such claims" which has given rise to a lot of controversy as to which claim in a particular case is incidental to the main claim and which not. In a recent decision in *Payment of Wages Inspector, Ujjain v. Surajmal Mehta*, AIR 1969 SC 590, their Lordships had to consider the question whether a claim for compensation payable under Section 25FF of the Industrial Disputes Act can be entertained under Section 15 (2) of the Act where the defence involved complicated questions of law, and they answered the question in the negative. Their Lordships observed—

"It is true that the Authority has the jurisdiction to try matters which are incidental to the claim in question. It is also true that while deciding whe-

ther a particular matter is incidental to claim or not care should be taken neither to unduly expand nor curtail the jurisdiction of the Authority. But it has at the same time to be kept in mind that the jurisdiction under Section 15 is a special jurisdiction. xx xx xx xx".

On the footing that compensation payable under Sections 25FF and 25FFF of the Industrial Disputes Act being wages within the meaning of Section 2 (vi) (d) of the Payment of Wages Act a claim for it on the ground that its payment was delayed by an employer cannot be entertained under Section 15 (2) of the Act, because the claim is not a simple case of deductions having been unauthorisedly made or payment having been delayed beyond the wage periods and the time of payment fixed under Sections 4 and 5 of the Act and in view of the defence taken the Authority would inevitably have to enter into questions arising under the proviso to Section 25-FF viz., whether there was any interruption in the employment of the workmen, whether the conditions of service under the new employer, were anyhow less favourable than those under the old employer and whether the new employer had become liable to pay compensation to the workmen if there was retrenchment in the future. Such an inquiry would necessarily be a prolonged inquiry involving questions of fact and of law. Besides, the failure to pay compensation on the ground of such a plea cannot be said to be either a deduction which is unauthorised under the Act, nor can it fall under the class of delayed wages as envisaged by Sections 4 and 5 of the Act. When the cases of sums payable under a contract, instrument or a law it could not have been intended that such a claim for compensation which is denied on grounds which inevitably would have to be inquired into and which might entail prolonged inquiry into questions of fact as well as law was one which should be summarily determined by the Authority under Section 15. Nor could the Authority have been intended to try as matters incidental to such a claim questions arising under the proviso to Section 25FF. It would be the Labour Court in such cases which would be the proper forum which can determine such questions under Sec. 33C (2) of the Industrial Disputes Act which also possesses power to appoint a commissioner to take evidence where question of facts require detailed evidence."

6. It is true that in this case we are not concerned with a case of retrenchment compensation payable either under Section 25FF or Section 25FFF of the Industrial Disputes Act, but with a claim of compensation made under Section 25F of the Industrial Disputes Act. In cases

where retrenchment itself is not disputed or is clearly indisputable, there can be no doubt that a claim for retrenchment compensation as per Section 25F of the Industrial Disputes Act can be entertained by the Authority under the Payment of Wages Act as retrenchment compensation comes within the definition of "wages". There are no materials in this case from which it can be inferred that it is a clear case of retrenchment. The employer disputes the claim that the termination of service was by way of retrenchment. The question, therefore, is whether under such circumstances, it is within the province of the relevant Authority under Section 15 of the Act to investigate into this question as a matter incidental to the claim arising out of deduction from wages.

This specific question came up for consideration before the Mysore High Court in *Manager, Codialabail Press v. K. Mohappa*, AIR 1963 Mys 128 and the learned Judge held —

"Even if retrenchment compensation payable under Section 25-F of the Industrial Disputes Act can be regarded as wages, an order for its payment can be made under Section 15 only when the retrenchment is not disputed or is clearly indisputable. But if the employer who admits the termination of the employment disputes that the termination was by the process of retrenchment there being no provision in the Payment of Wages Act for an adjudication on that matter, the foundation for a complaint under Section 15 that wages though due were withheld would be unavailable, since the purpose of the Act is to enforce payment of wages in a case where the facts admitted by the employer clearly establish the liability to pay the wages and it is complained that there is non-payment or incomplete payment".

This decision was rendered before the amendment of Section 15 (1) of the Act by the Amending Act 53 of 1964 which inserted the words "including all matters incidental to such claims" in sub-sec. (1) after the words "persons employed or paid in that area". After the amendment question similar to the one under consideration in the present case came up for consideration before a Division Bench of the Bombay High Court in *A. Rahim Hajubhai Shaikh v. Shiraj Kasim Nadar*, (1968) 70 Bom LR 704. In an application under Section 15 (2) of the Act, a workman claimed from his employer, notice pay, retrenchment compensation, leave wages and bonus for termination of his service by the employer. The employer admitted employment of the workman but contended that the workman had left his service of his own accord and therefore, he was not entitled to the

amount claimed by him. A preliminary contention was raised by the employer that the Authority under the Act had no jurisdiction to entertain and decide the application as he had no jurisdiction to try the issue whether the workman was retrenched or left of his own accord. After an exhaustive consideration of the principles involved and on an examination of the case law on the subject including the decision of the Mysore High Court referred to above, AIR 1963 Mys 128, their Lordships held that the question raised was connected with the matter in issue as it was necessary to decide it in order to give relief to the applicant, and that, therefore, it was within the jurisdiction of the Authority to decide it. With respect we are in full agreement with the views expressed by the learned Judges of the Bombay High Court that the question about retrenchment compensation raised in this case is a matter incidental to the claim for wages. Both the Authority under Section 15 and the appellate Court have held on consideration of the evidence on record that the termination of service of the opposite party was by way of retrenchment and sitting in revision we are bound by this finding. It is on this basis that compensation was allowed to the opposite party.

7. In the result, the application fails and is dismissed, but in the circumstances, without costs.

8. ACHARYA, J. — I agree.

Petition dismissed.

AIR 1970 ORISSA 81 (V 57 C. 32)

G. K. MISRA, C. J.
AND R. N. MISRA, J.

Brundaban Padhi, Petitioner v. State of Orissa, Opposite Party.

O. J. C. No. 203 of 1965, D/- 8-7-1969.

Constitution of India, Art. 311 (2) — Proposed punishment lesser — Graver punishment imposed — Art. 311 (2) is violated — 'Discharge' is a lesser one than 'dismissal'.

Where the punishment tentatively proposed against civil servant is of a lesser kind but after hearing the representation of the civil servant, he is awarded a graver form of punishment, there is non-compliance with Art. 311 (2). 'Discharge' is a punishment of lesser kind than dismissal. AIR 1955 Orissa 33 & 1967 BLJR 58, Foll. (Paras 2, 3)

Cases Referred: Chronological Paras (1967) 1967 BLJR 58 = 15 Fac LR 95, S. K. Pandey v. State of Bihar

(1955) AIR 1955 Orissa 33 (V 42) =
ILR (1955) Cut 53, Dayanidhi
Rath v. B. S. Mohanty 2
C. V. Murty, for Petitioner; Govt.
Advocate, for Opposite Party.

G. K. MISRA, C. J.: The petitioner was an Amin in the Hirakud Land Organisation. Certain charges were framed against him alleging misconduct. After the enquiry was over, Government in the Political and Services Department communicated their tentative decision to discharge the petitioner from service and he was asked to show cause. The petitioner showed cause. Ultimately, however, the petitioner was dismissed by the order of the Collector dated 20-3-65, and a direction was also issued to realise Rs. 343-85 from him representing half the misappropriated amount.

The writ application has been filed under Articles 226 and 227 of the Constitution saying that the order so passed was without jurisdiction and must be set aside.

2. Law is well settled that if the punishment tentatively proposed against a civil servant is of a lesser kind, but after hearing his representation he is awarded a graver form of punishment, there is non-compliance with the provisions of Article 311 (2) of the Constitution. 'Discharge' has been accepted as a punishment lesser than 'dismissal'. (See Dayanidhi Rath v. B. S. Mohanty, AIR 1955 Orissa 33). This has been followed in S. K. Pandey v. State of Bihar, 1967 BLJR 58.

3. On the accepted position that the proposed punishment was one of discharge, but the ultimate punishment inflicted was one of dismissal the order cannot be supported. The impugned order is accordingly set aside and the writ application is allowed with costs. Hearing fee Rs. 100/- (one hundred).

4. R. N. MISRA, J.: I agree.
Petition allowed.

AIR 1970 ORISSA 82 (V 57 C 33)

B. K. PATRA
AND S. ACHARYA, JJ.

Ram Nahak and others, Appellants v. Sita Dakuani and others, Respondents.

A. H. O. No. 10 of 1967, D/- 19-8-1969, from judgment of R. K. Das, J., reported in ILR (1967) Cut 593.

Transfer of Property Act (1882), S. 59 — Evidence Act (1872), S. 70 — Word "admission" in S. 70 — Meaning of — Admission of execution of mortgage bond by mortgagor — Evidence to prove attes-

tation, whether necessary — Mortgagee adducing evidence to prove attestation — Its effect on admission of execution — ILR (1967) Cut 593, Reversed; AIR 1927 Mad 143, Dissented from.

Admission referred to in S. 70 of the Evidence Act is admission of a validly attested document which means that when a party admits execution of the document, he thereby not only admits the mere signing thereof, but also the entire series of acts which would give validity to the document concerned. Where, therefore, the party admits execution of the mortgage bond, it means that he admits its valid execution including therein the valid attestation thereof. It is thereafter unnecessary for the mortgagee to proceed to prove attestation. Even if a mortgagee does proceed to lead evidence regarding attestation and the evidence so let in falls short of proof of due attestation, the mortgagee is entitled to succeed in the action on the footing that it is valid mortgage bond. But, if such evidence adduced by the mortgagee shows positively that the document has not been attested in accordance with law, then despite admission of its execution by the mortgagor, the mortgagee would fail. ILR (1967) Cut 593, Reversed. AIR 1927 Mad 143, Dissented. Case law discussed. (Para 8)

Cases Referred: Chronological Paras

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| (1960) 26 Cut LT 359, Pravas Chandra Pati v. Jagamohan Das | 7 |
| (1952) AIR 1952 Cal 7 (V 39) =
ILR (1953) 1 Cal 120, Rajani Kanta Barui v. Bonbehari Sarkar | 7 |
| (1948) AIR 1948 Bom 322 (V 35) =
50 Bom LR 260, Timmavva Dundappa v. Channava Appaya | 5 |
| (1936) AIR 1936 Mad 43 (V 25) =
ILR (1938) Mad 523, Davood Rowther v. Ramanathan Chettiar | 7 |
| (1937) AIR 1937 All 646 (V 24) =
ILR (1937) All 723, Amir Husain v. Abdul Samad | 7 |
| (1936) AIR 1936 Oudh 270 (V 23) =
ILR 12 Luck 109, Raja Ram v. Rameshwar Bakhsh Singh | 5 |
| (1932) AIR 1932 All 527 (V 19) =
1932 All LJ 653 (FB), Lachman Singh v. Surendra Bahadur Singha | 7 |
| (1927) AIR 1927 Cal 926 (V 14) =
45 Cal LJ 577, Sheikh Kachhu v. Mahammad Ali Mahamud | 7 |
| (1927) AIR 1927 Mad 143 (V 14) =
98 Ind Cas 280, Ramchandra Rao v. Sarna Rayar | 7 |
| (1925) AIR 1925 PC 203 (V 12) =
52 Ind App 362, Mt. Hira Bibi v. Ram Hari Lal | 5, 7 |
| (1923) AIR 1923 Cal 149 (2) (V 10) =
27 Cal WN 263, Arjun Chandra Bhadra v. Kailas Chandra Das | 5 |

(1922) AIR 1922 All 153 (1) (V 9) =

ILR 44 All 127, Asharfi Lal v.

Mt. Nannhi

(1921) AIR 1921 Mad 701 (V 8) =

14 Mad LW 563, Numberumal

Chettiar v. Raghava Chariar

R. C. Misra, for Appellants; N. V. Ramdas and Y. S. N. Murty, for Respondents.

PATRA, J.: This is an appeal against the judgment dated 28th April, 1967 of R. K. Das, J. passed in Second Appeal No. 252 of 1964. One Khali Dajua on behalf of himself and his minor son Ladu along with his son Raghunath Dakua executed on 3-3-1953 a registered deed of mortgage on conditional sale in favour of Ananta Nahak for a consideration of Rs. 600/- which was advanced to him in cash. The condition of the bond was that if the amount was not repaid within a period of two years from the date of the execution of the bond, mortgagee would become the full owner of the property and would enjoy the same absolutely.

As the amount was not paid within the stipulated period, the mortgagee demanded payment or, in the alternative, possession of the mortgaged property and as the demand was not complied with, a suit was instituted in Court by the heirs of the mortgagee who was by then dead, against Khali Dakua and his two sons Raghunath Dakua and Ladu.

Defendants 1 and 2 in the written statement admitted the execution of the bond, but contended that it was purely a benami transaction. Defendant no. 3 contended that he was not aware of the suit mortgage bond and that the same was not valid and binding on him. It is unnecessary for the purpose of this appeal to refer to other contentions raised on behalf of the defendants. At the time of hearing of the suit, two witnesses were examined on the plaintiffs' side. The first witness was plaintiff no. 1 who stated *inter alia* that—

"Defendant borrowed Rs. 600/- from my father about 9 years ago and executed a mortgage bond in his name."

The correctness of this statement is not challenged in cross examination. His witness P. W. 2 whose name appears as one of the attestors of the mortgage bond stated *inter alia* that—

"Defendant had borrowed once or twice from Ananta. He executed a document with same conditions. * * * I had signed there as an identifier and attester."

His statement that he signed the document as an attester has not been challenged in the cross-examination. The trial Court, however, dismissed the suit on the ground that although the execution of the document was admitted by the defendants, attestation of the same was not proved as required by law. The plaintiffs

appealed and the first Appellate Court reversed the finding on the ground that in view of the fact that the defendants had admitted execution of the document and had not challenged the validity of the execution in the written statement, no duty was cast on the plaintiffs to prove attestation and that, therefore, the suit document was proved to be a mortgage bond. The defendants filed an appeal in this Court. Das, J. on a critical examination of the relevant provisions held that despite the admission of the execution of the deed by the defendants, it is incumbent on the plaintiffs to prove due attestation of the mortgage unless attestation is specifically admitted and that mere admission of the execution of the bond would not absolve the plaintiffs from the duty of proving attestation. The correctness of this view is challenged before us in this appeal.

2. Section 59 of the Transfer of Property Act enjoins that a mortgage bond for an amount of rupees one hundred or upwards, in order that it may be enforceable as such must be attested by at least two witnesses. The expression "attested" is defined in Section 3 of the T. P. Act as meaning attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, . . . and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time. . . .

3. Section 68 of the Evidence Act provides the mode of proof of the execution of the document required by law to be attested and it says that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is such an attesting witness alive, and subject to the process of the Court. There is a proviso to the section in the nature of an exception which in effect says, that it shall not be necessary to call an attesting witness in proof of the execution of a registered mortgage bond, unless its execution by the person by whom it purports to have been executed is specifically denied. We have already noticed the written statements filed in this case and it is clear therefrom that while defendants 1 and 2 had admitted execution of the mortgage bond, defendant no. 3 had not specifically denied the execution thereof. All that he stated was that he was not aware of the execution of the mortgage bond. In the circumstances, the proviso to Section 68 of the Evidence Act is attracted. If, in such a case, execution of the document has still to be proved, it is not necessary for the plaintiff to call an attesting witness for the purpose, but execution and

due attestation may be proved by other methods.

4. Mr. N. V. Ramdas appearing for the defendant-respondents while conceding that the proviso to Section 68 of the Evidence Act is attracted in this case, and that in the circumstances, execution and attestation may be proved without calling an attesting witness for the purpose says, that the evidence adduced in this case falls short of proof of due attestation. His argument is that it is not enough for the witness to say that the document was attested but he should specifically state that each of the two attesting witnesses had seen the executants signing the document and there must be further proof that each of these witnesses had signed the instrument in presence of the executant. There is no dispute that such detailed evidence about attestation is wanting in this case.

The answer of Sri R. C. Misra appearing for the appellants to the above contentions is two-fold. He firstly relies on Section 70 of the Evidence Act which says that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. He says that as the defendants had admitted the execution of the document, such admission must be deemed to be an admission of a validly attested document and that, therefore, further proof of execution and attestation are unnecessary. His second point is that since the factum of attestation has not been challenged either in the written statements or in evidence, it is not open to the defendants to contend that the document is not validly attested. These contentions require careful examination.

5. The scope of Section 70 of the Evidence Act came up for consideration before the Privy Council in *Mt. Hira Bibi v. Ram Hari Lal*, AIR 1925 PC 203. A suit was brought to enforce a mortgage and it was pleaded by the defendants that the mortgage bond was void by reason of its not being attested in accordance with Section 59 of the T. P. Act. The mortgagor who was a pardanashin lady admitted that she had signed the bond. The evidence which was let in in this case showed that when Hira Bibi signed the bond not one of the persons who signed the mortgage was present or saw her signing. The High Court of Patna felt that the evidence was wholly insufficient to comply with the requirements of Section 59 of the T. P. Act but they held that the deed is good as against Hira Bibi, because she had admitted that she had signed it, and passed a mortgage decree against her. On appeal, their

Lordships of the Privy Council did not accept this view and held that Section 70 of the Evidence Act would apply only to a document duly attested and that as the evidence in that case showed that the document was not properly attested, it would not operate as a mortgage bond as against Hira Bibi.

Mr. Ramdas relies on this decision and contends that admission of execution of a mortgage bond by the mortgagor would not absolve the mortgagee from proving due attestation thereof. We are unable to see anything in the decision which supports this view. There are two important features in the Privy Council case which have to be particularly noticed. The mortgagor there specifically contended that the document was not attested in accordance with law and the evidence regarding attestation which the mortgagee adduced showed positively that the document was not properly attested. Section 59 of the T. P. Act is a substantial law and Section 70 of the Evidence Act is only a rule of evidence. When evidence on record showed that the substantial law has not been complied with, it could not certainly be ignored despite the admission of her signing the document. That is why their Lordships said that admission under Section 70 means admission of a validly attested document.

In this case, neither of the two features referred to above is present. Defendants 1 and 2 have not specifically stated that the document is not valid for want of due attestation, and the evidence regarding attestation that has been adduced may be insufficient to prove due attestation but does not go to show that the document has not been validly attested. It is only in cases where it appears on the face of the document or it is positively made out in evidence on record that the document required by law to be attested has not been attested in accordance with law that Section 70 of the Evidence Act cannot be made applicable in spite of the admission of a party to an attested document of its execution by himself, for the simple reason that a Court cannot shut its eyes to obvious facts appearing on the face of a document or on the surface of the record. But the position is quite different where there is no proof one way or the other about attestation and there is nothing on the face of the document to show that the document had not been properly attested.

A Division Bench of Oudh Chief Court in *Raja Ram v. Rameshwar Bakhsh Singh* AIR 1936 Oudh 270 held that in the aforesaid circumstances admission of execution of a mortgage bond would be sufficient proof of its execution against the party making the admission so as to dispense with the proof of attestation. A

Division Bench of the Bombay High Court in *Timmavva Dundappa v. Channava Appaya*, AIR 1948 Bom 322 held that the admission mentioned in Section 70 of the Evidence Act must be an admission about the due execution of the document which would include an admission as to its proper attestation.

In *Arjun Chandra Bhadra v. Kailas Chandra Das*, AIR 1923 Cal 149 (2) their Lordships of the Calcutta High Court held that where the admission of execution of a document is unqualified it may well be equivalent to an admission of due execution, or a waiver of proof of due execution within Section 70 of the Evidence Act, and that the term 'execution' in Section 70 is used in the sense of due execution or execution in a way in which a particular document is required to be executed. The same view is expressed by a Division Bench of the Allahabad High Court in *Asharfi Lal v. Mt. Nannhi*, AIR 1922 All 153 (1) that even in case of a document requiring attestation, where admission by a party to the suit of the execution is on record, the attestation need not be proved.

6. The contention of Mr. Ramdas for the respondents on this point is that the admission referred to in Section 70 of the Evidence Act relates only to admission of execution as such and that despite such admission of execution of the document by the mortgagor it is still incumbent on the mortgagee to prove due attestation. In other words, what he contends is that Section 70 of the Evidence Act is not sufficient to dispense with the necessity of proof of attestation by two witnesses to make a mortgage bond valid under Section 59 of the T. P. Act and that Section 70 thus only qualifies section 68 of the Evidence Act but does not affect or control Section 59 of the T. P. Act. If this interpretation is accepted and it is held that the admission of the executant has not the effect of dispensing with the proof of attestation, there was no necessity for Section 70 at all as, even without it, recourse could be had to the general provisions of the Evidence Act relating to admissions, if the admission of execution is to be used only in a sense of an admission of signing only.

7. We would now briefly notice the decisions on which Mr. Ramdas has relied in support of his contention. The first of these cases is AIR 1925 PC 203 which has already been referred and where their Lordships say that Section 70 of the Evidence Act applies only to a document duly attested. But it is clear from the decision that in that case the validity of the bond was specifically contested by the defendants on the ground that it was not properly attested and that in these circumstances, proof of valid attestation

was considered necessary in that case. *Lachman Singh v. Surendra Bahadur Singha*, AIR 1932 All 527 (FB) is also a case where the execution and attestation of the deed were not admitted by the mortgagor. Their Lordships held that in such a case, the mortgagee need prove only this much that the mortgagor signed the document in presence of an attesting witness and one man attested the document; provided the document on the face of it bears the attestation of more than one person; but if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses.

This Full Bench decision was followed by a Division Bench of the Allahabad High Court in *Amir Husain v. Abdul Samad*, AIR 1937 All 646 where in a suit on a mortgage, the mortgagors did not admit the validity of the mortgage and put the plaintiff to strict proof thereof. *Sheik Kachu v. Mahammad Ali Mahmud*, AIR 1927 Cal 926 was a case where a suit was brought for foreclosure on a mortgage. In the written statement the defendants whose defence was that they had paid off the amount due under the mortgage, did not plead that the document was not a valid mortgage in law and at the trial it was admitted by and on behalf of the mortgagors that the document was duly executed and attested. But the plaintiff instead of relying on the admission of the defendants, adduced evidence before the Court from which it became apparent that the document was not properly attested and was not a valid mortgage according to law. When faced with this difficulty, the plaintiff relied on S. 70 of the Evidence Act and contended that in view of the admission of execution, further proof of attestation was not necessary. This contention was overruled by their Lordships who held that S. 70 of the Act cannot and does not affect to render valid a document which, it is apparent from the evidence before the Court, is invalid in law. This decision therefore cannot be taken as an authority in support of the proposition that despite admission of execution of a mortgage bond, proof of attestation is still necessary.

In *Rajani Kanta Barui v. Bonbehari Sarkar*, AIR 1952 Cal 7, a suit was filed to enforce a mortgage and the defendant in his written statement admitted having executed the document but denied due and proper attestation. The Court held that the admission of the mere signature by the executant is not tantamount to admission of the entire series of facts as

would give validity to the document itself, and that therefore, the plaintiff has to prove due attestation. AIR 1921 Mad 701, *Namburumal Chettiar v. Raghava Chariar* relied upon by Mr. Ramdas does not deal with Section 70 of the Evidence Act. In *Davood Rowther v. Ramanathan Chettiar*, AIR 1938 Mad 43, which was also a suit on a mortgage bond, the defence was that it was not duly executed and validly attested and the Court held that attestation must be proved.

Reliance is then placed on *Pravas Chandra Pati v. Jagamohan Das*, (1960) 26 Cut LT 359, a decision of Mohapatra, J. The suit was for enforcement of a mortgage transaction and the plea of the defendant was one that of payment and adjustment. The trial Court dismissed the suit on the finding that the transaction had not been proved as a mortgage transaction as one of the attesting witnesses admitted to be alive had not been called as required under the provisions of Section 68 of the Evidence Act. The lower appellate Court reversed the finding and allowed a full decree in favour of the plaintiff. In this Court it was contended on behalf of the defendant-appellants that in view of the provisions of Section 68 of the Evidence Act, it was incumbent upon the plaintiff to have examined the attesting witness. Mohapatra, J. repelled this contention on the ground that far from specifically denying execution of the document, the defendants had admitted its execution and that therefore calling an attesting witness to prove execution was unnecessary.

The learned Judge then proceeded to say that if the plaintiff comes forth to enforce a mortgage transaction, he is not to rest satisfied by proving execution only but he has got to prove attestation as defined in Section 3 of the T. P. Act, and this can be proved by any other method provided the case is not hit by the provisions of Section 68 of the Evidence Act, in which case alone it is made compulsory and essential that the plaintiff has to call one of the attesting witnesses. On examination of the evidence of P. W. 1, his Lordship was satisfied that it was sufficient to prove attestation as defined in Section 3 of the T. P. Act and dismissed the appeal. It would thus be noticed that Section 70 of the Evidence Act did not at all come up for consideration in that case and obviously in view of the satisfactory evidence regarding attestation adduced therein it was not contended in that case that the defendants having admitted execution, it was further unnecessary to prove attestation. This cannot, therefore, be relied upon as an authority for the proposition contended for by Mr. Ramdas. None of the above cases therefore supports the stand taken by Mr. Ramdas that where the mortgagor

admits execution of the bond without specifically contending that it is not validly attested, the mortgagee has still to prove due attestation.

The only case which supports his contention is the judgment of a learned single Judge of the Madras High Court in *Ramchandra Rao v. V. Sama Rayar*, AIR 1927 Mad 143. In that case, the plaintiff sued on a mortgage bond executed in his favour by the first defendant. The latter confessed execution and pleaded some payment. The Munsif accepted the plea but on appeal the Subordinate Judge reversed the judgment and the defendant went up in second appeal and in that Court raised the plea that the mortgage deed was not duly attested. Relying on AIR 1925 PC 203, Curgenven, J. held that independent of the acknowledgment of the first defendant's execution it has to be found that the mortgage deed was valid as satisfying the requirements of Section 59 of the T. P. Act regarding attestation and although there was no issue, the witnesses were examined and cross-examined on that point, and it is the duty of the Court to satisfy itself that the mortgage bond was validly executed before granting a decree on it. In this view of the case, he framed an issue as to whether the mortgage deed was validly attested and in accordance with S. 59 of the T. P. Act and remanded the suit to the lower appellate Court for a finding on the evidence already on record and for disposal.

With great respect to the learned Judge, it appears to us, that in relying on the Privy Council decision in *Hira Bibi's case*, AIR 1925 PC 203, he overlooked the distinguishing feature that in that case the defendant had specifically pleaded that the mortgage bond was void by its not being attested in accordance with law. This view of Curgenven, J. does not appear to have been accepted in any subsequent decision of the Madras High Court; at least none was brought to our notice.

8. On a plain reading of Section 70 of the Evidence Act it appears to us, that the 'admission' referred to therein is admission of a validly attested document which means that when a party admits execution of the document, he thereby not only admits the mere signing thereof, but also the entire series of acts which would give validity to the document concerned. The preponderance of authorities is in favour of this interpretation. Where, therefore, the party admits execution of the mortgage bond, it means that he admits its valid execution including therein the valid attestation thereof. It is thereafter unnecessary for the mortgagee to proceed to prove attestation. But if a mortgagee does not (sic) proceed to

lead evidence regarding attestation and the evidence so let in falls short of proof of due attestation as has happened in the present case, then also the mortgagee is entitled to succeed in the action on the footing that it is a valid mortgage bond. But, if such evidence adduced by the mortgagee shows positively that the document has not been attested in accordance with law, then despite admission of its execution by the mortgagor, the mortgagee would fail.

In the present case, in view of the admission of execution by defendants 1 and 2 it was not incumbent on the plaintiff-appellant to prove attestation. Nonetheless, he examined a witness and although the evidence adduced by him is insufficient to prove attestation yet it does not show that the document was not attested according to law. Hence, so far as defendants 1 and 2 are concerned, the plaintiff is entitled to get a decree on the basis of the mortgage bond.

9. The position, so far as defendant no. 3 is concerned, stands on a different footing. He has not admitted execution and contended that it is not valid and binding on him. So far as he is concerned, Section 70 of the Evidence Act cannot be pressed into aid and attestation has to be proved. As admittedly the evidence adduced in this case falls short of the requirement of proof of valid attestation, the plaintiff would not be entitled to obtain a mortgage decree against defendant no. 3. The suit as against him must stand dismissed.

10. In the result, therefore, we would allow the appeal and restore the judgment and decree passed by the learned first appellate Court in so far as it relates to respondents 1 to 3 (defendants 1 and 2 in the trial Court). The appeal so far as it relates to respondent no. 4 Ladu Dakua (defendant no. 3 in the trial Court) shall stand dismissed. In the circumstances, parties are to bear their own costs in this Court and the Courts below.

11. S. ACHARYA, J.: I agree.

Appeal partly allowed.

AIR 1970 ORISSA 87 (V 57 C 34)

S. K. RAY, J.

Kanhur Charan Tripathi, Appellant v. Laxmidhar Tripathy and others, Respondents.

Second Appeals Nos. 62 and 112 of 1965, D/- 11-9-1969, from decision of Sub. J., Keonjhar, D/- 6-11-1964.

(A) Evidence Act (1872), S. 115—Plaintiff describing land as rayati land in partition suit and claiming it as Prajadakhali land in subsequent suit for possession —

No evidence to show that plaintiff intentionally made false declaration in partition suit and defendant prejudiced by it — Declaration of land either as rayati or prajadakhali land not relevant in partition suit — Cannot operate as estoppel against plaintiff in suit for possession.

(Para 8)

(B) Civil P. C. (1908), S. 11, Explanation (iii) — Suit by plaintiff for possession of land — Land described as tenanted land while in earlier suit for partition it was described as rayati land—Evidence showing that plaintiff and defendants were under bona fide mistake of fact as to character of land at that time — No issue whether nature of land was directly or substantially or was incidentally or collaterally in issue in that suit — Held, defendant could not claim benefit of explanation (iii) to S. 11 — Question not having been adjudicated on that point in previous suit cannot operate as res judicata in suit for possession. (Para 10)

G. R. Rao and Y. S. N. Murty, for Appellant; R. N. Mohanty and P. K. Sen Gupta, for Respondents.

RAY, J.: Both these appeals have been heard analogously as they arise out of the same judgment of the lower appellate court and the same original suit. Defendant-2 is the appellant in both these appeals.

2. Plaintiff filed O. S. 21/61 in the court of Munsif at Anandapur for confirmation of title or possession or in the alternative for recovery of possession and for permanent injunction in respect of Ka and Kha Sch. properties. Plaintiff and defendants 1 to 10 are members of a joint family. Both the schedules Ka and Kha properties are admittedly joint family properties, but they are tenanted lands. Ka Sch. property was under the Sikimi tenancy of Budhia Dehury, father of defendant-1 and Sch. Kha property was under the Sikimi tenancy of Chinta Behera, father of defendant-12. Both of them were Sikimi tenants under the joint family. These Sikimi tenants acquired occupancy rights by reason of their long possession in accordance with the tenancy law prevalent in Keonjhar State. Budhai sold his interest in Kha property on 29-1-51 to the plaintiff for a consideration of Rs. 100/- under a registered sale-deed, Ext. 3. Similarly defendant-2 sold his right in Sch-Kha property to the plaintiff under a registered sale-deed, Ext. 2. After purchase, the plaintiff was put in Khas possession of these properties. Subsequent to his purchase, the plaintiff paid rent, mutated his name and was in peaceful possession of the same from 1951 till 1959. In the year 1957 defendants 1 to 5 tried to disturb his possession by forcibly entering upon the land. A criminal case was filed by the plaintiff

against defendants 1 to 5 in which they were ultimately acquitted. Hence he filed the suit.

3. Defendants 6 to 8, 11 and 12 filed one written statement supporting the plaintiff's case. They did not, however, take any subsequent part in the litigation and were ultimately set down *ex parte*. D-2 alone contested the suit, though he filed a written statement jointly with defendants 1, 3 to 5, 9 and 10. His defence, in substance was that the suit was not maintainable. He raised pleas of *res judicata* and *estoppel* and also alleged that the suit is barred by limitation. He denied the allegation in the plaint that one Banamali was adopted to Hari of the second branch of the family. He further alleged that the suit-land was not tenanted land at any time. The plaintiff having described the suit-land as *raiya* land in a prior partition suit no. 10/46, it is not open to him now to say that they were tenanted land and that he is purchaser from those tenants. Plaintiff's Khas possession was also denied.

4. This litigation had a chequered career which need be stated here. The original suit O. S. 21/61 filed by the plaintiff was decreed in respect of Ka Sch. lands and was dismissed in respect of Kha Sch. lands. From that judgment two appeals were preferred, one by the plaintiff who claimed in respect of Kha was dismissed, and the other by defendant-2 in respect of Ka Sch. lands which was decreed in favour of the plaintiff. The plaintiff's appeal was T. A. No. 11/62 and the defendants' appeal was T. A. 15/62. Both of them were heard analogously and one judgment was passed by which T. A. 11/62 was allowed and T. A. No. 15/62 was dismissed. As a result of this decision of the lower appellate court the entire suit of the plaintiff was decreed. Defendant-2 came up to this Court and filed two second appeals, as there were two decrees, though one judgment. His second appeal no. 167/63 was against the judgment and decree in T. A. 11/62 and second appeal no. 168/63 was against the decree and judgment in T. A. 15/62. Both the appeals were heard together by Hon'ble Barman, J. (as he then was) and by his order dated 16-3-64, he remanded both the appeals. After remand, the lower appellate court again allowed the plaintiff's T. A. 11/62 and dismissed defendant 2's T. A. 15/62, in other words, after remand, the entire suit of the plaintiff was decreed afresh. D-2 accordingly has again come up to this Court and filed the present two second appeals, second appeal no. 62/65 is against the decision of the lower appellate court in T. A. 15/62 and second appeal no. 112/65 is directed against the decision in T. A. 11/62.

5. The trial court held that the plaintiff had acquired valid title to Ka Sch. property, but he acquired no title to Kha Sch. property as his vendor had no title. He also held that the suit is not barred by *res judicata*. He also held against the plea of *estoppel*.

6. The lower appellate court on the other hand came to a finding that fathers of defendants 11 and 12 were *Sikimi* tenants and they were in possession of the lands till 1951 as *raiya*s when they alienated their interest in favour of the plaintiff under exts. 2 and 3. Accordingly, the plaintiff's title in respect of Ka and Kha was upheld. He also found that the plaintiff was in possession of the disputed land from the date of his purchase till 1956 when his possession was disturbed. He also concurred with the trial court that the suit is not barred by *res judicata*, and negated the plea of *estoppel*.

7. It is in evidence that the plaintiff had filed a suit for partition in the year 1946 claiming partition of the joint family lands. This partition suit was numbered as 10/46 which had been decreed. This suit property was described in the schedule to the plaint in the partition suit as *raiya*-lands (as opposed to *Prajadakhali*) of the parties, and they were partitioned accordingly. The plaint, judgment and decree of the prior partition suit 10/46 has been proved respectively as exts. A, C and B in this case. The plea of *res judicata* is based upon this prior partition suit. The plea of *estoppel* is likewise founded upon the allegation of the plaintiff in the prior partition-suit that the suit-lands are *raiya* lands and not tenanted lands.

8. The plea of *estoppel* may be taken up first. It is argued on behalf of the defendants that the plaintiff not having described the lands in the previous partition Suit No. 10/46 as tenanted lands, is estopped from claiming the same as such in the present suit. Section 115 of the Evidence Act is the provision dealing with the rule of *estoppel*. It provides that when one person by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. So the main elements are that the plaintiff must have made a declaration intentionally so that another may believe it to be true and to act on the footing that it is true. There is nothing in evidence to show that the plaintiff had intentionally made a false declaration in the prior partition-suit describing the suit-lands as *raiya* lands.

and not Prajadakhali lands or know that such declaration was false at the time it was made, and thereby made the defendant to act in a manner, on the footing of that representation, to his own prejudice. That was a partition suit. Whether Prajadakhali or not, they would have been allotted to some co-sharer or other. The description of the suit-land in the partition suit either as raiyati land or Prajadakhali land would not have mattered very much for the relief of partition prayed for in that suit, such description, in my opinion, is irrelevant in a suit for partition. On the circumstances, the plea of estoppel has no legs to stand upon and this plea is accordingly rejected.

9. The next question which is urged is that the present suit is barred by *res judicata*. Mr. Murty seeks to base his case of *res judicata* upon explanation (iii) to Section 11, C. P. C. Section 11 of C. P. C. runs as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court".

xx xx xx xx
Explanation (iii): "The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly by the other".

10. It appears to me on a plain reading of this provision that the question whether the suit-land was tenanted or not was not and could not be a matter directly and substantially in issue in the former partition-suit. No issue was framed in that suit as to whether the suit-lands were Nijdakhali or Prajadakhali lands. In view of the present finding that the suit-land was in fact tenanted by the vendors of the plaintiff till the year 1951, it is clear that in the prior partition suit both the plaintiff as well as the defendants were not cognizant of the fact that they were tenanted, nor even if they had been cognizant, that would have affected the relief for partition claimed in that suit. No attention was focussed on the character of the suit-lands in the prior suit, nor was that matter adjudicated upon. This aspect of the matter has been dealt with by the lower appellate Court in para 12. He has noticed that in the prior partition-suit the partition was not only in respect of Prajadakhali lands but in respect of other lands also. Thus, in the prior suit

the inclusion of the suit-lands in the schedule of non-raiyati lands was obviously a mistake. It is a mistake which was bona fide committed by the plaintiff and concurred in by the defendants. In the circumstances, as already stated, it was not a matter which was directly and substantially in issue in the prior partition suit, nor was it even collaterally or incidentally in issue, nor adjudication of such an issue was material and essential for the decision of the prior partition suit. Accordingly, this point also fails. There is no merit in these two appeals which are accordingly dismissed, but there would be no order for costs of this Court.

Appeals dismissed.

AIR 1970 ORISSA 89 (V 57 C 35)

S. K. RAY, J.

Susila Dei and others, Appellants v. Sridhar Rautray and others, Respondents.

Second Appeal No. 88 of 1965, D/- 18-9-1969, from order of 3rd Addl. Sub. J., Cuttack, D/- 13-11-1964.

(A) Limitation Act (1908), Articles 62, 97, 115, 116 and 120 — Applicability — Suit by vendee against vendor for refund of consideration — Sale found to be void for want of subsisting interest in vendor — Article 97 does not apply — Starting of limitation is date when money was received — Suit filed more than 6 years after such date held barred whether Article 62 or Article 115 or Article 116 or Article 120 is applicable.

Article 97, applies where the suit is for recovery of money paid upon an existing consideration which afterwards fails, and the time begins to run from the date of such subsequent failure. The applicability of this Article would depend upon whether the consideration failed at once or failed subsequently to the payment of the sum. (1891) 18 Ind App 158 (PC), Rel. on. (Para 9)

A suit by the vendee against the vendor for refund of consideration money when the sale deed is found to be void for want of subsisting title in the vendor and when the vendee never obtained possession of the property, filed more than 6 years from the date of payment of the price would be barred by limitation under Article 62 or 115 or 116 or 120 whichever Article is applied. Article 97 is wholly inapplicable as the consideration failed at once. Article 115 or 116 in terms, did not apply, because price paid by the plaintiff, when there never was any consideration was money had and received to his account by the vendor. (Para 11)

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(B) Civil P. C. (1908), Section 52 — Decree against legal representative — Extent of liability — Suit by vendee for refund of consideration against heirs and legal representatives of deceased vendor on ground that vendor had no subsisting title — Defendant cannot be personally liable but will only be liable to pay same out of the assets of deceased in their hands — (Obiter). (Para 13)

Cases Referred: Chronological Paras (1891) 18 Ind App 158 = ILR 19

Cal 123 (PC), Hanuman Kamat v. Hanuman Mandur 10 J. M. Mitra and S. C. Ghosh, for Appellants.

JUDGMENT:— Defendants 2 to 4 are the appellants. This appeal is directed against the reversing judgment of Sri S. N. Misra, 3rd Additional Subordinate Judge, Cuttack, dated 13-11-64, passed in Title Appeal No. 180/83 of 1963-64.

2. Plaintiffs filed the suit for declaration of title in respect of the suit land purchased by them under a registered kabala dated 28-10-53 from late Durga Charan Das, father-in-law of defendant 2 and grandfather of defendants 3 and 4, and for recovery of possession, or in the alternative, for refund of consideration money of Rs. 200/-.

3. The defendants raised various defences. They contend that the plaintiffs' vendor had, previous to the plaintiffs' sale-deed, sold the same to defendant-1. The sale-deed in favour of defendant-1 was executed on 14-10-53 and registered on 3-11-53. As title upon registration, is deemed to pass with effect from the date of execution of the sale-deed, defendant-1 must be held to have acquired title to the suit-property with effect from 14-10-53. If that is so, Durga Charan had no more interest in the suit-property for conveyance under the plaintiffs' sale-deed dated 28-10-53.

4. This contention of the defendants found favour with both the Courts below who held that the plaintiffs had acquired no title to the suit-property and also had never obtained possession. Another defence was that the suit for recovery of consideration money is barred by limitation.

5. With regard to the alternative prayer for recovery of consideration money of Rs. 200/- from defendants 2 to 4, as the successors-in-interest of Durga Charan, the two Courts below differed. The trial Court held that the claim for refund of consideration money is barred by limitation. According to him the cause of action for recovery of this amount arose on 28-10-53 when the infructuous sale-deed in favour of plaintiffs was executed and registered, and the present suit having been filed on 26th

November, 1960, that is to say seven years after the date of execution of the sale-deed, is barred by limitation.

6. The lower appellate Court held to the contrary that the suit was not barred by limitation. He, therefore, has decreed the suit for refund of the consideration money of Rs. 200/- from defendants 2 to 4 upon a finding that defendants 2 to 4 have benefited by the consideration money received by late Durga Charan Das whose heirs they are. Therefore, he made defendants 2 to 4 personally liable for the money.

7. Two points have been urged by learned counsel for the appellants. First is that either Article 62 or Article 116 of the Limitation Act, 1908 would govern this suit and not Article 97 which has been applied by the lower appellate Court. The suit is accordingly, barred by limitation. The second point is that even if the suit is not barred by limitation, the lower appellate Court was in error in imposing a personal liability on defendants 2 to 4 in regard to refund of consideration money. It is argued that they should have been made liable to pay out of the assets, if any, which they inherited from the late Durga Charan Das.

8. With regard to the first point, it must be noticed at the outset that the law applicable is the Limitation Act, 1908, and not the Limitation Act of 1963 (Act XXXVI of 1963). A few facts found have to be kept in the background of the mind before launching into discussion as to the proper Article of the Limitation Act which would govern this suit.

9. It is no longer in dispute that the plaintiffs' sale-deed was a mere paper-transaction conveying no title. The lower appellate Court also found that the plaintiff paid Rs. 200/- to Durga Charan towards the consideration of his sale-deed dated 28-10-53 and that the plaintiffs never obtained possession of the properties in pursuance of their sale-deed. Durga Charan never mis-spent the money for immoral purposes and defendants 2 and 4 were benefited by the same. The lower appellate Court has applied Article 97. This Article runs as follows:

"For money paid upon Three years The date of an existing consideration which afterwards fails." failure."

This Article, applies where the suit is for recovery of money paid upon an existing consideration which afterwards fails, and the time begins to run from the date of such subsequent failure. The applicability of this Article would depend upon whether the consideration failed at once or failed subsequently to the payment of the sum. In the particular case, the plaintiffs never got possession of the property and the vendor had also no

title to pass, he having already executed a sale-deed to defendant-1 before he sold to the plaintiffs. The plaintiff in para 10 of his plaint has set out the date of cause of action as 2-10-60 when defendant-1 threatened to dispossess him. But according to the facts found this is not true. As already stated above, the finding is that Durga Charan had no subsisting interest in the suit properties to convey and that the plaintiffs were never able to obtain either title or possession, from the very inception. In that context the consideration obviously failed at once and its failure was not postponed to any later date. In the circumstances, I am of opinion that Article 97 would not save the suit from the bar of limitation.

10. The Privy Council in the case of *Hanuman Kamat v. Hanuman Mandur*, (1891) 18 Ind App 158 (PC), has given the same interpretation as indicated above by me to Article 97. They have said, while considering Article 97 of the Limitation Act, 1908, as follows:

"If there never was any consideration, then the price paid by the appellant was money had and received to his account by Dowlut Mandar. But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property and being opposed, found himself unable to obtain possession".

11. In the present case the sale transaction of the plaintiffs was void ab initio, and the plaintiffs never obtained possession of the suit-property. Therefore, consideration failed at once and Article 97 is wholly inapplicable. The learned lower appellate Court was of opinion that if Article 97 did not apply, then it may be either Article 115 or Article 116. These articles, in terms, do not apply, because in the instant case, price paid by the plaintiff, when there never was any consideration was money had and received to his account by Durga Charan; and in view of the aforesaid discussion the lower appellate Court was wrong in applying Article 97, and holding that the suit was in time. No other Article has been shown to specifically apply to the present suit. The choice, therefore, ranges between Articles 62, 115, 116 or the residual Article 120. Whichever Article of these is applied, the present suit having been filed beyond six years from the date when plaintiffs paid the price to Durga Charan which is the date when plaintiffs' right to sue accrued, is clearly barred.

12. The plaintiff has categorically stated that the consideration money was paid on the date of registration, that is, 28-10-53. Therefore, the right to recover the same arose from that date, and the suit having been filed on 26-11-60 is obviously barred.

13. In view of this decision on the question of limitation, the other point does not arise for consideration. Nevertheless, I would like to record that I agree with the contention of learned counsel for the appellants that defendants 2 to 4 cannot be personally liable for this amount of Rs. 200/-, but will only be liable to pay the same out of the assets inherited by them from Durga Charan.

In the result, therefore, the appeal succeeds, but since the respondents have not appeared to contest, there would be no order for costs of this Court.

Appeal allowed.

AIR 1970 ORISSA 91 (V 57 C 36)

A. MISRA AND S. ACHARYA, JJ.

Jogendra Garabadu and others, Appellants v. Lingaraj Patra and others, Respondents.

First Appeal No. 24 of 1964, D/- 24-6-1969, against order of Sub. J., Bhubaneswar, D/- 29-11-1963.

(A) Tort — Malicious prosecution — Suit for damages — Prosecutor, who is — Determination — First information report for criminal case lodged by first defendant — Other defendants examined therein as prosecution witnesses — Their evidence however not accepted by criminal Court — Such non-acceptance does not and cannot prove conspiracy between those defendants and the first defendant in initiating the prosecution — Hence those defendants are not prosecutors — Suit against them therefore, is not maintainable — First defendant is the prosecutor. (Para 7)

(B) Limitation Act (1963), Article 74 — Suit for damages for malicious prosecution — In criminal case protest petition filed by complainant against dropping of proceedings against accused — Protest petition cannot be treated as continuation of the proceedings — Proceedings terminated on the day when they were dropped — Limitation will necessarily commence from that date of termination — (Tort — Malicious prosecution — Suit for damages — Limitation — Computation) — (Criminal P. C. (1898), Section 204 — Issue of process — Commencement and termination of proceedings). (Para 9)

(C) Tort — Malicious prosecution — Suit for damages — Essentials — Onus

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and presumption — "Acquittal on merits" — Meaning — Civil Court must bear evidence of both parties to decide whether prosecution was without reasonable and probable cause and malicious — Criminal Court judgment is conclusive only as to acquittal of plaintiff — (Evidence Act (1872), Sections 101 to 104, 114 and 43) — (Criminal P. C. (1898), Section 258 (1) — "He shall record an order of acquittal") — (Words and Phrases — "Acquittal on merits").

To succeed in a suit for damages for malicious prosecution, it is incumbent on the plaintiff to prove that he was prosecuted by the defendant; that the prosecution terminated in his favour; that there was absence of reasonable and probable cause for initiating the prosecution and that the prosecution was malicious.

(Para 6)

Though normally the onus of proving the absence of reasonable and probable cause rests on the plaintiff it is subject to an exception that where the accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit and the trial had ended in acquittal on merits the presumption will be not only that the plaintiff was innocent but also that there was no reasonable and probable cause for the accusation. Then it is for the defendant to prove affirmatively the presence of such cause.

(Paras 14 and 24)

In every suit for malicious prosecution the civil Court must hear the evidence on both the sides and decide for itself independently whether the prosecution was without reasonable and probable cause and malicious. The judgment of the criminal court is evidence and conclusive at that to show the acquittal of the plaintiff as a fact in issue. No doubt that judgment is admissible to show certain facts and circumstances such as names of witnesses examined, documents exhibited or that the acquittal was on technical grounds without going into evidence or merits. But the reasonings and conclusions in that judgment cannot be gone into to determine whether the acquittal resulted from the weakness or insufficiency of the prosecution evidence. "Acquittal on merits" must mean acquittal after trial on a consideration of the evidence as distinguished from acquittals due to certain defects such as want of sanction, acquittals on weakness of prosecution evidence, on benefit of doubt or on insufficiency of evidence. AIR 1958 Pat 329 and (1881) 8 QBD 167 and AIR 1938 Pat 529, Followed by S. A. No. 490 of 1950, D/ 11-1-1955 (Pat) and AIR 1960 Orissa 29 and (1963) 29 Cut LT 357 and AIR 1968 Andh Pra 61 and AIR 1969 Pat 102, Foll.; AIR 1962 Pat 478, Dissenting

from AIR 1938 Pat 529 and following (1883) 11 QBD 440, Expl. (Para 17)

(D) Tort — Malicious prosecution — Malice — Meaning — Proof — Malice cannot be proved by direct evidence.

Malice means the presence of improper and wrongful motive, that is, an intent to use the legal process for some other than its legally appointed purpose. Malice is an element that can be established by inference from circumstances and cannot be proved by direct evidence. Thus when the relationship of the defendant with plaintiffs, members of an association, was not cordial and on finding some of those members responsible for committing certain offences relating to his properties, the defendant implicated the other members also who were not even present at the scene of occurrence, it is not unlikely that he had availed of the opportunity to implicate those other members. In the circumstances it is indicative of improper and wrongful motive and the necessary inference is that the accusation against those members was malicious. (Para 25)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 Pat 102 (V 56) = | |
| 1968 BLJR 441, Satdeo Prasad v. Ram Narayan | 13 |
| (1968) AIR 1968 Andh Pra 61 (V 55) = (1967) 1 Andh WR 64, Subbarayudu v. Venkatanarasayya | 12 |
| (1963) 29 Cut LT 357, Gangadhar Mohanti v. Priyanath Das | 12 |
| (1962) AIR 1962 Pat 478 (V 49) = ILR 41 Pat 369, Ucho Singh v. Nageshwar Prasad Singh | 11, 12, 14 |
| (1960) AIR 1960 Orissa 29 (V 47) = 25 Cut LT 366, G. C. Mobapatra v. Upendra Padhi | 12, 16 |
| (1958) AIR 1958 Pat 329 (V 45) = ILR 36 Pat 786, Nagendra Kumar v. Etwaril Sahu | 13 |
| (1955) S. A. No. 490 of 1950, D/ 11-1-1955 (Pat), Niku Tarini v. Kapai Beero | 12 |
| (1948) AIR 1948 Pat 167 (V 35), Darsan Pande v. Ghagu Pande | 12 |
| (1938) AIR 1938 Pat 529 (V 25) = 19 Pat LT 889, Taharat Karim v. Malik Abdul Khalik | 10, 11, 12, 13, 14 |
| (1883) 11 QBD 440, Abrath v. North Eastern Rly. Co. | 12 |
| (1881) 8 QB 167 = 51 LJQB 268, Hicks v. Faulkner | 22 |
| B. Mohapatra and S. C. Ghosh, for Appellants; L. K. Dasgupta, G. N. Sen Gupta and B. B. Ray, for Respondents. | |
| A. MISRA, J.: The unsuccessful plaintiffs are the appellants. Originally, the suit was instituted by 12 plaintiffs, but as plaintiff no. 5 died during the pendency of the suit, his name was expunged and the remaining 11 plaintiffs continued the suit. | |

2. Plaintiffs' case, in brief, is as follows: They are all members of the Brahmin Nijjog whose office is situate on plot no. 738 adjoining a tea stall owned by defendant no. 1 on plot no. 737. Defendant no. 1 had cherished a grudge against them on their refusal to allow him some further space to expand his tea stall. During the night preceding 31-10-58, the roof of defendant no. 1's tea stall was burnt. On the morning of 31-10-1958 out of the grudge which he cherished against the plaintiffs, defendant no. 1 conspired with defendants nos. 2 to 4 and lodged a F. I. R. making false accusations against the members of the Brahmin Nijjog including the plaintiffs of having committed certain offences in relation to him and his property while he was rearranging his articles in the shop.

As a result, some of the plaintiffs were arrested on 31-10-58, remained in custody till release on bail and others surrendered in court and got enlarged on bail. Ultimately, police submitted charge-sheet against the original plaintiffs nos. 1 to 10 for offences u/ss 147, 452 and 149 I. P. C. After protracted trial, plaintiffs were acquitted on merits. Alleging that the prosecution was started without any reasonable and probable cause and out of malicious motives, plaintiffs claim that they are entitled to damages for malicious prosecution from the defendants. So far as the quantum is concerned, each of the plaintiffs claimed Rs. 1,000/- for loss of reputation and mental agony; Rs. 75/- each towards loss sustained by them in not being able to attend to their normal avocations; Rs. 1,800/- incurred as lawyer's fee in defending themselves in the criminal Court; Rs. 240/- as the amount paid to the Advocate's clerk, besides an amount of Rs. 60/- alleged to have been spent in performing religious propitiation ceremonies for those who were released from custody on bail.

3. Defendants deny the allegation of conspiracy to prosecute the plaintiffs and state that the allegations made in the F. I. R. are not false; that the same were not made without reasonable and probable cause; that the police were the real prosecutors and that the report was not lodged out of any malicious motives but with the object of vindicating their legal rights. According to them, defendant no. 1 purchased 0.44 1/2 acre on the southern side of plot no. 737 from the Common Manager of the Bhingarpur Debottar estate with the permission of the District Judge on 9-8-56. Having come to know of this, plaintiff No. 11 obtained a document on behalf of the Brahmin Nijjog for a portion of the very same plot from some members of the Choudhury family who had no power of disposal but could

not get possession of the same. Therefore, they wanted to forcibly dispossess defendant No. 1 and take possession of the land. On the date of occurrence, while defendant No. 1 was rearranging his tea stall, members of the Brahmin Nijjog including plaintiffs formed themselves into an unlawful assembly with the common object of forcibly dispossessing defendant no. 1 from the tea stall, entered into it and tried to demolish the wall separating the tea stall and the nijjog office. When defendant no. 1 protested, he was pushed aside and his furniture and articles thrown away.

In response to the alarm raised by him, police arrived there, seized crowbar and pickaxes, prevented further damage to the wall and other properties of defendant no. 1. Defendant no. 1 thereupon went to the P. S., lodged the F. I. R. on the basis of which police took up investigation and ultimately charge-sheeted some of the plaintiffs. The quantum of damage claimed is disputed and the high status and respectability claimed by the plaintiffs is denied.

4. On a consideration of the evidence and circumstances, the trial court dismissed the suit on the following findings; (1) Defendant no. 1 is the real prosecutor and the alleged conspiracy with defendants nos. 2 to 4 not being proved, the suit against defendants nos. 2 to 4 is not maintainable; (2) the prosecution terminated in favour of the plaintiffs; (3) irrespective of the merits, the claim by plaintiffs nos. 11 and 12 is clearly barred by limitation; (4) the prosecution was not false and it was not without reasonable and probable cause; and (5) the prosecution was not malicious.

5. The trial court also assessed the quantum of damages in case all or any of them are found entitled to a decree as follows: An amount of Rs. 200/- each as solatium for loss of reputation and mental agony, so far as plaintiffs nos. 1, 2 and 4 are concerned; Rs. 150/- each, so far as plaintiffs nos. 3, 6 and 8 to 10 are concerned; a consolidated amount of Rs. 750/- towards lawyer's fee of all the plaintiffs and Rs. 50/- each for loss of occupation, so far as plaintiffs nos. 1 to 4, 6 and 8 to 10 are concerned. It found that plaintiffs are not entitled to the rest of the items of claim laid by them.

6. There is no dispute that to succeed in a suit for damages for malicious prosecution, it is incumbent on the plaintiff to prove (1) that he was prosecuted by the defendant; (2) that the prosecution complained of terminated in his favour if it is capable of so terminating; (3) that there was absence of reasonable and probable cause for initiating the prosecution

against the plaintiff and (4) that the prosecution was malicious.

7. Regarding the first element, the trial court has found and it is not disputed before us that plaintiffs were prosecuted by defendant no. 1. It is, however, contended by learned counsel for appellants that though the F. I. R. against the plaintiffs was lodged by defendant no. 1, the other defendants also should be treated as prosecutors as they conspired with him to initiate the prosecution on false accusations, joined hands with him at all stages of the proceeding and gave false and perjured evidence. This contention has been negated by the trial court, and in our opinion, rightly so.

There is no evidence direct or otherwise to prove any conspiracy between the defendants in lodging the F. I. R. All that has been said against defendants nos. 2 to 4 is that they deposed in support of the prosecution case and their evidence was not accepted. The mere fact that the evidence of defendants nos. 2 to 4 examined as P. Ws. in the criminal case was not accepted by the criminal court does not and cannot prove a conspiracy between them and defendant no. 1 in initiating the prosecution. Therefore, we agree with the trial court's finding that defendants nos. 2 to 4 cannot be said to be the prosecutors, and as such, the action for damages for malicious prosecution against them is not maintainable.

8. Before dealing with the main contentions urged before us by the respective parties, it will be convenient to dispose of the claim of appellants nos. 6, 10 and 11 who were plaintiffs nos. 7, 11 and 12 in the trial court. As already stated, plaintiff no. 5 having died during the pendency of the suit, his name was expunged. Learned counsel for appellants contends that though plaintiff no. 7 did not examine himself in the suit, the evidence adduced on the side of plaintiffs being on behalf of all of them, the court below erred in holding that plaintiff no. 7 cannot be entitled to any damages even if otherwise such a claim is found to be maintainable. It is not necessary for us to consider the merits of this contention, in view of the concession made before the trial Court. In Paragraph 18 of the trial Court judgment it has been observed:

"It is fairly conceded by the learned counsel for the plaintiffs that the claim for personal damages made on account of plaintiffs Nos. 5 and 7 cannot be allowed. So the damages claimed on account of their personal inconvenience and loss of reputation has to be disallowed."

Learned counsel for appellants does not say that such a concession was not made in the trial Court. Therefore, irrespec-

tive of the merits of the present contention, so far as appellant No. 6 (plaintiff no. 7) is concerned, his claim in this appeal cannot be sustained.

9. As regards appellants nos. 10 and 11 who figured as plaintiffs nos. 11 and 12 in the trial court, it is admitted case that though their names found place in the F. I. R. (Ex. 4), they were omitted from the chargesheet and were not actually put on trial. Learned counsel for appellants contends that though they were not actually put on trial and the proceeding was dropped against them at the time of filing the chargesheet, they had to suffer humiliation and other inconvenience during police investigation, because defendant no. 1 had levelled accusations against them in Ex. 4 which led to the investigation. Further, it is contended that as a protest petition had been filed by defendant no. 1 against dropping of the proceeding against these two appellants and the said petition remained undisposed of, the bar of limitation will not stand in their way.

In our opinion, this contention is not acceptable. On the day, on the report of the police the proceeding was dropped against these two appellants, while cognizance was taken against others, the proceeding, so far as these two appellants are concerned, terminated. The period of limitation necessarily will commence from the date of such termination. The protest petition, if any, filed by defendant No. 1 cannot be treated as a continuation of the proceeding. Therefore, we agree with the Court below that so far as appellants Nos. 10 and 11 are concerned, irrespective of other considerations the claim is barred by limitation.

10. The only other question that remains for consideration is the claim of appellants Nos. 1 to 5 who were plaintiffs Nos. 1 to 4 and 6 and appellants Nos. 7 and 9 who figured as plaintiffs Nos. 8 and 10. Out of the four elements which are required to be proved to successfully maintain a claim for malicious prosecution, as already stated, the first two, i.e. defendant no. 1 being the prosecutor and the proceeding terminating in favour of the above appellants are proved and not seriously disputed. It now remains to be seen how far the other two elements, i.e. absence of reasonable and probable cause and the prosecution being malicious are established in this case. The findings of the trial court on both these questions are against the plaintiffs.

Mr. B. Mohapatra, learned counsel for appellants, challenges the correctness of the findings of the trial court on the above two points, mainly on the following grounds: (1) though the trial court has correctly stated the proposition of law relying on the decision of the Patna

High Court reported in AIR 1938 Pat 529 and the consistent view taken by this Court in a series of decisions on the question of onus regarding absence of reasonable and probable cause, it has erred in application of the principle of law while discussing and assessing the evidence; (2) irrespective of the question of onus, the trial court has failed to properly appreciate the evidence and erred in its finding that the prosecution was not without reasonable and probable cause and that it was not actuated by malice and (3) even if on the evidence it is found that there was reasonable and probable cause in initiating the prosecution, the trial court should have further considered whether such reasonable and probable cause existed in implicating all the plaintiffs and if it found that there was no such justification for implicating some of the plaintiffs, at least it should have partially decreed, so far as their claims are concerned, instead of dismissing the suit in toto.

11. Mr. Dasgupta, learned counsel appearing for respondents, on the other hand, contends that in an action for malicious prosecution, the onus to prove absence of reasonable and probable cause invariably rests on the plaintiffs. It is argued that the Patna case reported in AIR 1938 Pat 529 puts the proposition rather too broadly and such a proposition does not find support from the authorities which it purports to follow. It is further contended by him that the decisions which have followed the view expressed in AIR 1938 Pat. 529 are distinguishable, inasmuch as, they are all cases where the prosecution has been categorically found to be false. Lastly, it is urged by him that in view of the later Division Bench decision of the Patna High Court reported in AIR 1962 Pat. 478, the decision in AIR 1938 Pat. 529 is no longer good law and the decisions of our High Court which have followed it require reconsideration.

12. As a broad proposition of law, there is no divergence of opinion that the onus to prove absence of reasonable and probable cause in an action for malicious prosecution normally rests on the plaintiff. It was however, held in AIR 1938 Pat 529 (Taharat Karim v. Abdul Khaliq) that once plaintiff establishes that defendant instituted the prosecution on the allegation that the offence was committed in his presence and the trial results in an acquittal on the merits, the obligation to establish absence of reasonable and probable cause is satisfied and the onus necessarily shifts to the defendant to prove affirmatively that he had reasonable and probable cause to institute the prosecution. This view has been con-

sistently followed by this Court in a series of decisions.

A Division Bench of this Court in the unreported decision in S. A. No. 490 of 1950 (Pat) (Niku Tarini v. Kapai Beero) disposed of on 11-1-1955 agreeing with the decision reported in AIR 1938 Pat. 529 observed as follows:

"With great respect, we entirely agree with the view of Mr. Justice Dhavle in the case in AIR 1938 Pat. 529, which was subsequently followed in AIR 1948 Pat. 167, and hold that where the complaint against the plaintiff was in respect of an offence which defendant claimed in the criminal proceeding to have seen him committing, and the trial ends in an acquittal on the merits, there would be a presumption in favour of the plaintiff that there was no reasonable and probable cause for the accusation."

This view has been reiterated by Mr. Justice Barman (as he then was) in the decision reported in (1959) 25 Cut. L. T. 366 = (AIR 1960 Orissa 29) (G. C. Mohapatra v. Upendra Padhi) and by Mr. Justice G. K. Misra (as he then was) in the decision reported in (1963) 29 Cut. L. T. 357 (Gangadhar Mohanti v. Priyanath Das), though the later decision of the Patna High Court reported in AIR 1962 Pat. 478 was cited and it was contended that by this later decision the proposition laid down in AIR 1938 Pat. 529 was no longer good law. The same view has been expressed by the High Court of Andhra Pradesh in the decision reported in AIR 1968 Andh Pra 61 (Subbarayudu v. Venkatanarassayya). Mr. Dasgupta contended that in the light of the later Division Bench decision of the Patna High Court reported in AIR 1962 Pat. 478, the position requires reconsideration. The view taken in AIR 1938 Pat. 529 has been dissented from in the decision reported in AIR 1962 Pat. 478 mainly relying on certain observations of Bowen, L. J. at page 457 in the decision reported in (1883) 11 QBD 440. The observations by Bowen, L. J. in the same decision occurring at page 462 and other Division Bench decisions of the Patna High Court have not been noticed in the decision reported in AIR 1962 Pat. 478. The following observation by Bowen, L. J. at page 462 in the decision reported in (1883) 11 QBD 440 to a certain extent qualifies the broad proposition of law expressed at page 457 and followed in AIR 1962 Pat. 478.

"Something has been said about innocence being proof, prima facie, of want of reasonable and probable cause. I do not think, it is. When mere innocence wears that aspect, it is because the fact of innocence involves with it other circumstances which shew that there was the want of reasonable and probable

cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting, is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and proper care. Except in cases of that kind, it never is true that mere innocence is proof of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause."

13. The question also came up before another Division Bench of the Patna High Court in the decision reported in AIR 1958 Pat 329, Nagendra Kumar v. Etwarī Sahu. There, it was observed:

"The principles which can be extracted from the just mentioned cases cited by the Bar may be stated thus:

(1) If a man acts on his own knowledge, and if he gives information of the commission of an offence committed in his presence, and, therefore, the accusation against the plaintiff is in respect of an offence which defendant claims to have seen him committing, and the trial commenced, on acquittal on merits the presumption will be not only that the plaintiff was innocent but also there was no reasonable and probable cause.

(2) Where therefore, the charge is of such a nature as must be true or false to the knowledge of the defendant, then no question of reasonable and probable cause can arise. Falsity of the evidence by the prosecutor himself would go to show want of reasonable and probable cause and further go to show malice on the part of the prosecutor."

In the latest decision of the Patna High Court reported in AIR 1969 Pat. 102 (Satdeo Prasad v. Ram Narayan) the view expressed in AIR 1938 Pat. 529, has been reaffirmed and it is observed:

"where therefore the accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit, and the trial ends in acquittal on merits as is the case here, the presumption will be not only that the plaintiff was innocent but also that there was no reasonable and probable cause for the accusation."

In the body of this decision, It has been mentioned that the case reported in AIR 1958 Pat. 329 was taken in appeal and

was upheld by the Supreme Court. Thus, there is overwhelming authority reiterating the principles enunciated in AIR 1938 Pat. 529.

14. Even in the decision reported in AIR 1962 Pat. 478, while purporting to dissent from the view expressed in AIR 1938 Pat. 529 regarding the burden of proof, to prove absence of reasonable and probable cause in cases where the defendant purported to be an eye-witness to the alleged crime, it has been recognised that the fact that defendant purported to be an eye witness to the occurrence is a factual circumstance which should be taken into account in deciding whether plaintiff has discharged the burden of proof relating to the absence of reasonable and probable cause.

Thus, though as a broad proposition it is well settled that in an action for malicious prosecution the onus to prove absence of reasonable and probable cause rests on the plaintiff, it is subject to an exception and is qualified to this extent that in cases where the accusation against the plaintiff purports to be in respect of an offence which the defendant claimed to have seen him commit and the trial ends in an acquittal on the merits, the presumption will be not only that plaintiff was innocent, but also there was no reasonable and probable cause for the accusation. With great respect we agree with this view in spite of the observations made in the Division Bench decision reported in AIR 1962 Pat. 478.

15. The next contention of learned counsel for respondents is that even if the aforementioned view is accepted, to attract the presumption in favour of the plaintiffs, two conditions are necessary. They are: (1) the accusations must have been made against the plaintiffs in respect of offences which defendant claimed to have seen them commit and (2) the trial must have ended in an acquittal on merits. According to him, in the present case, the acquittal being by way of giving benefit of doubt to the plaintiffs, the aforesaid presumption of absence of reasonable and probable cause cannot arise in their favour. Mr. Mohapatra, learned counsel for appellants, on the other hand, contends that the acquittal in this case was not by giving benefit of doubt, but on a consideration of the merits of the evidence.

16. What the words "acquittal on merits" precisely connote have not been dealt with in any of the decisions. Reference was made to a decision of our High Court reported in (1959) 25 Cut LT 366 = (AIR 1960 Orissa 29) where a distinction has been made between "acquittal on grounds of extreme weakness of the prosecution evidence" and "acquittal by

appearing for the opposite party submitted that the companies running railways are public utility concerns and as such if a particular company running a non-Government Railway does not make reasonable profit, the Government have to subsidise that company. Keeping that fact in view, the Central Government took into consideration the over-all financial position of a company including its reserves in fixing the rates of freight and fare. Referring to the chart (Annexure C), learned counsel submitted that the financial position of all the other light railways excepting the petitioner company was unsatisfactory since the year 1960-61. Three of the railways, namely, Futwah-Islampur, Burwwan-Katwa and Bankura-Damodar River Light Railways had to be subsidised by the Government from different dates on account of their deteriorating financial position. The management of one of the Railways, namely, Ahmadpur-Katwa, was actually taken by the Government with effect from the 1st of July, 1967. The chart (annexure C) shows that the petitioner company earned a net profit of Rs. 16 lakhs and odd in the year 1960-61 and declared a dividend of 20%. Rs. 59 lakhs and odd was its reserves and surplus. In the year 1961-62 it earned a net profit of Rs. 11 lakhs and odd and declared 15% dividend. Its reserves and surplus were Rs. 57 lakhs and odd. In the year 1962-63 it earned a net profit of Rs. 9 lakhs and odd and it declared a dividend of 10%. Its reserves and surplus were Rs. 67 lakhs and odd.

In the year 1963-64 it earned a net profit of Rs. 7 lakhs and odd and it declared a dividend of 10%. Its reserves and surplus were Rs. 73 lakhs and odd. In the year 1964-65 it earned a net profit of Rs. 7 lakhs and odd and declared 10% dividend. Its reserves and surplus were Rs. 78 lakhs and odd. In the year 1965-66 it earned a net profit of Rs. 4 lakhs and odd and declared a dividend of 10% and its reserves and surplus were Rupees 82 lakhs and odd. In the year 1966-67 it earned a net profit of Rs. 3 lakhs and declared a dividend of 8%. Its reserves and surplus were Rs. 74 lakhs and odd. Annexure 'C' further shows that in the year 1960-61 the paid-up capital of the petitioner company was Rs. 30 lakhs and odd and its total capital outlay was Rs. 90 lakhs and odd. In the year 1966-67 its paid-up capital was Rs. 50 lakhs and odd and its total capital outlay was Rs. 104 lakhs and odd. On the above figures shown in the chart, it was submitted by learned counsel that the over-all financial position of the petitioner company remained sound throughout and keeping that fact in view, the

Central Government did not allow the petitioner company same rates of freight and fare as were allowed to the other non-Government Railways. Mr. Lal Narayan Sinha submitted that except the net profit which has been earned by the petitioner company, all the other factors which have been taken into consideration by the Central Government in fixing the rates of freight and fare are irrelevant. According to learned counsel, even while calculating the net profit of the petitioner company, the railway Board have committed errors in not deducting the amount of money which was paid as Managing Directors' remuneration and the Director's commission.

39. As I have already stated, "reasonableness", "interest of the public" and "avoidance of discrimination" are the basic legislative policy behind the enactment as contained in Chapter V of the Act. I may state here that the 'general public interest' has been considered to be a valid ground for fixing the different rates both in England and America. Vide Halsbury's Laws of England Volume 27, paragraph 514, (Second Edition) and section 287 of Corpus Juris Secundum, Volume 13. Keeping in view the basic legislative policy of the Act in the matter of fixation of rates of freight and fare, I am of the view that the net profit earned by a particular company running a private railway is a relevant and important factor and fixation of rates of freight and fare on that basis cannot be said to be unreasonable or against the interest of the public. I, however, find it difficult to hold that the reserves accumulated by a company have any relevancy in the matter of fixation of rates of freight and fare. The 'reserves' represent the past profit of a company and as such it is unreasonable to take into consideration the reserves which a company has accumulated. As it has been admitted by the opposite party in the counter-affidavit that the over-all financial position of the petitioner company including its reserves has been taken into consideration in the matter of fixation of rates of freight and fare, it cannot but be held that the Central Government have taken into consideration the irrelevant matter, namely, the reserves of the company, along with the relevant matter, namely, the net profit earned by the petitioner company. It is not very clear from the counter-affidavit whether the other factors which are mentioned in the chart (annexure C), namely, paid-up capital and total capital outlay, have also been taken into consideration by the Central Government. If, in fact, those factors have been taken into consideration, in my opinion, they are irrelevant.

As the declaration of dividend has a direct bearing on the actual net profit earned by a company it cannot be said that it is an irrelevant matter. I am not expressing any opinion on the question whether the Central Government were justified or not in not deducting the amount of money which was paid as Managing Directors' remuneration and the Director's commission, which is comparatively a negligible factor, while calculating the net profit of the petitioner company. In my considered opinion, however, the facts disclosed in the counter-affidavit establish that the Central Government have taken into consideration some irrelevant factors, specially the reserves of the company, in fixing the rates of freight and fare applicable to the petitioner company. An attempt was made by learned counsel appearing for the petitioner Company to show that even the figures shown as reserves in the chart (Annexure C) are not correct. It is not necessary to go into that question as I am of the view that the reserves of a company ought not to have been taken into consideration by the Central Government in fixing the rates of freight and fare of the petitioner company.

40. The next question which falls for consideration is whether the order of the Central Government as contained in Annexure 13, which is under challenge, should be struck down as invalid on the ground that the Central Government have taken into consideration certain irrelevant matters in passing that order. Learned counsel appearing for the opposite party submitted that if a quasi-judicial order is based on several grounds and if some of the grounds are irrelevant, the order can be sustained on the basis of the relevant grounds. In support of his contention he relied on the decision of the Supreme Court in Civil Appeal No. 2340 of 1956 (SC) *State of Maharashtra v. Babulal Kriparam Takkamore*, decided on the 2nd February, 1967. In that case it was observed as follows:

"... An administrative or quasi-judicial order based on several grounds, all taken together, cannot be sustained if it be found that some of the grounds are non-existent or irrelevant, and there is nothing to show that the authority would have passed the order on the basis of the other relevant and existing grounds. On the other hand, an order based on several grounds some of which are found to be non-existent or irrelevant, can be sustained if the court is satisfied that the authority would have passed the order on the basis of the other relevant and existing grounds, and the exclusion of the irrelevant or non-existent grounds would not have affected the ultimate opinion or decision".

In the instant case I am of the opinion that it is difficult for the court to come to the conclusion that the Central Government would have passed the same order if they would have excluded out of consideration the irrelevant matters, specially the reserves accumulated by the petitioner company, and would have fixed the same rates of freight and fare as they have fixed by the impugned order (annexure 13). I am, therefore, of the opinion that the first part of the observation made in the case, referred to above, applies to the facts and circumstances of the instant case. As I have already stated, in the application the petitioner company has challenged the validity of the order (annexure 13). The petitioner company being not satisfied with the decision of the Railway Board as conveyed in the latter (Annexure 13) sent another representation on the 11th of May, 1968 (annexure 16). That representation, as it appears from the counter-affidavit, was ultimately rejected by the Railway Board by their letter no. TCR/1078/66 DRL, dated the 23rd of July, 1968 (annexure D). Annexure D is thus the final order of the Central Government by which the request of the petitioner company for enhancement in fares and freights has been rejected. The point which now falls for consideration is whether the impugned order (Annexure 13) or the final order (annexure D) dated the 23rd of July, 1968, in which that part of Annexure 13 which is adverse to the petitioner company stands merged should be quashed. By the order as contained in Annexure 13 the petitioner company has got at least some relief. If that order is struck down as invalid, some complications may arise. In the circumstances, I am of the opinion that it will be proper to strike down the final order dated the 23rd July, 1968, passed by the Central Government as contained in Annexure D to the counter-affidavit. There can be no legal objection to it as it is always open to the court to grant the appropriate relief on the facts pleaded.

41. For the reasons stated above, this application is allowed and the order dated the 23rd of July, 1968, of the Government of India, Ministry of Railways (Railway Board) Annexure D to the counter-affidavit is quashed by a writ of certiorari. A writ of mandamus is further issued on the opposite party to reconsider the representation of the petitioner Company in the matter of enhancement of rates of freight and fare in accordance with law after giving the petitioner company adequate opportunity to represent its case and to show that the facts and figures relied upon by the opposite party are not correct. If a prayer

for oral hearing is made by the petitioner Company, the authorities would not deny it. In the circumstances of the case, this application is allowed with costs. Hearing fee Rs. 250/- only.

42. SHAMBHU PRASAD SINGH, J.: I agree.

Application allowed.

AIR 1970 PATNA 131 (V 57 C 19)

H. MAHAPATRA, J.

Balleshwar Mandal and others, Appellants v. Uchit Lal Jha and others, Respondents.

A. F. A. D. No. 111 of 1967, D/- 13-2-1969 from order of Sub. J. Monghyr, D/- 23-12-1966.

Trusts Act (1882), Section 90 — Advantage gained by mortgagee — Usufructuary mortgagee bound to pay part of rent to landlord — Property brought to sale for default in payment of rent — Mortgagee purchasing it at the sale has to hold it for the benefit of the mortgagor — Fact that the property brought to sale was more than mortgage security, held, immaterial. AIR 1964 SC 1707 and AIR 1960 Pat 423, *Foll.*; AIR 1961 Pat 439, held no good law, in view of AIR 1964 SC 1707. (Para 5)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 1707 (V 51) =

1964 BLJR 751, *Basmati Devi v. Chamru Sao* 4

(1961) AIR 1961 Pat 439 (V 48) =

Mt. Barti Kuer v. Brahmchari Singh 4

(1960) AIR 1960 Pat 423 (V 47) =

Subedar Rai v. Bachai Pandey 4

Ramakant Verma and A. B. S. Sinha, for Appellants; Shivanandan Ray, Nawal Kishore Sinha and Md. Noor Akhtar, for Respondents.

JUDGMENT:— The defendants second party in a suit for redemption of a usufructuary mortgage executed by plaintiff No. 1 in favour of the grandfather of defendant No. 1 are the appellants. The mortgage was executed on the 2nd February, 1933, with a condition that the mortgagee was liable to pay the rent to the landlord amounting to Rs. 13/- and odd a year. On account of default in payment of rent, the entire holding including the mortgaged security was brought to sale in execution of a rent decree and purchased by the father of defendants 1 and 2 in 1939. Thereafter, the auction purchaser sold the property to the father of defendant No. 5. The plaintiffs claimed that they were entitled to redeem that mortgage in spite of the auction purchase in the rent sale. The Courts below have relied upon the prin-

ciple of equity in section 90 of the Trusts Act to decree the suit in favour of the plaintiffs.

2. The defence on behalf of the defendants second party was that there was no liability on the mortgagee to pay the rent, and, therefore, the sale of the mortgaged security and other properties for default of payment of rent cannot be attributed to any contributory default on the part of the mortgagee. The mortgagee auction purchaser in the rent sale derived independent title and by purchasing the same from him the defendants second party also acquired a good title.

3. The suit having been decreed by both the courts below, the transferees-defendants second party have come up in appeal.

4. Two points were raised on behalf of the appellants. Learned Counsel urged that in the present case, according to the findings, the liability to pay rent was on the mortgagee, not in full but in part, the other part of the rent being payable by the mortgagor. On account of the default committed by both, the rent sale took place. In a case where there is a joint default by the mortgagor and the mortgagee, the principles envisaged in Section 90 of the Trusts Act cannot be invoked against the mortgagee, and the equity of redemption will be deemed to have been extinguished by the purchase by the mortgagee of the mortgaged security in the rent sale.

In support of this proposition, learned Counsel referred to the case of *Mt. Barti Kuer v. Brahmchari Singh*, AIR 1961 Pat 439. This decision no doubt goes a long way to help the appellants. But, in the case of *Basmati Devi v. Chamru Sao*, 1964 BLJR 751 = (AIR 1964 SC 1707), their Lordships of the Supreme Court have held otherwise. I may quote a portion from that Judgment:

"The question for consideration is whether in circumstances like the present where the decree and the sale in execution of it are brought about by the default of both the mortgagor and the mortgagee, the mortgagee can be said to have taken advantage of his position by purchasing the property at the sale. The High Court appears to think that unless the sale was brought about by the default of the mortgagee alone the mortgagee cannot be said to have taken advantage of his position in making the purchases. What seems to have weighed with the learned Judges is that even if the mortgagee had done his duty by paying the rent he was liable to pay, the sale would still have taken place as the mortgagor did not pay that portion of the rent which he was liable to pay. So, they thought

that the mortgagees, though they took advantage of the fact that the property had been brought to sale, could not be said to have taken advantage of their position as mortgagees.

"With this view, we are unable to agree. In our opinion, the fact that the mortgagor had made a default, does not alter the position that the mortgagee had also defaulted in paying the rent he was liable to pay. By his default he has contributed to the position that a suit had to be brought for arrears of rent and ultimately to the position that the property was put to sale in execution of the decree obtained in the suit. This contribution to the bringing about of the sale was a direct result of his position as a mortgagee. When therefore, he purchased the property himself at the sale in execution of the rent decree he clearly gained an advantage by availing himself of his position as a mortgagee.

"This, in our opinion, is the position in law even if the mortgagee's liability was to pay less than the major portion of the rent of the holdings".

In view of the above observations, I do not think that the appellants can take advantage of the decision in the case of AIR 1961 Pat 439.

I may here refer to another decision of this Court in the case of Subedar Raf v. Bachal, Pandey, AIR 1960 Pat 423, where in circumstances similar to those in the instant case, the principle involved in Section 90 of the Trusts Act was applied against the mortgagee.

5. Learned Counsel referred to Exts. L and J, the sale proclamation in the rent execution case and the suit register in regard to that rent suit, and, he pointed out that the suit register indicates that the judgment debtors included persons other than the mortgagor. It also appears, as he contended, that the property brought to sale was more than the mortgaged security and the rent for which the rent suit was laid was more than the rent payable for the mortgaged security. No doubt the mortgaged security was involved in the rent execution case along with other properties. The sole purpose of referring to these two exhibits by learned Counsel was to contend that in a case where the rent sale in which the mortgagee is the auction-purchaser is for immovable property more than the mortgaged security, Section 90 of the Trusts Act should not be invoked. If the equitable principle involved in that section can be attracted in a case where the mortgagee's liability to pay rent is only in part, the other part of the rent being payable by the mortgagor, I do not see what justification there should be in holding otherwise for

the mere reason that the property brought about to be sold in rent execution case was more than the mortgaged security.

6. For the reasons given above, the view taken by the Courts below cannot be said to be wrong. This appeal is dismissed with costs.

Appeal dismissed.

AIR 1970 PATNA 132 (V 57 C 20)

N. L. UNTWALIA, J.

Dudh Nath Singh, Petitioner v. Sarju Singh, Opposite Party.

Criminal Revn. No. 325 of 1968, D/- 23-1-1969, from order of Magistrate, 1st Class, Dhanbad, D/- 30-11-1967.

Criminal P. C. (1898), Section 145 — "Parties concerned in such dispute" — Proceedings against servant of landowner — Servant not claiming to be in actual physical possession of disputed land — Owner residing opposite disputed land — Owner and not servant is party within the meaning of Section 145 — In the absence of owner, proceeding is bad and illegal — (1894) ILR 21 Cal 915, Followed by (1898) ILR 25 Cal 423 and AIR 1954 Assam 77, Foll.; AIR 1953 Cal 397 and AIR 1959 Cal 505, Expl. and Diss. from; AIR 1952 Madh B 165, Dist.; (1904) ILR 31 Cal 48 (FB), Expl.

(Paras 2 and 5)

Cases Referred: Chronological Paras

- (1959) AIR 1959 Cal 505 (V 46) =
1959 Cri LJ 970, Sukechand Roy v. Sefazuddin Mohammad 5
(1954) AIR 1954 Assam 77 (V 41) =
1954 Cri LJ 525, Rup Chand v. Bhagalu Singh 4, 5
(1953) AIR 1953 Cal 397 (V 40) =
1953 Cri LJ 908, Turu Majhi v. State 5
(1952) AIR 1952 Madh B 165 (V 39) =
1952 Cri LJ 1449, Ratan Singh v. Raghubir Singh 4, 5
(1904) ILR 31 Cal 48 = 7 Cal WN 825 (FB), Dhondhai Singh v. Follet 4, 5
(1898) ILR 25 Cal 423, Brown v. Prithiraj Mandal 3
(1894) ILR 21 Cal 915, Behary Lal Trigunait v. Darby 3, 4, 5
Ram Nandan Sahay Sinha and Lala Sachindra Kumar, for Petitioner; Tarni Prasad, for Opposite Party.

ORDER:— There is a strip of land measuring 165 feet x 35 feet situate in the town of Jharra in front of a building known as Anand Bhawan. It is part and parcel of plots Nos. 1016 and 1017. On a portion of this land stand structures. A proceeding under Section 144 of the Code of Criminal Procedure (hereinafter)

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after called the Code) was started some time in the year 1964. Subsequently it was converted into a proceeding under Section 145 of the Code. Dudh Nath Singh, the petitioner in this criminal revision, was the first party in the proceeding which seems to have been started upon the police report and Sarju Singh, the opposite party in this revision, was the second party. In the show cause filed by the petitioner on 14-2-1965 in the Court of the Sub-divisional Magistrate at Dhanbad he clearly stated that he is an employee under one Shreemati Kusumlata Agarwala, wife of Om Prakash Agarwala and he looks after, and manages, her property and that the disputed land which was the subject matter of the proceeding belonged to the said lady and she had all along been in peaceful possession of the same by constructing temporary structures for her servants and other men stated in 7th paragraph of her show cause petition. The opposite party claimed himself to be in actual physical possession of the disputed land. The learned Magistrate Shri Ghanshyam Chandra Prasad Sinha, Magistrate 1st class at Dhanbad has concluded and decided the proceeding under Section 145 of the Code in favour of the opposite party and declared him in possession. The petitioner has come up in revision to this Court.

2. In my opinion the proceeding in absence of Shreemati Kusumlata Agarwala is misconceived and suffers from an infirmity of the kind, which would not justify the conclusion of the proceeding in favour of any party. Nowhere the petitioner in any sense claimed to be in actual physical possession of the disputed land. He was, therefore, on the facts and in the circumstances of this case, not a party concerned in the dispute in question within the meaning of Section 145 of the Code. The party concerned on the case of the petitioner, as stated in the order of the learned Magistrate, was Shreemati Kusumlata Agarwala. It is undisputed that Shreemati Kusumlata Agarwala is a resident of Jharia town and is stated to be living in Anand Bhawan, in front of which lies the disputed land. The preliminary proceeding drawn against the petitioner, who was the servant of Shreemati Kusumlata Agarwala was defective and illegal. He was not a person who could be asked to put in his written statement his respective claim as respects the facts of actual possession of the subject of dispute.

Supposing, the learned Magistrate or this Court were to come to the conclusion that the property was in actual physical possession of Shreemati Kusumlata Agarwala, the petitioner could not be declared in possession of such pro-

perty nor could Shreemati Kusumlata Agarwala be so declared as she was not a party to the proceeding. In my opinion, therefore, if an order in the proceeding could not be made in favour of either the petitioner or Shreemati Kusumlata Agarwala, it could not either be made in favour of the opposite party and against the petitioner, which in effect would be against Shreemati Kusumlata Agarwala.

3. In support of the view which I have expressed above, I may cite the decision of a Bench of the Calcutta High Court consisting of I may say so, of very eminent Judges in Behary Lall Trigunait v. Darby, (1894) ILR 21 Cal 915. In that case the order under Section 145 of the Code had been made in favour of Mr. Darby, who had stated in his written statement that the property in question belonged to a coal Company, and that his position was that of a manager of the Company. He had not stated that he had any interest except as manager, and did not state that he had any independent or in fact any possession, except as representing the Company on whose behalf he was managing the mine. Under such a situation Petheram, C. J. and Rampini, J. set aside the order in favour of Mr. Darby saying—

"..... We do not think that the kind of possession is a possession such as is contemplated by this section, or, as I said just now, that the parties interested are properly before us".

In material particulars the written statement of the petitioner in the instant case is identical with that of Mr. Darby of the Calcutta case aforesaid. Another Bench of the Calcutta High Court took the same view in Brown v. Prithiraj Mandal, (1898) ILR 25 Cal 423 under similar circumstances. In this case the order was against one Mr. Brown, who in his written statement had stated that he was not the actual proprietor of the land in dispute, but was there merely in the character of the manager for the actual proprietor, one Mr. Ephgrave. The Magistrate had decided the proceeding against Mr. Brown not disputing his statement that he was not claiming actual physical possession for himself. Following the decision in (1894) ILR 21 Cal 915 the proceedings were set aside ab initio.

4. To the same effect is the view expressed by a learned single Judge in Rup Chand v. Bhagalu Singh, AIR 1954 Assam 77. The decision of a learned single Judge of Madhya Bharat High Court in Ratan Singh v. Raghurib Singh, AIR 1952 Madh B 165 is clearly distinguishable as in that case the son-in-law, who was a party to the proceeding and was claiming actual physical possession of

his mother-in-law, was not only there as the son-in-law but was there as her Mukhtyar also. The preponderance of the view is in favour of the one expressed by the Calcutta High Court in (1894) ILR 21 Cal 915. In a Full Bench decision of the Calcutta High Court in Dhondhai Singh v. Follet, (1904) ILR 31 Cal 48 (FB), it was pointed out, to quote the placitum, that—

"There is jurisdiction under S. 145 of the Criminal Procedure Code, to make an order in favour of a person who claims to be in possession of the disputed land, as agent to, or manager for, the proprietors when the actual proprietors are not residents within the Appellate Jurisdiction of the High Court".

If I may say so with respect, under certain circumstances this would be so. To illustrate my point, supposing a man as an agent of the owner of the property, who lives far away from the place where the property is situated, is managing the property on behalf of the principal and while so managing it is possible to take the view he is in actual physical possession of the property for the purposes of Section 145 of the Code. But to extend this principle to a mere servant, agent or an employee and call him a person in actual physical possession or a party concerned within the meaning of Section 145 of the Code when the principal or the master is himself or herself, as the case may be, is the resident of the same place is to obliterate and brush aside a very salient principle of law, if I may say so with great respect, as laid down by Petheram C. J. in (1894) ILR 21 Cal 915 a case which has not been overruled by the Full Bench of the Calcutta High Court or does not seem to have been overruled by any higher Court.

5. Mr. Justice S. K. Sen of the Calcutta High Court sitting in a Division Bench and without referring to the earlier Calcutta decisions said in Turu Majhi v. State, AIR 1953 Cal 397—

"..... The second point taken was that the opposite party being an employee of the landlord was not competent to figure as a party in the proceedings under Section 145, Criminal P. C. There appears, however, no legal bar to a landlord being represented by his employee".

I am constrained to observe with very great respect that this view was expressed per incuriam and cannot be accepted to be the consistent view of the Calcutta High Court. The same learned Judge stuck to this view sitting singly in Sukchand Roy v. Sefazuddin Mohammad, AIR 1959 Cal 505 and this time he preferred to follow the single Judge decision of the Madhya Bharat High Court in AIR 1952 Madh B 165 instead of the decision of the Assam High Court in AIR

1954 Assam 77. Reference was made to Behary Lal Trigunait's case in (1894) ILR 21 Cal 915, as also to the Full Bench decision in (1904) ILR 31 Cal 48 (FB). Again without much discussion, I may say so with very great respect, the learned Judge persuaded himself to stick to his observation made in AIR 1953 Cal 397. I do not feel persuaded to accept his view as correct and following the earlier Calcutta decision I hold in this case that the proceeding was bad in absence of Shreemati Kusumlata Agarwala being made a party to the proceeding. If in addition to her the petitioner was made a party to the proceeding, no serious objection could be taken to it but in absence of the only necessary party I must hold that the proceeding is misconceived and illegal.

6. In the result I allow the application, set aside the proceeding in case No. 634 of 1964 and consequently the order of the learned Magistrate dated 30-11-1967 passed in favour of the opposite party in the said proceeding. I may, however, observe that if there is any fresh apprehension of breach of peace, proper proceeding may again be drawn up on proper materials and against the necessary parties.

Petition allowed.

AIR 1970 PATNA 134 (V 57 C 21)

KANHAIYALAL J.

Rupdeo Singh, Petitioner v. Natha Singh and others, Opposite Parties.

Criminal Revn. No. 2588 of 1968, D/- 11-2-1969, against order of Magistrate, 1st Class, Aurangabad, D/- 14-9-1968.

Criminal P. C. (1898), Ss. 107, 112 and 119 — Proceeding under S. 107 — Proceeding becomes judicial only from stage of enquiry under the provision — Before that stage is reached and notice under S. 112 is issued, the Magistrate has inherent power to drop proceeding.

On 21-8-1968, the Magistrate on the strength of police report, drew up a proceeding under S. 107 Criminal P. C. against the opposite parties and required them to show cause why they should not be ordered to execute surety bonds. On the same day, a protest petition was filed by the opposite parties and after perusing its contents, the Magistrate stayed issue of notices to them and sent the police report to the Divisional Inspector of Police for scrutiny in the light of the protest application. The Divisional Inspector of Police reported that only six persons against whom another proceeding under S. 107 Criminal P. C. was already going on should be ordered to

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execute bonds. The Magistrate heard both the parties and dropped the proceeding against the opposite parties finding that there was no truth in the allegation found in the police report about the opposite parties being ring leaders. The order dropping the proceeding was challenged on ground that the Magistrate had no jurisdiction to do so until he reached the stage of S. 119.

Held, that there was no illegality or want of jurisdiction in the impugned order passed by the Magistrate dropping the proceeding.

(Para 5)

The words "in the manner hereinafter provided" occurring in Section 107 (1) are significant and the manner is laid down in Sections 112 to 117. Under Section 112 a Magistrate exercises his discretion and decides to require any person to show cause. The notice to show cause must be a notice which specifies the requirements of S. 112. Sections 113 to 116 deal with modes for securing attendance of the persons proceeded against. Section 117 is the stage when the Magistrate proceeds to enquire into the truth of the information upon which action has to be taken and take further evidence. The final stage of enquiry is reached when the Magistrate under Section 119 passes an order discharging the person proceeded against, when on enquiry it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be. A Magistrate under Section 107 of the Code is not required to examine the person proceeded against until at a much later stage when he proceeds to act under S. 117 of the Code. The proceeding before the Magistrate under S. 107 becomes judicial only from the stage of enquiry under this section, but before this stage is reached and before any notice to show cause is issued under S. 112 of the Code, a Magistrate has inherent power to reconsider the truth or falsehood of the information received by him. No hard and fast rule can be laid down about the quality and character of the information on which the Magistrate should or should not act. Hence, the impugned order was not liable to be disturbed. (Paras 3 & 4)

Gorakh Singh, Shambhu Nath Jha and B. N. Mandal, for Petitioner; S. B. N. Singh and Ashok Kumar Verma, for Opposite Parties.

ORDER: This application in revision is against the order of the Sub-divisional Magistrate, Aurangabad, dated the 14th September, 1968, dropping a proceeding under Section 107 of the Code of Criminal Procedure against the opposite parties.

2. On a report of the Deo Police for action under Section 107 of the Code of

Criminal Procedure against the opposite parties, the learned Sub-divisional Magistrate passed the following order on the 21st August, 1968:

"... I am satisfied from the Police report that there is an apprehension of breach of peace at the hands of O. Ps. I hereby draw up proceeding u/S 107, Cr. P. C. against the O. Ps. to show cause on 14-9-68, as to why they should not be ordered to execute bonds of Rs. 1000/- each with one surety of like amount to keep peace for a period of one year."

On the same day (21-8-1968), a protest petition was filed on behalf of the opposite parties for verification of the Police report. The Sub-divisional Magistrate perused the record of another proceeding under section 107 of the Code (Case No. 485M of 1968), in which at least five members of the opposite parties were being proceeded with by his order dated the 22nd August, 1968, sent the report of the Police to the Divisional Inspector of Police for scrutiny in the light of the report submitted by him in the other case.

In the meantime, however, he stayed the issue of notices to the Opposite Parties. The Divisional Inspector of Police reported that only six persons against whom the proceeding under section 107 of the Code of Criminal Procedure was already going on should be ordered to execute bonds under section 117 (3) of the Code. The learned Magistrate heard both the parties and passed the following order on 14-9-1968:

"Since another 107 proceeding is going on between both the parties, there is no need of keeping this proceeding alive. This is dropped."

However, he ordered the opposite parties to show cause why they should not be asked to execute ad interim bond in the other proceeding.

3. The main point urged before me is one of law. Mr. Gorakh Singh appearing for the petitioner has submitted that after passing the order under section 107 of the Code of Criminal Procedure, the Magistrate has no jurisdiction to drop the proceeding unless the stage of S. 119 of the Code reaches. The argument raises question of considerable importance. Section 119 of the Code reads as follows:

"If, on an inquiry under Section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and, if such person is in custody only for the purposes of the inquiry, shall release him, or, if such per-

son is not in custody, shall discharge him."

The words "in manner hereinafter provided" occurring in section 107 (1) of the Code of Criminal Procedure are significant words, and the manner provided is laid down in section 112 of the Code, when a Magistrate exercises his discretion and decides to require any person to show cause. The notice to show cause must be a notice which specifies the requirements of section 112 of the Code. In sections 113 to 116 of the Code, the modes for securing attendance of the persons proceeded against are laid down. Section 117 of the Code lays down the stage when the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and take such further evidence as may appear necessary. The final stage of the inquiry is reached when the Magistrate under Section 119 of the Code passes an order discharging the person proceeded against, when on inquiry it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be.

4. A Magistrate under Section 107 of the Code is not required to examine the person proceeded against until at a much later stage when he proceeds to act under Section 117 of the Code. The proceeding before the Magistrate under Section 107 becomes judicial only from the stage of inquiry under this section, but before this stage is reached and before any notice to show cause is issued under Section 112 of the Code, a Magistrate has inherent power to reconsider the truth or falsehood of the information received by him. No hard and fast rule can be laid down about the quality and character of the information on which the Magistrate should or should not act.

5. In the present case, I have already stated that the Sub-divisional Magistrate on a perusal of the protest petition filed on behalf of the opposite parties entertained doubt regarding the allegations contained in the report submitted by the Deo Police. In my view, he was perfectly justified in sending the Police report for verification by the Divisional Inspector of Police. From the report submitted by the Divisional Inspector of Police, it is clear that the persons named in the petition filed by the petitioner did not appear to be ring-leaders and it was not thought proper to round up the whole villagers. In view of the fact that a proceeding under section 107 of the Code of Criminal Procedure was already going on against six members who were ring-leaders, the Magistrate was perfectly justified in dropping the proceeding against the opposite parties. In this view of the matter, I do not find any il-

legality or want of jurisdiction in the impugned order passed by the Magistrate dropping the proceeding.

6. I do not find any merit in this application which is accordingly dismissed.

Petition dismissed.

AIR 1970 PATNA 136 (V 57 C 22)

ANWAR AHMAD AND

M. P. VERMA, JJ.

MT. Azia and others, Appellants v. Sukhai Biswas, Respondent.

A. F. A. D. No. 232 of 1966, D/- 18-3-1969, from Order of 3rd Addl. Sub. J., Purnea, D/- 3-2-1966.

Tenancy Laws — Bihar Tenancy Act (8 of 1885), S. 106 — Scope — Suit to declare the lands as belonged to plaintiffs' ancestors and for correction of survey entry — Defendants alleged to have no interest whatever — Suit transferred to Civil Court on the ground that it involved questions of title — Held, Settlement Officer could neither entertain the plaint nor transfer it to Civil Court — Civil Court too would have no jurisdiction to try it — Transfer by Settlement Officer is not presenting of plaint within the meaning of O. 4, R. 1 (1) of Civil P. C. — Patna High Court Rules and Circular Orders barred receipt of plaint by post. AIR 1955 NUC (Madh B) 3774, Diss. — (High Court Rules and Orders — Patna High Court Rules and Circular Orders Vol. I, Preliminary Chapter, R. 10).

A suit filed under S. 106 of the Bihar Tenancy Act prayed (1) for declaration that the lands in question belonged to plaintiffs' ancestors and that the defendants had no sort of interest therein and (2) for the necessary correction in the survey record which showed that the defendants owned 8 annas share in such lands with the plaintiffs. The Assistant Settlement Officer transferred the plaint in the suit to Civil Court for decision on the questions of title.

Held, since the suit as framed did not fall under Section 106 of the Bihar Tenancy Act the Assistant Settlement Officer had no jurisdiction to entertain the plaint or to transfer it to the Civil Court. The receipt of the plaint in the Civil Court would not have the effect of curing the irregularity because the transfer of the plaint by the Settlement Officer to the Civil Court was not "presenting a plaint" within the meaning of the expression in O. 4, R. 1 (1) of Civil P. C. by which act alone a suit could be instituted in a civil court. The expression "presenting a plaint", in its ordinary

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dictionary meaning, connoted that it should be handed over to the Court by some human agency. It could not include the transfer of a plaint from one court to another. The Code of Civil Procedure, although providing for the transfer of an execution, made no provision for the transfer of a plaint. Further, under R. 10 of the Preliminary Chapter of Patna High Court's General Rules and Circular Orders (Civil) Vol. 1, no document or proceeding required to be presented to or filed in court, which was sent by post or telegraph, could be received or filed in court. AIR 1955 NUC (Madh B) 3774, Diss.; AIR 1923 Pat 213, Foll.; AIR 1931 All 507 (SB) & AIR 1949 All 367 (FB) & AIR 1959 All 487 Ref. (Paras 6 to 8)

Cases Referred: Chronological Paras
(1959) AIR 1959 All 487 (V 46) =

ILR (1958) 1 All 64, Shiv Narain
v. Deputy Collector (C) Mathura 7

(1955) AIR 1955 NUC (Madh B) 3774
(V 42), Nathulal v. Shivrinarayan 7

(1949) AIR 1949 All 367 (V 36) =
ILR (1949) All 973 (FB), Kanhaiya
Lal v. Panchayati Akhara 7

(1931) AIR 1931 All 507 (V 18) =
1931 All LJ 777 (SB), Wali
Mohammad Khan v. Ishak Ali
Khan 7

(1923) AIR 1923 Pat 213 (V 10) =
4 Pat LT 68, E. A. Moore v. Rai
Babu Gulab Chand Saheb 5, 6

Raghunath Jha and Pitambar Mishra,
for Appellants; S. A. Ghafoor, for Res-
pondent.

ANWAR AHMAD, J.: The suit giving rise to this appeal was originally filed under Section 106 of the Bihar Tenancy Act, hereinafter referred to as the Act, before the Assistant Settlement Officer Purnea, on the 2nd July 1958. On the 13th December 1958, the Assistant Settlement Officer found that complicated questions of inheritance, survivorship and title were involved in the case. He, therefore, transferred the suit to the Civil Court for disposal.

2. The case of the plaintiff-appellants was that Tabloo Mandal, father of the plaintiffs, had a brother Lahsun Mandal. Lahsun died leaving a son Parsan. Both the brothers were members of a joint Hindu family. Parsan died leaving a son Chalbali. Chalbali died unmarried and the plaintiffs came in possession of the entire lands by survivorship. During the recent survey operation, these lands came to be recorded under Khata No. 61; but the Khata showed that the defendant-respondent also had got 8 annas interest in this Khata and his possession over some other plots was also recorded while some other plots were recorded in the joint possession of the parties. On the case of the appellants, the respondent had no title whatso-

ever to the lands in dispute nor was he related to them in any way. He was a labourer and had been wrongly set up by the enemies of the appellants.

3. The case of the respondent was that Piar Chand, father of Tabloo, had three sons, namely, Tabloo, Lahsun and Lachhman. The lands in dispute were acquired by Tabloo and Parsan jointly. Parsan died leaving his son Chalbali. They were separate. On the death of Chalbali, Manglu, son of Lachhman, came in possession of his eight annas share and, on his death, the respondent, the son of Manglu, came in possession thereof and, as such, the survey record-of-rights was correctly prepared.

4. The trial Court found that the respondent was not the grandson of Piar Chand and he did not belong to the family of the appellants. It further found that the respondent had no title to the lands nor was he in possession of the same, and, as such, the survey entry was wrong. On these findings, the suit was decreed.

5. On appeal by the respondent, the Court of appeal below, on a scrutiny of the evidence on record, affirmed these findings but dismissed the suit on the ground that, as the disputed question of title was involved in the case, the Assistant Settlement Officer had no jurisdiction to entertain the plaint.

It further held, following the Bench decision of this Court in E. A. Moore v. Rai Babu Gulab Chand Saheb, AIR 1923 Pat 213, that, if the Assistant Settlement Officer had no jurisdiction to decide the question of title under section 106 of the Act, he could not entertain the plaint nor could he transfer it to the Civil Court and, as such, the decision given by the learned Additional Munsif was without jurisdiction.

6. Mr. Raghunath Jha for the appellants has, in the first instance, seriously contended that the suit as framed was a suit falling under section 106 of the Act. This argument of learned counsel is without any force. The scope of such a suit is limited by the words of section 106 of the Act. It is a suit for "the decision of any dispute regarding any entry made in or any omission" from the record. Thus, the only relief which a plaintiff can obtain in a suit under section 106 is the correction of the record on the basis of possession. A reading of the plaint as a whole leaves no room for doubt that complicated questions of inheritance, survivorship and title have been raised therein. So far as the reliefs are concerned, the first relief claimed by the plaintiffs is that it should be declared that the disputed lands are their ancestral property and the defendant has no interest therein. The second relief, which is for correction of the survey entry, has been

made dependent on the first relief. It is thus, clear that the main relief claimed by the appellants was a declaration of title in their favour as against the respondent who, according to them, had no title whatsoever. The Court of appeal below was, therefore, right in holding that the suit as framed did not fall under section 106 of the Act, and, as such, the Assistant Settlement Officer had no jurisdiction to entertain the plaint or to transfer it to the Civil Court.

It will be useful to quote the following lines from the Bench decision in E. A. Moore's case, AIR 1923 Pat 213:

"In my opinion, it is impossible to contend that the suit does not raise a question of title as between rival proprietors. I hold that the Settlement Officer had no jurisdiction to entertain this suit. That being so he had no jurisdiction to make any order under section 106 transferring the case to a competent Civil Court for trial. The Civil Court accordingly had no jurisdiction to try the suit."

The facts of that case were very much similar to those of the present case and I respectfully follow the principles laid down by their Lordships.

7. It is next contended by learned counsel for the appellants that, even if the order of the Assistant Settlement Officer transferring the suit to the Civil Court was an irregularity, no sooner had the plaint been admitted by the Civil Court than the irregularity was cured. This submission of learned counsel has no force. It overlooks the provisions of sub-rule (1) of Rule 1 of Order IV of the Code of Civil Procedure, which runs as follows:

"Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf."

This sub-rule lays down that every suit has to be instituted by "presenting a plaint". The expression "presenting a plaint", in its ordinary dictionary meaning, connotes that it should be handed over to the Court by some human agency. It cannot include the transfer of a plaint from one Court to another. The Code of Civil Procedure, although it provides for the transfer of an execution makes no provision for the transfer of a plaint.

Learned counsel relied on Wali Mohammad Khan v. Ishak Ali Khan, AIR 1931 All 507 (SB), Kanhaiya Lal v. Panchayati Akhara, AIR 1949 All 367 (FB), and Shriv Narain v. Deputy Collector (C) Mathura, AIR 1959 All 487. In none of these cases, however, the plaint was transferred from one Court to another. In these cases, there were irregularities in the presentation of the plaint, but in the instant case there was no defective presentation but a

transfer of the plaint from the Revenue to the Civil Court.

Reliance has also been placed on Nathulal v. Shrivnarayan, AIR 1955 NUC (Madh B.) 3774. In that case, the plaint was sent to the Court by post. It was held to be a proper presentation. I am, however, unable to subscribe to this view on the ground that, under rule 10 of the Preliminary Chapter of this Court's General Rules and Circular Orders (Civil), Volume I, no document or proceeding required to be presented to or filed in Court, which is sent by post or telegraph, can be received or filed in Court.

8. Both the points raised on behalf of the appellants having failed, the appeal is dismissed; but there will be no order for costs.

Appeal dismissed.

AIR 1970 PATNA 138 (V 57 C 23)

TARKESHWAR NATH AND

K. K. DUTTA, JJ.

Ripumadhusudan Prasad Singh, Appellant v. Rama Shankar Prasad Singh and others, Respondents.

A. F. A. D. No. 787 of 1963, D/- 21-3-1969, from order of Addl. Dist. J. Arrah, D/- 10-7-1965.

Evidence Act (1872), S. 41 — Provincial Insolvency Act (1920), S. 4 (2) — Judgment in insolvency proceeding — Binding nature.

A judgment is conclusive proof, as against persons and privies, of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based. But there are certain exceptions to this general rule and the provisions contained in section 41 are by way of exceptions. This section consists of two parts. The first one makes certain judgments, orders or decrees relevant, and the second one makes those judgments conclusive evidence in certain matters. In order that a judgment should come within the purview of section 41, it must be (1) of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction and (2) it must (a) confer upon or take away from any person any legal character, or (b) declare any person to be entitled to any such character, or (c) to be entitled to any specific thing, not as against any specified person but absolutely. Case law discussed.

(Para 11)

Under S. 4 (2) of the Provincial Insolvency Act a decision of an Insolvency court is final between a debtor and the debtor's estate on the one hand and all

claimants against him or it and all persons claiming through or under them or any of them on the other hand. Thus a decision is not binding on the plaintiff who were not debtors or claimants as against the debtors inasmuch as they were not parties to the insolvency case or the appeal arising therefrom. Section 4 (2) of the Act is not at all attracted to the case.

(Para 14)

Cases Referred: Chronological Paras

- (1956) Misc. Appeal No. 226 of 1951,
D/- 28-11-1956 (Pat) 8
- (1947) AIR 1947 Nag 161 (V 34) =
ILR (1947) Nag 85 (FB), D. G.
Sahasrabudhe v. Kilachand Deo-
chand & Co. 15
- (1937) AIR 1937 Rang 369 (V 24),
Hla Gyaw U v. U Tun Kyaw Sen 13
- (1931) AIR 1931 Mad 441 (V 18) =
ILR 54 Mad 601 (SB), In the mat-
ter of P. C. Venkataramanayya
Fantulu 12, 15
- (1928) AIR 1928 Sind 121 (V 15) =
22 Sind LR 105, Radhakishin v.
Mt. Gangabai 15
- (1924) AIR 1924 Mad 662 (V 11) =
46 Mad LJ 580, Official Assignee
of Madras v. Official Assignee of
Rangoon 12
- (1914) AIR 1914 Bom 8 (V 1) =
ILR 38 Bom 309 (FB), Kalyan-
chand Lal Chand v. Sitabai 17
- (1896) 65 LJ QB 616 = (1896) 2
Q. B. 455, Ballantyne v. Mackin-
non 15

Ray Parasnath and Vinod Chandra, for Appellant; Jaleshwar Prasad and Chandra Shekhar Prasad, (for Nos. 1, 6, 11 (a) and 11 (b).) and Lakshmi Narayan Yadav, (for Nos. 2 to 4 and 7 to 10), for Respondents.

TARKESHWAR NATH, J.:— This appeal by defendant No. 1 arises out of a suit for a declaration that defendant No. 2 had no right and interest in the property conveyed by the sale deed dated 21st November, 1957, or to execute the said sale deed in favour of defendant No. 1 and moreover defendant No. 1 had not acquired any right, title and interest in the said property. The plaintiffs wanted a further declaration that the said sale deed was not binding upon them.

2. The case of the plaintiffs was that one Chandramadho Singh had two wives. From the first wife he had a son, Gopal Saran Singh (defendant No. 2). Rambha Devi (plaintiff No. 6) is the wife of defendant No. 2, whereas plaintiffs 7, 8, 9 and 10 are the minor sons of defendant No. 2. The name of the second wife of Chandramadho Singh is Keshmati Kuer (plaintiff No. 5). Plaintiffs 1 to 4 are the sons of Chandramadho Singh by his second wife, Keshmati Kuer. Chandramadho Singh died in December, 1945, but de-

fendant No. 2 had separated from his father and step brothers (Plaintiffs Nos. 1 to 4) during the lifetime of his father. Defendant No. 2 executed a deed of gift on 9-3-1940 in favour of his wife (plaintiff No. 6) in respect of his entire share in the family property which was one-sixth. Later on, defendant No. 2 filed Title Suit No. 10 of 1941 for partition of his share in all the properties (inasmuch as there was no partition by metes and bounds till then). That suit was compromised on 28-6-1941 and the deed of gift was accepted as valid. Defendant No. 2 was given a monthly allowance of Rs. 25/- by that compromise and he had no concern with the properties. In the year 1946 one Lachmi Prasad Singh, Pleader, was appointed guardian by the Court to manage the properties of the minor sons and grandsons of Chandramadho Singh, but the said guardian resigned and thereafter the mother of plaintiffs 1 to 4 was appointed guardian. She was discharged from the guardianship by the order of the High Court on 1-9-1955 and thereafter plaintiff No. 1 began to manage the family properties, as he had attained majority. In the year 1954 the proprietary interest of the said family vested in the State of Bihar, but the plaintiffs continued in possession of the bakasht and zirat lands. Defendant No. 2 had no right, title and interest in the lands described in Schedules Ka and Kha of the plaint and he had no right to transfer those properties as the plaintiffs were in possession thereof. The land bearing plot No. 233 of Khata No. 755 did not at all belong to the plaintiffs or their family and the plaintiffs had not acquired title to any portion of that plot by exchange, but defendant No. 2 fraudulently included that land also in the sale deed dated 21-11-1957. Defendant No. 2 fell in bad company and he used to drink wine. Defendant No. 1 took advantage of the weaknesses of defendant No. 2 and got the said sale deed executed by him fraudulently, without paying a single pie as a consideration. Moreover, defendant No. 2 had no necessity at all to take any loan and the aforesaid sale deed was neither for consideration nor for legal necessity. The plaintiffs learnt about the said sale deed on 30-11-1957, and by the execution of that sale deed a cloud had been cast on their title, although they were in possession of the lands transferred by defendant No. 2, barring the land bearing plot No. 233. The plaintiffs thus filed the suit for the reliefs indicated above.

3. Defendant No. 2 filed a written statement supporting the case of the plaintiffs and alleged that no consideration was paid to him in respect of the

said sale deed. He gave his left thumb impression and signature on a blank stamp paper under the influence of defendant No. 1. Defendant No. 1 contested the suit on grounds, *inter alia*, that the share of defendant No. 2 was one-fifth and not one-sixth in the family properties and defendant No. 2 got the said share by partition, and he was separately in possession of that share. Defendant No. 2 was neither a drunkard nor a vagabond, and he executed the sale deed in question for legal necessity after receiving full consideration for it. He fully understood the contents of the sale deed before executing it. The portion of survey plot No. 233 sold by defendant No. 2 had been obtained by the family of defendant No. 2 by an exchange. The plaintiffs had full knowledge of that sale deed much earlier than 30th November, 1957, and there was no fraud at all in the execution of that sale deed.

4. The issues framed by the trial Court were the following:—

"1. Is the sale deed dated 21-11-57 binding upon the plaintiffs and can it affect the property in suit?

2. Is the sale deed, dated 21-11-57 genuine, valid and for consideration and was (it?) executed for legal necessity?

3. Whether the defendant No. 2 had any right to execute the sale deed?

4."

5. The trial Court held that the sale deed dated 21-11-1957 was not binding on the plaintiffs. No consideration was paid in respect of that sale deed and it was not for legal necessity. Defendant No. 2 had no right to execute that sale deed. In view of these findings, the trial Court (Additional Subordinate Judge) decreed the plaintiffs' suit on contest against defendant No. 1.

6. Defendant No. 1, being aggrieved by the said decree, preferred an appeal. The learned Additional District Judge held that Gopal Saran Singh (Defendant No. 2) had never any title to the land bearing survey plot No. 233 and his right, title and interest in the other lands conveyed by the aforesaid sale deed (Ext. B) had been already extinguished by the deed of gift dated 9-3-1940 (Ext. 7) and the compromise decree (Ext. 13/b) and that he was never in possession of those lands after the year 1941. He thus came to the conclusion that plaintiffs 1 to 6 had title to the properties other than Plot No. 233 sold by Ext. B. He further held that consideration was paid in respect of that sale deed, but there was no legal necessity for the execution of the sale deed, and in fact the finding of the trial Court in that respect (which was against defendant No. 1) was not challenged before him. He granted the plaintiffs a

declaration that the sale deed was not binding on them. He dismissed the appeal, and hence defendant No. 1 has filed this second appeal. Gopal Saran Singh (defendant No. 2) had been impleaded as respondent No. 11, but he died during the pendency of this appeal and on his death his heirs have been substituted and some of them are already on the record as respondents 6 to 10.

7. The learned Additional Subordinate Judge held that the sale deed dated 21-11-1957 executed by defendant No. 2 was not for legal necessity, and it appears from the judgment of the Additional District Judge that the Advocate appearing on behalf of the appellant (Defendant No. 1) did not advance any argument challenging that finding of the trial Court, and accordingly that finding was affirmed by the Additional District Judge. Learned Counsel for the appellant could not assail this finding in this second appeal. The position thus is that there being no legal necessity for the execution of that sale deed, plaintiffs 6 to 10 (the wife and sons of defendant No. 2) are entitled to the declaration that the said sale deed was not binding on them, and the decree passed in their favour can be affirmed on this score itself. But apart from it, both the Courts have held that on account of the deed of gift dated 9-3-1940 (Ext. 7) and the compromise decree (Ext. 13/b), defendant No. 2 had no right at all to execute the sale deed dated 21-11-1957 in favour of defendant No. 1. This finding has been arrived at on a consideration of the oral and documentary evidence.

8. Learned Counsel for the appellant submitted that in view of the judgment dated 28-11-1956 (the certified copy of which has been marked Ext. D) of this Court in Miscellaneous Appeal No. 226 of 1951 (Pat) holding that the aforesaid deed of gift and the compromise were collusive and inoperative, it was not open to the Courts below to consider the other evidence about the validity or otherwise of the deed of gift and the compromise, inasmuch as that judgment in an insolvency proceeding was a judgment in rem. In order to appreciate this contention it is essential to mention a few facts. On 11-2-1950, Gopal Saran Singh, present defendant No. 2, had filed an application before the District Judge of Shahabad for being declared as an insolvent, and that application had been registered as Insolvency Case No. 2 of 1950. His case was that he was not possessed of any property, except an allowance of Rs. 25 per month and he was indebted to the extent of Rs. 7214/10/9 pias which he could not pay. That application was opposed by Bhola Ram Marwari and others on the ground

that the said applicant owned vast properties and as such was not entitled to be adjudged an insolvent. They alleged that the said applicant had executed a bogus deed of gift in the name of his wife to defeat his creditors. The Insolvency Court, by its order dated 28-2-1951, rejected the said application, and hence Gopal Saran Singh filed Miscellaneous Appeal No. 226 of 1951 in this Court. A Division Bench of this Court dismissed that appeal on 28-11-1956, holding that the deed of gift was a collusive deed and the compromise petition based on that deed was similarly a collusive one brought about to shield the appellant (defendant No. 2) from his creditors. In view of that finding it was held that the then appellant failed to establish that he was unable to pay his debts and hence he was not entitled to any protection order from the Insolvency Court. Learned counsel for the appellant relied on the provisions of Section 41 of the Evidence Act which reads thus:—

"A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof — that any legal character which it confers accrued at the time when such judgment, order or decree came into operation.

that any legal character to which it declares any such person to be entitled, accrued, to that person at the time when such judgment, order or decree declares it to have accrued to that person:

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease:

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property".

9. Learned Counsel submitted that, generally speaking, judgment in a suit only concerned those persons who were parties to it and other persons were not affected by it. But there was an exception in respect of a final judgment of a competent Court in the exercise of insolvency jurisdiction. According to him, the judgments which come within the

purview of Section 41 are known as judgments in rem and they would bind even persons not parties to the proceeding in which those judgments were given. He laid stress on the expression "which declares any person to be entitled to any specific thing" occurring in Section 41 and also upon the last clause of that section, according to which a judgment declaring any person to be entitled to a certain property would be conclusive proof of the fact that that property should be deemed to be the property of that person from the time of that judgment. He pointed out that the effect of the judgment of the High Court referred to above was that the property, which was the subject matter of the deed of gift dated 9th March, 1940, continued to be the property of Gopal Saran Singh (defendant No. 2), inasmuch as that deed was held to be collusive and, similarly, the interest of that defendant was not, in any way, jeopardised or extinguished by the compromise decree in Title Suit No. 10 of 1941. According to him, in this manner, Gopal Saran Singh was declared to be entitled to that property, and this finding was conclusive and binding not only against the parties to the insolvency case but also against all the persons including even the plaintiffs. He further contended that this question could not be reargued in the present suit, and it was not open to the Courts below to consider the other evidence and come to a different conclusion with regard to the effect of the deed of gift and the compromise decree.

10. Learned Counsel appearing for some of the respondents, on the other hand, urged that there was no declaration at all in respect of the ownership of Gopal Saran Singh (Defendant No. 2) with regard to any property by that judgment, and, in any event, the plaintiffs not being parties in that insolvency case, the said judgment was not binding on them. According to him, the judgment relied upon was a judgment in personam and not in rem. He pointed out that the word 'absolutely' occurring in Sec. 41 was of great significance and, in no event, there was any declaration in favour of defendant No. 2 absolutely.

11. A judgment is conclusive proof, as against persons and privies, of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based. But there are certain exceptions to this general rule and the provisions contained in Section 41 are by way of exceptions. This section consists of two parts. The first one makes certain judgments, orders or decrees relevant, and the second one makes those judgments conclusive evidence in

certain matters. In order that a judgment should come within the purview of Section 41, it must be (1) of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction and (2) it must (a) confer upon or take away from any person any legal character, or (b) declare any person to be entitled to any such character, or (c) to be entitled to any specific thing, not as against any specified person but absolutely. According to learned counsel, the case of the appellant came within the last part indicated by me in Clause (c), referred to above. It is true that the judgment relied upon was a judgment of a competent Court in the exercise of insolvency jurisdiction, but the question for consideration is as to whether by that judgment any declaration was given that defendant No. 2 was entitled to any specific thing absolutely.

12. The learned Additional District Judge referred to Official Assignee of Madras v. Official Assignee of Rangoon, AIR 1924 Mad 662, but that decision is not relevant, inasmuch as the question which arose for consideration in that case was as to whether an order made by an Insolvency Court declaring that a particular person was never a partner of a firm and was never adjudged an insolvent by that Court was a judgment in rem and it was held that it was not so as it did not confer or take away any legal character within the meaning of Sec. 41. In the present case, learned counsel for the appellant has not submitted that any legal character was conferred by the judgment in question. The learned Additional District Judge has referred to "In the matter of P. C. Venkataramanayya Pantulu", AIR 1931 Mad 441 (SB). The earlier decision of the Madras High Court in the case of the Official Assignee of Madras, AIR 1924 Mad 662 was relied upon, and it was further held that it was not enough to show that under the judgment of an Insolvency Court one had become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person, but absolutely. The relevant observations are these:

"So far as I could see, there is nothing in the Insolvency Act for declaring the title of any portion (person?) to a specific thing in the manner provided for in Section 41 of the Evidence Act. The title to the specific thing should be declared absolutely and not merely as against another person, and in such a case only it would have to be conclusive as against the whole world".

In that case a question arose whether an actionable claim, such as a right to recover a debt from any person, could be deemed to come under "any specific

thing" mentioned in Section 41, and it was held that the final judgment (Ext. 13) of the appellate Court in insolvency jurisdiction, holding that L. V. N. Sastri was entitled to recover the debt, did not amount to a judgment in rem within the meaning of Section 41 of the Evidence Act so as to bind persons who were not parties or privies to that case.

13. Learned counsel for the appellant relied on Hla Gyaw U v. U Tun Kyaw Sen, AIR 1937 Rang 369, but the facts of that case are entirely different, inasmuch as the receiver appointed in that case had moved the Court to avoid the transfer of certain lands made by the insolvent Hmwe Ban in favour of his wife, Ma Tarokma, by registered deed on 25th May 1934, which was prior to the application for adjudication as an insolvent and the order of adjudication. The wife, in turn, sold those lands to the appellant, Hla Gyaw U by a registered deed dated 14th May, 1935. The Court found that the transfer made by the insolvent to his wife was fraudulent and annulled it. The receiver then sold those four pieces of paddy land (which were transferred by the insolvent in favour of his wife) to one Pu Hla Aung on 21-1-1936. On 1-2-1936, Hla Gyaw U filed an application to pay into Court the amount that had been bid at the auction of those lands. He filed another application asking the Court to direct the receiver to set aside the sale of those paddy lands and made a prayer for enquiry as to the title in respect of the paddy lands as between himself and the receiver. This application was dismissed and the appeal against the order of dismissal also was dismissed. In second appeal by Hla Gyaw U, it was urged that the decision to the effect that the gift to Ma Tarokma had been avoided was not binding on him, in view of the fact that that decision was reached in an enquiry in which he was not a party. Spargo, J., referred to Section 4, sub-section (2) of the Provincial Insolvency Act and came to the conclusion that the appellant, Hla Gyaw U should be regarded as a claimant through Ma Tarokma and he was bound by the finding that the transfer to Ma Tarokma was void, although he was not a party to the application, inasmuch as the decision to that effect was a decision in rem and was valid against all persons. It is quite obvious from these facts that in that case the transfer (the gift) in question had been avoided at the instance of the receiver and that decision was arrived at in a proceeding under Section 4 of the Provincial Insolvency Act. In the instant case, however, the deed of gift dated 9th March, 1940, in favour of plaintiff No. 6 has not been avoided and there was no proceeding under Section 4 of the Pro-

vincial Insolvency Act. Moreover in the case relied upon by learned counsel the decision that the gift was not valid was arrived at in a proceeding in which the wife, Ma Tarokma, was a party, and as such it could be reasonably held that her transferee, Hla Gyaw U was claiming title through her and he was bound by the decision given in the proceeding under Section 4 initiated at the instance of the receiver. In my opinion, this decision is not of any assistance to the appellant.

14. Learned counsel for the appellant relied on the provisions of sub-sections (1) and (2) of Section 4 of the Provincial Insolvency Act, and they read thus:

"4. (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between on the one hand, the debtor and the debtor's estate and on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

(3)"

He contended that the decision of the High Court in Miscellaneous Appeal No. 226 of 1951 (referred to above) was binding on the present plaintiffs, according to the provisions of sub-section (2) of Section 4. But this contention cannot be accepted. According to sub-section (2), the decision shall be final between a debtor and the debtor's estate on the one hand and all claimants against him or it and all persons claiming through or under them or any of them on the other hand. The present plaintiffs were admittedly not the debtors, but besides this they were not the claimants as against the debtor (defendant No. 2), inasmuch as they were not parties to the insolvency case or the appeal arising therefrom. Moreover, the plaintiffs were not claiming through the persons who were the claimants in the insolvency case. The position thus is that the provisions of Section 4 (2) are not at all attracted.

15. Learned counsel for the appellant has not been able to point out any provision in the Provincial Insolvency Act for declaring the title of any person to

a specific thing absolutely which alone could make that declaration conclusive even as against the persons who were not parties to a proceeding under that Act. I would now refer to D. G. Sahasrabudhe v. Kilachand Deochand and Co., AIR 1947 Nag 161 (FB). The question referred to the Full Bench was as follows:

"When an act of insolvency which forms the basis of the order of adjudication consists of a certain transfer can the transferee question the correctness of that order in the subsequent proceedings for annulment and contend that the transfer is good when he was not a party to the adjudication proceedings?"

Pollock, J, referred to Section 41 of the Evidence Act and observed as follows:—

"The order of adjudication under that section is conclusive proof that any legal character which it confers or takes away accrued or ceased as stated in the order. It does not, however, appear to me that the order is conclusive proof of anything more than that the insolvent has been so adjudged. It seems to me that a judgment in rem is conclusive only as regards status but not as regards the grounds on which the order is based, see *Ballantyne v. Machinnon*, (1896) 65 LJQB 616; *Radhakishin v. Mt. Gangabai*, AIR 1928 Sind 121 and ILR 54 Mad 601 = (AIR 1931 Mad 441 (SB)), and that therefore the order adjudging the debtor insolvent is inadmissible in evidence as between third parties to prove that the act on which the order was based was an act of insolvency".

His Lordship answered that question by saying that it was open to the transferee to contend that the transfer was good. Sen, J., also held that under Section 41, Evidence Act, the order of adjudication in an insolvency case was admissible to prove the legal character of the debtor as an insolvent, but was inadmissible as against third parties to prove that the act on which the order was passed was an act of insolvency. His Lordship's answer to the said question was that the transferee could contend in subsequent proceeding for annulment that his transfer was good notwithstanding that the order of adjudication was based on the alleged transfer as being an act of insolvency. Bose, J., however, took a contrary view and answered the question referred to the Full Bench by saying that the transferee could not question the order of adjudication in the annulment proceedings either as regards the fact of insolvency or as regards the act on which the order was founded, and the remedy of the transferee was to appeal under Section 75 as a person aggrieved. In accordance with the opinion of the majority, the answer to the question referred to was that the transferee, who was

not a party to the adjudication proceedings could contend in subsequent proceedings for annulment that his transfer was good notwithstanding that the order of adjudication was based on the alleged transfer as being an act of insolvency.

16. In the present case, the question which arose for determination in Miscellaneous Appeal No. 226 of 1961 was as to whether Gopal Saran Singh, defendant No. 2 (the appellant in that appeal) was entitled to be adjudicated as an insolvent, and the decision given on that question is of course conclusive, but only with regard to the fact that the said appellant was not adjudicated as an insolvent and that his application for being declared as an insolvent failed and was dismissed. The ground on which that application failed cannot be deemed to be conclusive so far as the present plaintiffs are concerned, inasmuch as they were not parties to the insolvency case. It is true that the question whether the deed of gift executed by defendant No. 2 in favour of the plaintiff No. 6 was a collusive one or not was gone into in that miscellaneous appeal, but the finding arrived at on that question is conclusive only between the parties to that case and not against the present plaintiffs. The determination of the nature of the deed of gift or the compromise was not absolute as against all the persons, and hence the judgment relied upon by learned counsel for the appellant was not a conclusive proof of the title of defendant No. 2 in respect of the properties which he transferred in favour of defendant No. 1 on 21-11-1957. I am thus of the view that the learned Additional District Judge was right in holding that the findings arrived at by the High Court in Miscellaneous Appeal No. 226 of 1961 were not binding on the present plaintiff. The position thus is that it was open to him to consider the other evidence as well as regards the title claimed by the plaintiffs on the basis of the deed of gift and the compromise.

17. Mr. Jaleshwar Prasad appearing for some of the respondents referred to Kalyanchand Lalchand v. Sitabal, ILR 38 Bom 309 = (AIR 1914 Bom 8) (FB), but in that case the question for consideration was whether the judgment refusing probate was as much within the scope and intention of Section 41 of the Evidence Act as a judgment granting probate and whether the judgment in the probate proceeding operated as *res judicata*. It was held that Sec. 41 was not applicable to the judgment of the appellate Court refusing probate and the said judgment in the probate proceeding operated as *res judicata* between the parties under Section 83 of the Probate

and Administration Act (V of 1881) and Section 11 of the Civil Procedure Code. This decision is not relevant for the present purpose. He further urged that the plaintiffs' suit could be decreed even on the basis of the finding of the learned Additional District Judge that Rambha Devi (plaintiff No. 6) was in possession of the gifted properties and that Gopal Saran Singh (defendant No. 2) had no concern with those properties. He submitted that the possession of plaintiff No. 6 and the other plaintiffs should be deemed to be adverse, and on that basis they had acquired a title in respect of the properties in question. This was, however, not the ground on which the plaintiffs claimed any relief in the present suit, and as such defendant No. 1 was not called upon to meet this ground. I thus do not find any merit in this contention: but the plaintiffs have been rightly granted a decree on the basis of the deed of gift and the compromise.

18. No other point was raised by learned counsel for the appellant. There is no merit in this appeal and it is accordingly dismissed with costs payable to respondents 1 and 6.

19. DUTTA, J.:— I agree.

Appeal dismissed.

AIR 1970 PATNA 144 (V 57 C 24)

TARKESHWAR NATH AND

K. K. DUTTA, JJ.

Gauri Shanker Sah and others, Appellants v. Ramchander Sah and others, Respondents.

A. F. A. D. No. 510 of 1966, D/- 18-4-1969, from decree of 2nd Addl. Dist. J., Chapra, D/- 26-4-1966.

(A) Succession Act (1925), Ss. 74, 95— Will — Construction of — Interest created whether is absolute or limited one — Will has to be considered as a whole.

The recitals in a will in each case have to be considered in order to determine as to whether the interest created in favour of one person or the other was an absolute one or a limited one. The will has to be read as a whole, meaning thereby that the true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. Effect should be given to every disposition contained in the will as far as it is legally possible unless the law prevents effect being given to it. But if there were two repugnant provisions conferring successive interests, a Court of construction will proceed to the farthest extent to avoid

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repugnancy, so that effect could be given to every testamentary intention contained in the will. AIR 1953 SC 7 & AIR 1963 SC 1703 & AIR 1964 SC 1323, Rel. on.

(Paras 11, 12)

(B) Succession Act (1925), Ss. 131 and 124 — Contingent bequest — Bequest in favour of B — Condition superadded that if he as well as his male issue would die without leaving behind any legitimate male issue then agnates of testator would get properties as absolute owner — Event of death of B or of his son though specified was uncertain — Provisions of S. 131 attracted and ulterior bequest in favour of agnates is contingent and subject to rules contained in S. 124 — Unless B dies during life time of testator i.e. specified uncertain event happens, legacy in favour of agnates cannot take effect. Case law discussed.

(Paras 14, 22)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Pat 40 (V 53) =
1965 BLJR 410, Tarkeshwari
Devi v. Ram Ran Bikat Prasad
Singh 12, 21
- (1964) AIR 1964 SC 1323 (V 51) =
(1964) 2 SCR 722, Ramachandra
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- (1963) AIR 1963 SC 1703 (V 50) =
(1963) Supp 2 SCR 834, Pearey
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- (1953) AIR 1953 SC 7 (V 40) =
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- (1950) AIR 1950 PC 32 (V 37) =
1950 All LJ 118, Sri Subramania-
swami Temple v. Ramaswami
Pillai 11
- (1942) AIR 1942 Cal 571 (V 29) =
ILR (1942) 2 Cal 363, Habibullah
v. Ananga Mohan Roy 17
- (1936) AIR 1936 Cal 643 (V 23).
Anukul Chandra v. Gurupada
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- (1935) AIR 1935 Pat 401 (V 22) =
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v. Shiolal Upadhyaya 20, 21
- (1933) AIR 1933 Pat 126 (V 20) =
ILR 12 Pat 18, Bashista Narain v.
Sia Ramchandra 13, 21
- (1932) AIR 1932 PC 172 (V 19) =
59 Ind App 268, Nasir Ali Khan
v. Mohammad Ali Khan 16, 17
- (1932) AIR 1932 PC 269 (V 19) =
59 Ind App 419, Indira Rani v.
Akhoy Kumar 12, 17
- (1926) AIR 1926 Pat 356 (V 13) =
7 Pat LT 631, Kamla Prasad v. Murli
Manohar 13
- (1925) AIR 1925 Bom 282 (2) (V 12) =
ILR 49 Bom 478, Gulbaji Ajisiji
and Co. v. Rustomji Kharsedji 15
- (1899) 3 Cal WN 478, Monohur
Mukerjee v. Kasiswar Mukerjee 14

(1896) ILR 23 Cal 563 = 23 Ind
App 18 (PC), Norendra Nath Sircar
v. Kamalabasini Dasi 13, 14

J. C. Sinha and Nageshwar Saran, for Appellants; Prem Lal and Gupteshwar Prasad (for Nos. 1 to 6) and M. S. Madhup (for Nos. 7 & 8), for Respondents.

TARKESHWAR NATH, J.: This appeal by the plaintiffs arises out of a suit for a declaration that the house including the site and Sahan appertaining thereto specified in schedule no. 2 of the plaint as well as the moveable properties kept in that house, as mentioned in schedule no. 3 of the plaint, belonged to them and that they were entitled to recover possession thereof by evicting the defendants therefrom. The plaintiffs made a prayer for allowing mesne profits and for permanently restraining the defendants from interfering with their possession after the granting of the said declaration. In the alternative, the plaintiffs asked for a decree for a sum of Rs. 1000 as the price of the moveable properties specified in schedule no. 3, in case they were not able to get a decree for recovery of possession of those moveables.

2. The plaintiffs' case was that one Mathura Ram left two sons, Gauri Shanker Sah (plaintiff no. 1) and Bhagwan Lal. Plaintiffs 2 to 5 are the sons of plaintiff no. 1, plaintiff no. 6 is the son of plaintiff no. 3, and plaintiff no. 7 the wife of plaintiff no. 1. Ramrati Kuer was the widow of Bhagwan Lal. Mathura Ram had a sister named Janki Kuer and she was married to Bisheshwar Sah son of Gurudeyal Sah of village Godana. Bisheshwar had no issue, either male or female, and so he kept Bhagwan Lal with himself. He executed a will in respect of his moveable and immoveable properties on 2-7-1893 and this will was a registered one. He provided in that will that he would remain the absolute owner of all the properties till his death but, after his death, his wife, Janki Kuer, would remain in possession of those properties; but she would have no right to transfer them. There was a further provision that after the death of Janki Kuer, Bhagwan Lal would become the absolute owner in respect of those properties and, after the death of Bhagwan and his wife, the son of Bhagwan would be the absolute owner of those properties. But if Bhagwan as well as his male issue would die without leaving behind any male issue, then the agnates of Bisheshwar Sah would be the absolute owners of those properties.

The plaintiffs alleged that the last clause of the will giving the properties to the agnates was repugnant and void and it could not curtail in any manner the absolute interest given to Bhagwan

Lal in clear and unambiguous terms. After the death of Bisheshwar Sah and Janki Kuer, all his properties came in possession of Bhagwan Lal as an absolute owner and he obtained a probate of the said will from the District Judge of Saran on 8-7-1904.

3. The case of the plaintiffs further was that apart from other houses, orchards and lands, Bisheshwar Sah (was?) the owner of a north facing residential house in village Godana, covering an area of about 1 katha 10 dhurs described in schedule no. 1 of the plaint. There was a Part land measuring about 2 kathas adjacent east of the said house and that land belonged to one Jagdish Bhagat alias Jaggu Bhagat, but it was purchased by one Ramnandan Gir in a Court sale held in an execution case, and the said purchaser sold that land to Bhagwan Lal orally for a sum of Rs. 50. Ramnandan Gir executed an unregistered sale deed in respect of that land in favour of Bhagwan Lal on 25-12-1911. There was another piece of land measuring about 15 dhurs adjacent south of the aforesaid house and that land belonged to one Ganaur Mahto, but he sold it to Bhagwan Lal orally for a sum of Rs. 15. In this manner, Bhagwan Lal came in possession of those lands lying adjacent to east and south of the house of Bisheshwar Sah and he made some extensions in the said house towards the east by making certain constructions. He further constructed a verandah and a latrine on the southern Part land. The house and the Sahar including the original house of Bisheshwar Sah as well as the subsequent acquisitions and additions made by Bhagwan Lal were described in schedule No. 2 Bhagwan died on 15-9-1925 and then his widow, Ramrati Kuer, came in possession of that house and other properties of Bisheshwar, except the orchard and the land which were dedicated orally by Bisheshwar for Dharamshala and celebration of Annakut.

Ramrati Kuer executed a gift in respect of all the properties on 11-4-1958 in favour of plaintiff No. 4, as a result of which the plaintiffs came in possession of those properties as donees. Ramrati died on 13-4-1958. The plaintiffs were the preferential heirs of Bhagwan Lal and Ramrati Kuer, and in that capacity as well they were the owners of the estate which at one time belonged to Bhagwan and his widow. Plaintiff No. 1 was duly recorded in the municipality in respect of the disputed house which was given to him by Ramrati Kuer. The defendants (agnates of Bisheshwar Sah) were anxious to usurp the properties left behind by Bisheshwar and they embarked on a frivolous litigation with Ramrati Kuer and plaintiff No. 1 in the year 1927 which continued even up to the High Court, but

they were unsuccessful throughout. On 10-7-1958 defendants 1 to 5 forcibly entered in the disputed house in which plaintiff no. 7 alone was living on that date and they took forcible and wrongful possession of the moveables kept in that house. Plaintiff no. 2 was seriously assaulted by defendants 2 to 5 and there was a criminal case against them which ended in acquittal on 31-3-1959. This emboldened them and they continued their possession wrongfully.

Apart from the title referred to above, the plaintiffs had acquired title in respect of the disputed properties even on the basis of adverse possession in respect of those properties. The plaintiffs thus filed the suit on 11-7-1959 for the reliefs indicated above.

4. The plea of defendants 1 to 6 was that the suit was barred by limitation and they alleged that, according to the said will of Bisheshwar Sah, Janki Kuer got a life estate only and, similarly on her death, Bhagwan Lal as well got a life estate, and on his death, Ramrati Kuer also got a similar estate. Bhagwan had left no male issue and, even if he would have any, he also would have got a limited interest till his life, but that contingency did not arise at all and as such, after the death of Bhagwan Lal without a male issue, the defendants (agnates) were entitled to all the properties as absolute owners thereof. Their case further was that Bhagwan did not make any construction and as such the plaintiffs were not entitled to claim any portion of the disputed land and house as belonging to Bhagwan Lal. They, however, admitted that the entire land and the house as described in schedule no. 2 of the plaint belonged to Bisheshwar Sah and the same devolved on Bhagwan Lal as a legatee, but for his lifetime only according to the will.

Ramrati Kuer did not get the properties as an heir of Bhagwan, but whatever right she had, it was under the will and the gift executed by her in favour of plaintiff no. 4 was a fraudulent one, inasmuch as she was extremely weak and was unconscious for several days before her death which took place on 13-4-1958. The plaintiffs were never in possession of the disputed house and they never paid any tax or rent in respect thereof. According to them, Gurudeyal Sah was their ancestor as well as that of Bisheshwar Sah and they were the descendants of Agandh Sah who was one of the two sons of Gurudeyal Sah. They denied the claim of the plaintiffs regarding adverse possession and alleged that they were entitled to the properties absolutely as being agnates of Bisheshwar Sah. There was a formal written

statement by the guardian ad litem of minor defendants 7 and 8.

5. The Additional Subordinate Judge held that Bhagwan Lal got an absolute interest in the properties of Bisheshwar Sah by the will dated 2-7-1893 and not a life interest. Ramrati Kuer and the plaintiffs had acquired title by adverse possession in respect of a portion of the suit properties. The portion of land described in Schedule no. 2 was acquired by Bhagwan Lal and the plaintiffs were entitled to it, but their case that the defendants had wrongfully carried away the moveables worth Rs. 1000 was not correct.

He found that the deed of gift dated 11-4-1958 executed by Ramrati Kuer in favour of plaintiff no. 4 was neither valid nor genuine, and hence plaintiff no. 4 did not acquire any title on the basis of that deed. He held that the suit was maintainable and it was not barred by limitation. In view of these findings, he decreed the suit in part and declared the plaintiffs' title in respect of the properties described in schedules 1 and 2 and granted them a decree for recovery of possession thereof.

6. Defendants 1 to 6 filed an appeal against the aforesaid decree. The Additional District Judge held that the estate conferred on Bhagwan Lal was not an absolute estate and as such, after the death of Bhagwan Lal on 15-9-1925, the estate which came to Ramrati Kuer was only a life estate and not an absolute estate. The plaintiffs failed to prove their title by adverse possession. They further failed to establish as to which portion of the disputed land described in schedule no. 2 was purchased by Bhagwan Lal and even the factum of sale of that portion or the identity thereof was not proved by them. He allowed the appeal, set aside the judgment and decree of the trial Court and dismissed the plaintiffs' suit. Hence, the plaintiffs have filed this second appeal.

7. Learned Counsel for the appellants submitted that the learned Additional District Judge had misconstrued the terms of the will (Ext. 9) dated 2-7-1893, and according to the true conception, Bhagwan Lal had acquired an absolute interest and not only a limited one. He contended that the last clause of the will giving an absolute interest to the agnates was repugnant, inoperative and void and the absolute interest given to Bhagwan Lal could not be curtailed by that clause. He further contended that even Ramrati Kuer had acquired an absolute interest, after her death the plaintiffs who were the heirs of Bhagwan Lal were entitled to the properties in suit as absolute owners. Learned counsel for the respondents, on the other hand, submitted that

the will had to be read as a whole and all the terms or clauses should be taken into account in order to determine the intention of the testator and no clause of it should be held to be repugnant or void. He submitted that it was true that according to the tenor of the will Bhagwan Lal was given an absolute interest and the agnates of Bisheshwar Sah also were given absolute interest after the death of Bhagwan and that of his son, if any dying without leaving any male issue, but the real intention of the testator was to give only a life interest to Bhagwan Lal and not an absolute one. The interpretation of the will in this manner alone would be consistent, workable and reconcilable of all the terms.

8. In order to appreciate the respective contentions it is necessary to refer to the various terms of the will (Ext. 9) executed by Bisheshwar Sah. The relevant terms, as translated, can be classified in the following heads:

"(a) I, the executant, have no male or female issue. . . Hence I, the executant with the idea in view that my name and trace may be perpetuated, have kept with me and brought up and maintained Bhagwan Lal . . . who is related to me, the executant, as my nephew (Sarh-beta), since his childhood, with the consent of his mother and father and performed his marriage and Duragawan ceremonies."

"(b) Hence I, the executant, of my own accord and free will, in a sound state of my body and mind, with a view to avoid dispute in future execute this will, in favour of Bhagwan Lal, aforesaid and declare that till my death I, the executant shall remain in possession, occupation and appropriation of the entire immovable properties, mentioned below, moveable household goods, cash and ornaments as an absolute owner as usual . . ."

"(c) After the death of me, the executant, Mossammat Janki Kuer, wife of me, the executant, shall remain in possession, occupation and appropriation of the produce thereof, without the right of transfer thereof."

"(d) After the death of Mossammat Janki Kuer, aforesaid, the said Bhagwan Lal shall enter into possession, occupation and appropriation thereof as son, legal heir and an absolute owner."

(e) "After the death of Bhagwan Lal and his wife his legitimate male issue shall enter into possession and occupation thereof, as an absolute owner."

(f) "In case the said Bhagwan Lal as well as his male issue die without leaving behind any legitimate male issue in that case (illeg) agnate of me, the executant out of the agnates of me, the executant, shall enter into possession and appropri-

tion, as an absolute owner of the entire properties entered in this will i.e., cash, ornaments and moveable properties."

"(g) In case son is born to me, the executant, the sons (sic) if they are at all born to me, the executant, and the legatee shall partition among themselves in equal shares the entire moveable and immoveable properties, ornaments and cash. The stipulations which have been entered (in this deed) concerning the agnates of me the executant, in case of Bhagwan Lal aforesaid being issueless shall hold good for the sons of me, the executant."

"(h) . . . son if born to me, the executant, the agnate of me, the executant shall have no connection and concern with it (sic)."

9. There is no controversy between the parties that the testator, Bisheshwar Sah, was the absolute owner of the properties till his death and later on his widow, Janki Kuer got a limited interest. Besides this, it is the admitted case of the parties that Bhagwan Lal came in possession of the properties after the death of Janki Kuer. It is further clear that Bhagwan did not leave any male issue and, therefore, the question of his son getting interest of one kind or the other does not arise at all. The substantial dispute between the parties, however, is with regard to the interest acquired by Bhagwan Lal. According to the plaintiffs, Bhagwan Lal became absolute owner as mentioned in clear terms in the will, but, according to the defendants, the absolute interest must be deemed to be the limited interest, inasmuch as two absolute interests cannot be created in favour of Bhagwan Lal as well as the agnates of Bisheshwar Sah. In case Bhagwan got an absolute interest, then the plaintiffs would be entitled to the disputed properties, but in the event of his getting only a limited interest, the defendants would be entitled to the properties in the capacity of agnates of Bisheshwar Sah.

10. Learned counsel for the appellants relied, at first, on the provisions of section 95 of the Indian Succession Act which reads thus:

"Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him."

He contended that Bhagwan Lal having been made the absolute owner his interest as such was not restricted in any manner by the aforesaid will and, even if there was a restriction, that must be held to be repugnant and void. He then referred to Section 131 of the very same Act, and it reads thus:

"131 (1) A bequest may be made to any person with the condition superadd-

ed that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

(2) In each case the ulterior bequest is subject to the rules contained in Sections 120, 121, 122, 123, 124, 125, 126, 127, 129 and 130."

This section, however, has to be read in conjunction with Section 124 which is the first one in Chapter X which deals with contingent bequests, Section 124 is in the following terms:

"Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable."

Learned counsel relied on Illustrations (iv) and (v) of this section. He contended that a legacy was no doubt given to the agnates of Bisheshwar Sah, but the passing of the legacy to them was dependent on the death of either Bhagwan Lal without leaving a male issue or his son dying without leaving a male issue. (These were the specified uncertain events for the occurrence of which no time was mentioned.). Bhagwan Lal had left no male issue, but he had not died during the lifetime of Janki Kuer and as such the specified uncertain events had not occurred at the time the properties bequeathed became either payable or distributable. That being the situation, his argument was that the legacy in favour of the agnates could not take effect according to the provisions of section 124. In other words, if Bhagwan Lal had died during the lifetime of Janki Kuer then only the legacy could be acquired by the agnates (defendants).

11. Learned counsel for the appellants referred to Tiruchendur Sri Subramaniaswami Temple v. P. Ramaswami Pillai, AIR 1950 PC 32 to support his contention that absolute interest had been given to Bhagwan Lal by the testator. In the case relied upon, the will of the testator dated 20th May, 1919, read as follows:

"... I have bequeathed to my son, Picha Pillai the right to all my properties and moneys, etc., and he shall solely enjoy them. If he or his son has no child, the said properties shall pass to Subramaniaswami at Tiruchendur."

The said son entered into possession of the estate and enjoyed it until his death. He died on 10-12-1927, without issue. Thereupon his reversioners took possession of the properties. The appellant, Tiruchendur Sri Subramaniaswami Temple, instituted the suit on 10-11-1932

(giving rise to that appeal) against defendants 1 to 22 as being in possession of different parts of the estate, and defendant no. 23 was impleaded as an alienee of a part of the estate. The appellant claimed that on the death of Picha Pillai he became entitled to the entire estate. The Subordinate Judge held that Picha Pillai took an absolute estate, notwithstanding the direction that if he or his son had no child the properties should pass to the temple, and the bequest to the temple was bad as contravening the rule against perpetuities to be found in section 5, Madras Act, I of 1914 (re-enacted as section 114, Succession Act, 1925). He thus dismissed the suit as against the contesting defendants and also against a few others. The learned Judge who heard the appeal against that decree agreed with the trial court that the bequest to the son was unconditional and, therefore, conferred upon him an absolute estate.

For the appellant, it was urged that the Courts below had erred in their interpretation of the will, inasmuch as the bequest to the son Picha Pillai was curtailed, as there were qualifying words in the will providing that if the said son or his son had no child, the said properties shall pass to Subramaniaswami. It was further urged that if the will was read as a whole the effect was of creating an interest in favour of the deity of the temple in the event of Picha Pillai dying childless. Their Lordships referred to the provisions of section 95 of the Indian Succession Act and held that the additional qualifying words did not restrict the interest given to Picha Pillai. In other words, the testator did not in any way limit either the character of the estate that was given by the earlier bequest in favour of the son or made it conditional and liable to be divested at his death without issue. This decision is not exactly on the point which arises for consideration in this appeal, but apart from this, the recitals in a will in each case have to be considered in order to determine as to whether the interest created in favour of one person or the other was an absolute one or a limited one.

12. There are, however, some cardinal principles which should be kept in view while considering the effect of a will. The will has to be read as a whole, meaning thereby that the true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory, (vide *Bajrang Bahadur Singh v. Bakht-raj Kuer*, AIR 1953 SC 7 and *Pearey Lal v. Rameshwar Das*, AIR 1963 SC 1703).

Moreover, another cardinal principle of construction of a will was that effect should be given to every disposition contained in the will as far as it is legally possible unless the law prevents effect being given to it. But if there were two repugnant provisions conferring successive interests, a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given to every testamentary intention contained in the will, see *Ramchandra Shenoy v. Mrs. Hilda Brite*, AIR 1964 SC 1323.

These principles could not be contested by either side, but learned counsel for the appellants strenuously pressed that the legacy in favour of the agnates (defendants) could not take effect in view of the provisions of section 131 read with section 124 of the Indian Succession Act. He relied on *Tarkeshwari Devi v. Ram Ran Bikat Prasad Singh*, AIR 1966 Pat 40 in which the provisions of sections 124 and 131 were considered fully. The registered will (Ext. 1) in that case was executed by one Raghunath Prasad Singh on 21-8-1938, who died a month or two later. He was married to one Srimati Jageshwar Kuer and had a son named Sukhdeo Prasad Singh and a daughter, Srimati Satrupa Kuer. The son died in the lifetime of the father, leaving two daughters, namely, Srimati Tarkeshwari Devi (plaintiff appellant), who was married to Awadhesh Prasad Singh and Srimati Shivrani Devi, who was married to Ram Ran Bikat Prasad Singh (defendant No. 1). Defendant no. 2 was the brother of defendant no. 1. Jageshwar Kuer died in November, 1948 and Shivrani Devi died on 1-11-1949 without leaving any issue. The will provided that till his lifetime the executant shall remain in possession and occupation of the entire property, but after his death the shares in certain villages would absolutely belong to his wife, Srimati Jageshwar Kuer, who will have the full rights and power to make transfer, etc., but the remaining property would remain in her possession for her lifetime with limited power to appropriate the income thereof.

Both the granddaughters were minors and till the lifetime of Jageshwar Kuer she would be their guardian. The testator further provided that after the death of Jageshwar Kuer the entire property would be treated as 16 annas property, out of which 5 annas 4 pies share constituting proprietary interest would pass to Srimati Satrupa Kuer and her heirs as absolute owners and the remaining 10 annas 8 pies share would pass to both the minor granddaughters, (1) Srimati Tarkeshwari Kuer and (2) Srimati Shivrani Kuer in equal share as absolute pro-

prietary interest; but if one of the two granddaughters died issueless, then the other living granddaughter would enter into possession and occupation of the entire 10 annas 8 pies share and would become the absolute owner thereof. The subject-matter of the suit related to the remaining property which was given to Jageshwar Kuer for her lifetime with a limited power. In accordance with the provisions of the will, Jageshwar Kuer came in possession of the property and continued in possession thereof till her death. Thereafter, 5 annas 4 pies share of that property devolved on Satrupa Kuer and the remaining 10 annas 8 pies share devolved on Tarkeshwari and Shivrani in equal shares.

By a private partition between the two, the property in suit, i.e., a little over 40 acres of kasht land in village Toralpara besides the 16 annas milkiaat interest in a certain tauzi in the same village were allotted to Shivrani. Shortly after her death, a dispute arose, as the plaintiff claimed to have become the owner of the property allotted to Shivrani, and the case of the plaintiff was that in view of the aforesaid provisions in the will she was entitled to the suit property after the death of Shivrani or, in the alternative, a decree for Rupees 33,800, being the value of the suit property. The defence was that inasmuch as both Tarkeshwari and Shivrani were alive at the time of the testator's death as also at the time of the death of Jageshwar Kuer, the absolute estate was bequeathed to them and each of them got equal shares in them absolutely. In other words, the estate which vested in Shivrani was not a life estate, as contended by the plaintiff. The question for consideration in the appeal was the nature of the estate which vested in the two granddaughters after the death of Jageshwar Kuer. It was contended on behalf of the plaintiff appellant that a joint life estate was created in favour of the two granddaughters and in the event of the one surviving the other dying issueless, an absolute estate came to the survivor. Ramratna Singh, J., who delivered the main judgment, pointed out that the testator did not intend to divest the interest of one granddaughter, once it had vested in her. Their Lordships considered the provisions of Sections 124 and 131 of the Act. On a review of the various authorities, including *Indira Rani v. Akhoy Kumar*, 59 Ind App 419 = (AIR 1932 PC 269), the correct legal position was stated in the following manner:

"If the interest created in favour of a person should take effect on the happening of an event which must happen, it is a vested interest; but if it is to take effect on the happening of a spe-

cified uncertain event which may or may not happen, the interest is a contingent one. The death of a life tenant is an event not contingent but certain, still it is by no means certain that the subsequent legatees will survive the life tenant. Hence, where the legacy is to go subsequently to those persons who survive the life tenant, the interest vests in the survivors only after the death of the life tenant. If thereafter the will contains a defeasance clause for divesting of the interest of one of those subsequent legatees on the happening of any specified uncertain event, the defeasance clause would be valid on the basis of the provision contained in sub-section (1) of Section 131 of the Succession Act. But this sub-section is subject to the rule contained in Section 124 (see sub-section (2) of Section 131), and Section 124 applies when no time is mentioned for the occurrence of the specified uncertain event or contingency. The position with regard to a gift is similar in the Transfer of Property Act. Section 28 of this Act, which corresponds to Section 131 of the Succession Act, is subject to the rule contained in Section 23 (corresponding to Section 124 of the Succession Act). The true test, therefore, is whether any time is mentioned or not for the occurrence of the specified uncertain event".

In that case, their Lordships held, applying the provisions of Section 124, that the subsequent legacy in favour of Tarkeshwari Kuer could not take effect unless Shivrani died issueless before the bequeathed fund became payable, before the death of Jageshwar Kuer. Shivrani died long after Jageshwar Kuer and, therefore, she (Shivrani) got an absolute estate in 5 annas 4 pies share and Tarkeshwari Kuer was not entitled to the same after her death. Learned counsel for the appellants, relying on this decision, submitted that the provisions of Section 124 were fully attracted so far as the non-passing of the legacy in favour of the defendants (agnates) was concerned.

13. Learned counsel for the appellants referred to *Kamla Prasad v. Murli-Manohar*, AIR 1926 Pat 356. The testator in that case devised his estate by his will to his widow and his two daughters-in-law and then provided that in case the said three Musammats would die, Murli Manohar, son of Ram Charan Lal, his brother's son, shall be the heir and possessor of the properties. It was contended on behalf of the appellants in that case that Section 124 of the Indian Succession Act was directly applicable and that the bequest in favour of Murli Manohar could not take effect as the uncertain event specified in the will did not happen before the period when the 'fund' bequeathed was payable or distributable.

The 'fund' in that case, the estate of the testator, was distributable on his death and it was not disputed that all the three ladies survived him. Their Lordships observed that the rule enunciated in Section 124 of the Succession Act was a rule of law and not a rule of construction, and although it was not necessary for them to decide that point, it appeared that Section 124 operated so as to bar the right of Murli Manohar to take under the will. This opinion of their Lordships, however, did not decide that appeal and as such it may be said that that opinion was in the nature of an obiter.

He then referred to *Bashist Narain Sahi v. Sia Ramchandra*, AIR 1933 Pat 126. In that case one Chengan Sahi left a widow, Mt. Rajo Kuer, and a son Sheoratan. Chengan executed a will bequeathing three properties to the deities and they were to be managed by his widow as Shebait, and after her death (which had not yet occurred) by his son Sheoratan (who, however, died in 1908). He bequeathed the residue of his properties to Sheoratan, but in the event of Sheoratan's death without issue, the legacy was to pass on to the aforesaid deities absolutely, and in those circumstances the entire income of the estate was to be applied to various charitable, educational and religious purposes. One question which arose for decision was as to whether or not the legacy of the entire estate to the deities had failed due to the fact that Sheoratan had survived the testator. It was contended that Sheoratan took an absolute estate on the death of the testator and subsequently, after the death of Sheoratan without leaving any issue, the estate would devolve upon the deities. This contention did not impress their Lordships and they referred to the provisions of Section 124 of the Indian Succession Act, 1925, which corresponded to Section 111 of the Indian Succession Act, 1865. Illustrations (i) and (ii) of that Section also were referred to, and it was pointed out that Section 124 specifically prevented the legacy, even if made, from taking effect unless the event happened before the period when the fund bequeathed was payable or distributable.

Their Lordships relied on *Norendra Nath Sircar v. Kamalbasini Dasi*, (1896) ILR 23 Cal 563 (PC), and observed that the 'period' referred to in S. 124 did not mean an indefinite period after the testator's death during which the contingency of the death issueless might occur, but the lawful period for distribution by the executor, and "before the period" meant "before the commencement of such period". Their Lordships held that Sheoratan took an absolute estate inde-

feasible by the fact that he died issueless after the death of the testator.

14. Section 124 of the present Indian Succession Act which corresponds to Section 111 of the Succession Act of 1865 deals with contingent bequests, meaning thereby that the bequest would take effect only if the contingency happened before the period of distribution. When death is spoken of as a contingency, it must be construed to mean death before the period of distribution. Illustration (iv) reads thus:

"A legacy is bequeathed to A for life, and, after his death to B, and 'in case of B's death without children', to C. The words 'in case of B's death without children' are to be understood as meaning 'in case B dies without children during the lifetime of A'."

I would refer to *Monohur Mukerjee v. Kasiswar Mukerjee*, (1899) 3 Cal WN 478, in which it was held that Section 111 of the then Succession Act laid down a hard and fast rule regulating the validity of certain classes of contingent bequests which, to use the words of their Lordships of the Judicial Committee in the case of *Norendra Nath Sircar*, (1896) ILR 23 Cal 563 (PC), 'must be applied wherever it is applicable, without speculating on the intention of the testator'. Their Lordships held in that case that they were bound to apply the provisions of Sec. 111 to that case to which its plain language made it applicable; and applying that section, the gift over to Monohur Mukherjee did not take effect and that the plaintiff had taken an absolute and indefeasible estate in the properties mentioned in Schedule 3 of the will (in that case). Turning once again to the facts of the present case, it appears undoubtedly by the will in question that a bequest was made in favour of Bhagwan Lal, but a condition was superadded that if he as well as his male issue would die without leaving behind any legitimate male issue, then the agnates of the testator would get the properties as absolute owners. An estate was no doubt conferred on Bhagwan Lal but it was subjected by the said condition. The event of his death or that of his son, if any, was undoubtedly specified, but the happenings thereof were uncertain. On the happening of the said event or events, the properties bequeathed were to go to the agnates.

These aspects of the will in question attract the provisions of Section 131 (1) of the Indian Succession Act and, according to sub-section (2) of that section the ulterior bequest (in this case, to the agnates) would be subject to the rules contained in Section 124. The latter section definitely provides that the legacy cannot take effect unless the specified uncertain event would happen before the

period when the fund bequeathed became payable or distributable. Applying that section to the facts of the present case, the position is that unless Bhagwan Lal died during the lifetime of Janki Kuer (which was the specified uncertain event), the legacy in favour of the defendants (agnates) cannot take effect. The bequest to the agnates was a contingent one, and there is no escape from the conclusion that the provisions of Section 124 are fully attracted in respect of the present will (Ext. 9).

15. I would not refer to the provisions of the Succession Act and the various decisions relied upon by Mr. Prem Lal appearing for the major respondents. He first referred to Section 75 of the present Succession Act which gives a power to the Court to determine questions as to the object or subject of the will. This section, however, is not relevant. The other section relied upon is Section 82. It provides that the meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other. In other words, according to this section, the will has to be construed as a whole in order to determine the intention of the testator, and whenever any question arises as to the meaning of any particular clause, that has to be gathered from a conspectus of the entire will so that all the parts of the will can be construed with reference to each other in order to reconcile and harmonise the different parts. I have already referred to the decisions laying down that the will has to be construed as a whole. Mr. Prem Lal at first, referred to *Gulbaji Ajisiji and Co. v. Rustomji Kharshedji*, ILR 49 Bom 478 = (AIR 1925 Bom 282 (2)) in support of his contention that the bequest to Bhagwan Lal was a limited one and not an absolute one, but the will dated May 6, 1870, in that case was of a different nature. Cl. 8 of the will in that case executed by *Kharshedji Jamasiji Banatwalla* provided inter alia as follows:

"..... This is given as a gift to Chi. Rustomji. After my decease, the income of the ground that is the rent is to be collected from those persons who are possessed thereof and credited to the name of the Chi. Rustomji in (the books of) the shop. For Chi. Rustomji is now seventeen years old when, therefore, he shall arrive at the age of 21, twenty-one years, the said ground is to be made over to him, and as to the moneys which may have been collected and credited, the principal together with interest thereon at the rate of 5 five per cent. is to be paid over to Chi. Rustomji. It is to be paid over by Chi. Edulji".

Clause 10 read thus:

"The property which is in the above eighth clause directed to be given to Chi. Rustomji is to be given (to him) in accordance therewith. And afterwards should my son, Chi. Rustomji die, which God forbid, and should he then leave a son, such his son shall afterwards be the owner thereof. Should he, however, leave daughters, an estimate is to be formed of the value of the said estate at that time and out of the same four annas in the rupee are to be paid to his daughters. And should he have no children, two annas in the rupee is to be paid to his widow. And as to the whole residue which should then remain Chi. Edulji and his heirs are to become the owners thereof".

It was first contended that Clause 10 was repugnant and void as being contrary to the terms of Clause 8 whereby the property was gifted to the first defendant. The second contention was that Sec. 111 of the Indian Succession Act applied so that the gifts over bequeathed by Cl. 10 could only take effect if the first defendant had died in the lifetime of the testator. A question arose as to whether Rustomji was given a life interest or an absolute one according to Clause 8. The provisions of Section 111 of the Indian Succession Act were referred to but their Lordships held that that section had no bearing in the construction of that will and Clauses 8, 9 and 10 of that will had to be read together. The important distinction between the recitals in the will of that case and those in the will of the present case is that there was no contingent bequest in the case relied upon. The will in that case definitely provided that the property mentioned in the 8th Clause was given to Chi. Rustomji and Rustomji did come in possession of that property. The passing of the legacy, either in part or in whole, to the daughters of Rustomji was not dependent on the death of Rustomji. In fact this position was made absolutely clear by *Crump, J.*, in the following words:

"The question, therefore, is whether on the words of that section it appears from this will that only a restricted interest was intended for him (Rustomji). That question must be answered by reading paras 8 and 10 together. The first sentence of para 10 refers to the directions in para 8, and reaffirms those directions. The testator had in mind that point of time when those directions had been carried into effect, that is to say, that Rustomji had attained the age of twenty-one years, and had been put in possession of the property. The will then proceeds 'and afterwards should my son Rustomji die, which God forbid, and should he then leave a son, such his son

shall afterwards be the owner thereof. I agree with the learned trial Judge that the words 'should my son Rustomji die which God forbid' are no more than an euphemism and that the plain meaning is 'on the death of my son Rustomji'. The meaning is in substance 'after the death of Rustomji if he leaves a son his son shall be the owner of the property.' It was held that the testator intended only a life interest for Rustomji.

16. Mr. Prem Lall referred to *Nisar Ali Khan v. Mohammad Ali Khan*, 59 Ind App 268 = (AIR 1932 PC 172). In that case Haji Nawab Nasir Ali Khan executed two wills on 15-7-1896, one relating to the Oudh property and the other relating to the Punjab properties, Juliana and Rakh Khamba. These wills were, with one exception, identical *mutatis mutandis*. He appointed Nawab Fateh Ali Khan, son of his late brother, Nawab Nisar Ali Khan, as successor and executor of all his taluqdari estate giving him all the powers of an owner which he himself had after his death, provided the executor would remain alive. He further provided that after the lifetime of Nawab Fateh Ali Khan, his son Nawab Mohammad Ali Khan, should if alive, be his successor and he should also have the very same powers as had been bestowed on Nawab Fateh Ali Khan. After the lifetime of Nawab Mohammad Ali Khan, Nawab Hidayat Ali Khan, son of the other brother of the testator should be the successor of Nawab Mohammad Ali Khan, provided he be alive. After all those successors the fit amongst the descendants of the successors would have the right to succeed and the last legatee should have the power to nominate anyone as his successor whom he considered fit from amongst the descendants of each of the three successors; and if the last legatee would die without nominating his successor, the male descendants of each of the three successors were given the power to appoint as successor whomsoever they considered fit and superior amongst themselves.

The trial Judge held that upon the true construction of the wills Nawab Fateh Ali Khan took a life interest only and that after his death the respondent, Mohammad Ali Khan succeeded to the properties which the wills affected either as next tenant for life or as heir of Nawab Nasir. His conclusion, therefore, was that the respondent had made out his title to the Oudh and Juliana properties and he thus made a declaration of the respondent's right to possession of those properties. On appeal to the Chief Court of Oudh, the judgment of the trial Court was affirmed as to the Oudh and Juliana properties but it was reversed as to the Rakh Khamba and Khalikabad properties.

There was a deed of endowment on June 17, 1892, by Nasir Ali Khan in respect of the Khalikabad property. Both parties appealed to His Majesty in Council, and it was argued by the defendant appellant (Nisar Ali Khan) that the Courts below were wrong with regard to the Oudh and Juliana properties because the wills of Nawab Nasir upon their true construction conferred a series of absolute interests, and, therefore, that Nawab Fateh Ali Khan took absolutely as the taker of the first absolute interest, all subsequent interests and provisions being repugnant and bad.

Their Lordships of the Judicial Committee gave the opinion that the dominant intention of the testator as displayed by each of the wills was that the property should pass to three persons in succession and thereafter to some one or more persons selected in a specified manner. This intention was inconsistent with the idea of a series of absolute interests and could only be given effect to with such a series if each taker voluntarily denied himself the exercise of all power of alienation, *inter vivos*, and disposed of the property testamentarily to the next taker in accordance with the testator's scheme. Without a succession of limited interests the dominant intention could not have effect, and regarding each will as a whole their Lordships were of opinion that life interests only were conferred. This view received additional support from the fact that the gift to each subsequent taker was expressed to be to him if alive or provided he be alive and after the life-time of the previous taker and that the testator referred to all three named takers as his successors. The position thus is that the properties in question were to be taken by each successive legatee but after the death of the previous legatee. In other words, the successor legatee was to get the property after the death of the previous legatee. In view of those terms in the wills the provisions of Sec. 124 of the Succession Act were not at all applicable and there was no contingent bequest, as envisaged by that section.

17. Learned counsel then referred to *Habibullah v. Ananga Mohan Roy*, AIR 1942 Cal 571. One Abinash was married twice, and by his first wife who predeceased him he had a son named Abani. Ananga was the only son of Abani. The name of the second wife was Kumudini and she survived her husband, but she was childless, Abinash executed a will on 10-7-1909 disinheriting his only son Abani and making his second wife executrix. He gave the whole of his estate, moveable and immoveable including his eight annas share in the tenure, taluk Bishwa-

nath Roy, to the second wife and made provisions for the devolution of his whole estate after her death. His grandson, Ananga, was to take that estate, according to the terms of the will, after Kumudini's death. The most important controversy in the suit and the appeal was about the nature of the estate conferred by the will on Kumudini, namely, whether it was a life estate or an absolute estate. The will consisted of 13 paragraphs and the interest of Kumudini was defined in one of the parts of paragraph 5 (indicated by their Lordships as paragraph 5 (b)). Some of the expressions used in that sub-paragraph seemed to be sufficient to confer an absolute estate on her, but in the other part of the same paragraph (marked sub-paragraph (c) of paragraph 5), the testator provided that after the death of his wife his grandson Ananga would take all his properties, if he did not forsake his religion. In that sub-paragraph words were used which conferred an absolute estate on Ananga. Relying upon the case of Nisar Ali Khan, 59 Ind App 268 = (AIR 1932 PC 172), their Lordships held that Kumudini had only a life estate notwithstanding the terms of paragraph 5 (b) of the will and as such she had no power to make a will in respect of the tenure taluk Bishwanath Roy or to dedicate it to the deity. In that case the properties were first given to Kumudini, and after her Ananga was to take those properties. I wish to point out that there was no contingent bequest which could attract the provisions of S. 124 of the Succession Act. Learned counsel referred to another decision of the Privy Council in 59 Ind App 419 = (AIR 1932 PC 269). The testator, one Romanath Ghose governed by the Bengal School of Hindu Law, died on 26-7-1904 leaving behind his widow and two sons, Sidheshwar Ghose and Akhoy Kumar Ghose, both of them at his death being infants of tender years. Romanath Ghose had executed a will on 30-10-1903 appointing his son-in-law (as he had a daughter as well), his widow and her brother and another named person and such and so many of his sons attaining the age of 22 years as shall be orthodox Hindus of good repute as the executors and trustees of his estate. In Clause 14 of the said will the testator provided as follows:

"..... I devise and bequeath the whole of my estate real or personal of any kind or description whatsoever and wheresoever situate to my said executors and trustees in trust for such of my sons as shall be living at my death or come into existence within twelve months after my death and also for the son or sons of such of my sons as shall then be dead (such son or sons taking the share

their or his father would have taken hereunder had they or he been then alive) provided the said sons or son's sons shall be orthodox Hindus of good repute equally as tenants-in-common and the said sons or sons of my sons taking equally per stirpes as tenants-in-common, but nevertheless in the event of any sons or son's sons dying without leaving lineal male issue him surviving the other of my son or sons or son's sons living of the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu Law, but should die without lineal male descendants the son or sons to be adopted by my wife shall inherit the whole of my residuary estate, but he shall not be put in possession until he attains the age of twenty-one years, and should any of my heirs or residuary legatees cease to be orthodox Hindus of good repute he shall forfeit a moiety of his share, which shall go to my other qualified heirs according to their respective shares".

The appellant's contention was that the terms of Clause 14 of the will in so far as the gift over was concerned were governed by the provisions of Section 124 of the Indian Succession Act. But this contention was negatived. Their Lordships pointed out that the death of a son or son's son referred to in that Clause was the death of one who had taken something under the original gift contained in it; that is to say, it was a death which must take place after that of the testator. This distinction was vital, and the application of Section 124 was ruled out, inasmuch as the testator had provided in Clause 14 for the possibility of a son dying without issue after his death, which was the period of distribution. This decision as well is of no assistance to the defendants.

18. Learned counsel referred to AIR 1963 SC 1703, and this was relied upon even by the learned Additional District Judge. In that case Girdharilal executed a will dated February 8, 1897, bequeathing his property, both moveable and immoveable, to his wife Mst. Kishen Dei and adopted son. The adopted son predeceased Girdharilal. After the death of Girdharilal in the year 1923, Mst. Kishen Dei executed a will dated October 8, 1941, bequeathing the property in dispute, i.e., a house in Delhi to her brother's grandson Rameshwar Dass. A question arose as to whether under that will Mst. Kishen Dei got an absolute interest in the house. The Subordinate Judge held that she got an absolute interest, but on appeal the District Judge held that she got only a limited estate and therefore, she could not under a will confer any interest on the plaintiff respondent Rameshwar Dass. The plaintiff prefer-

red a second appeal to the High Court of East Punjab at Simla. Khosla J. held that under the said will the testator gave a life interest to Mst. Kishen Dei and made a gift over to the adopted son, but as the gift over failed the life estate became an absolute estate under Section 112 of the Indian Succession Act.

Alternatively, he also found that on the wording of the will Mst. Kishen Dei got an absolute interest in the property. In the result, his Lordship set aside the decree of the District Judge and restored that of the Subordinate Judge. The defendant preferred a Letters Patent Appeal against the said judgment, and it was held by a Division Bench that the intention of the testator was that at any rate on the failure of the bequest to Nathi Mal (the adopted son) the testator's widow Mst. Kishen Dei should take an absolute interest in his property. The Division Bench confirmed the judgment of Khosla, J. The defendant preferred an appeal in the Supreme Court. It was urged on behalf of the appellant that Mst. Kishen Dei was given only a life estate and, therefore, the plaintiff did not acquire any title to the property in question. Their Lordships dealing with this contention observed as follows:

"These two bequests *prima facie* appear to be inconsistent with each other, for there are two absolute bequests of the same property in favour of his wife and, after her death, in favour of his son. Two constructions are possible: one is to accept the first and negative the second on the ground that it is repugnant to the first; the other is to make an attempt to reconcile both in a way legally permissible. Both can be reconciled and, full meaning given to all the words used by the testator, if it be held that there was an absolute bequest in favour of the wife with a gift over to operate by way of defeasance, that is to say, if the son survived the wife the absolute interest of the wife would be cut down and the son would take an absolute interest in the same. If that was the construction the statement in the will relied upon by learned counsel for the appellant could also be reconciled with such a bequest".

Their Lordships dismissed the appeal. This case as well did not attract the provisions of Section 124, inasmuch as the bequest was at first to the wife and after her death to the adopted son, Nathi Mal.

19. Learned counsel referred to AIR 1964 SC 1323. (This was also relied upon by the learned Additional District Judge). Mrs. Mary Magdelene Coelho was the testatrix and she provided in Clause 3 (c) of the will executed by her on 25-7-1907 as follows:

"3 (c) All kinds of moveable properties that shall be in my possession and authority at the time of my death, i.e., all kinds of moveable properties inclusive of the amounts that shall be got from others and the cash; — all these my eldest daughter Severina Sabina Coelho shall after my death, enjoy and after her lifetime, her male children also shall enjoy permanently and with absolute right"

The short question for decision in the appeal was whether under that clause the interest which the eldest daughter Severina took under the bequest was absolute or whether she had merely a life interest with the absolute remainder vesting in her male issues. The original will was in Canarese language. The learned Single Judge in the High Court accepted the following as the correct translation:

"All these (properties) shall after me be enjoyed by my eldest daughter Severina Sabina and after her life time by her male children too as permanent and absolute Hukdars".

It was pointed out that the bequest to Severina was 'to enjoy', and the testatrix proceeded to add that after the lifetime of Severina, her male issues were 'to have permanent and absolute rights in the same'. In other words, the very contrast in the phraseology led one irresistibly to the conclusion that the nature or quantum of Severina's interest was different from that of those who took after 'her lifetime'. It was held that the dominant intention of the testatrix was to confer a permanent and absolute remainder on the male issue of the daughter of the testatrix after the lifetime of the first donee and the words used were apt and capable of supporting such construction. The facts of that case also did not attract the provisions of section 124 of the Indian Succession Act.

20. Learned counsel referred to Anukul Chandra Haldar v. Gurupada Haldar, AIR 1936 Cal 643. In that case Kinuram Haldar had executed a will by which he bequeathed the moveable and immoveable properties, ancestral and self-acquired, and the Government promissory notes, and the bonded warehouse shares and the money lying in deposit in the Savings Bank and all the other (properties) barring of course the properties described in the second paragraph of that will to his son Gurupada Haldar born of the womb of his third wife and gave his son absolute right and he was to enjoy the same down to his sons, grandsons and so on and heirs in succession (clause 3 of the will). Clause 5 of that will, however, provided that out of the income of the properties left by him the expenses of the Seva of certain deities established by

his ancestors shall be borne. According to clause 3, there was an absolute bequest in favour of Gurupada of the properties mentioned therein. But it was contended on the basis of clause 5 that the property was Debottar. In other words, the clause which gave absolute interest to Gurupada had practically been superseded by the subsequent clause, viz., clause 5. This contention was repelled, and it was held that there was nothing in clause 5 to sustain the contention that that clause gave any of the properties to any deity, and all that could be said was that the properties left by Kinuram should be charged with the worship of those deities.

This decision as well does not improve the case of the defendants. He then relied on *N. Ramadasa Kamath v. M. Kalliammal*, AIR 1950 Kar 182. *Wittayya* had executed a will on 17-12-1931 dividing his estate under three lists. He bequeathed List 1 properties to Ganapathy. List 2 properties to Ramdas, Narasimha and Achutha along with other sons to be born of Mukunda and finally list 3 properties to his three daughters by his concubine subject in respect of all to certain terms and conditions detailed. The vital clause of the said will was that Ganapathy had then no male children and if no male children would be begotten by him until his death List 1 properties would after his death devolve on List 2 legatees absolutely. Ganapathy died on 3-8-1951 without leaving any issue, but he left his widow Sharada. A controversy arose soon after between Sharada on the one side and Ramadas and his brothers on the other as to who should succeed to List 1 properties. The Courts below had come to the conclusion that the property devolved upon the second defendant, widow of Ganapathy and hence the plaintiff (*N. Ramadasa Kamath*) had filed several second appeals arising out of the various suits. It was contended on his behalf that there was an absolute bequest to Ganapathy regarding List 1 properties, but subject to a defeasance in the event of a contemplated contingency provided for in section 131 of the Succession Act, corresponding to section 28 of the Transfer of Property Act.

N. Varadaraja Iyengar, J., sitting singly, quoted the provisions of section 131. His Lordship noted the distinction between a repugnant provision and a defeasance provision which was sometimes subtle and referred to a decision of this Court as well in *Rameshwar Kuer v. Shialal Upadhaya*, AIR 1935 Pat 401. His Lordship held that the absolute estate of Ganapathy in respect of List 1 properties under the will was reduced to a mere life estate on the non-happening of the event of the birth of a male child to him and the estate went

over to the plaintiff and his brother, holders of list 2 properties. It is true that the said will provided that if Ganapathy would not beget male children until his death, in that case list 1 properties were to devolve on List 2 legatees absolutely, but for the begetting of the male children a time limit was fixed, i.e., till the death of Ganapathy. The facts of that case did not exactly attract the provisions of S. 124 of the Indian Succession Act.

21. Learned counsel, lastly, referred to AIR 1935 Pat 401 in which the question of interpretation of a deed of gift dated 14-10-1917 executed by Mt. Ganga Kuer arose. She had only three daughters. She provided that after her death "the three daughters aforesaid shall be the share-holders proprietresses of the properties gifted". According to that deed, all the three daughters had, in proportion to their respective shares, acquired full and absolute title with rights of transfer in respect of those properties. If the agreement had terminated at that point, each of the three daughters would be the absolute owner of one-third share in the estate given. The difficulty, however, arose by the concluding sentence of that deed which read thus:

"If any daughter, out of the three, dies issueless the surviving daughters shall in equal shares be the absolute proprietresses of the properties specified below. I have therefore executed this deed of gift, so that it may be of use when required"

Dhaneshwar Kuer was the youngest of the daughters and she married the plaintiff in the year 1921, but later on she died without leaving an issue in May, 1923. The plaintiff sued the two surviving daughters, Rameshwar Kuer and Parmeshwar Kuer, for a declaration that the deceased Dhaneshwar Kuer became the absolute owner of the share of the property transferred to her by the deed of gift. That claim was resisted by the defendants on the ground that upon the death of Dhaneshwar Kuer her share passed on to them. The contention of the defendants appellants was that the deed had to be read as a whole and the effect of that deed was to confer upon each of the daughters, in the first instance, a life estate, meaning thereby that if any daughter would die without leaving an issue, her life estate would terminate and pass on to the surviving daughters. On the other hand, the plaintiff contended that each of the daughters took an absolute estate and the last clause was mainly an attempt to change the course of inheritance. *Courtney Terrell, C. J.* (who presided in the Division Bench) noted in the judgment as follows:

"It is conceded however that the intention of the donor was as the construction

proposed by the defendants would suggest, that is to say, that the donor intended to make a gift over to the surviving daughters if one of them should die issueless."

Thereafter, his Lordship referred to the provisions of sections 28 and 31 of the Transfer of Property Act and also to those of section 131 of the Succession Act, and held that the donor did not intend that the property should go to another family but should continue as long as possible in the hands of her daughters and the survivors of them and it could not have been in contemplation that either of the daughters would be at liberty so to dispose of her share of the property in her lifetime as to defeat the intention expressed in the last clause. The result was that those daughters took only life estate. In the first place, I have already referred to the concessions which were made on behalf of the plaintiff in that case that the intention was to make a gift over to the surviving daughters if one of them died issueless. In the second place, the case of AIR 1933 Pat 126, the judgment of which was delivered by Courtney Terrell, C. J. (Fazl Ali, J. agreeing with him), in which their Lordships relied on Section 124 of the Succession Act, does not seem to have been brought to their Lordships' notice in the case of Mt. Rameshwar Kuer, AIR 1935 Pat 401 aforesaid. In the present appeal, the question is as to how the will of Bisheswar Sah is to be interpreted and understood, and for this purpose the case of Bashist Narain Sahi, AIR 1933 Pat 126 is relevant. The decision in Mt. Rameshwar Kuer, AIR 1935 Pat 401 has been noted in AIR 1966 Pat 40 which has already been referred to above.

22. On a careful consideration of the points urged by learned counsel for the parties I am of the view that there is no escape from the conclusion that the terms of the will in question do attract the provisions of sections 124 and 131 of the Succession Act and Bhagwan Lal, not having died during the lifetime of Janki Kuer, the ultimate bequest in favour of the agnates (defendants) cannot take effect. The position thus is that Bhagwan Lal got an absolute interest by the said will and after the death of Bhagwan and his wife, the plaintiffs (who are the heirs of Bhagwan) are entitled to the properties mentioned in the will. The finding of the learned Additional District Judge that Bhagwan had only a life interest must be reversed for the reasons stated above.

23. Mr. J. C. Sinha for the appellants raised an alternative contention that Ramrati Kuer did not get any interest either limited or absolute by the said will, but she had remained in continuous pos-

session of the house described in schedule no. 1 of the plaint since the death of Bhagwanlal and as such that possession must be deemed to be adverse. He further urged that after the death of Ramrati Kuer the plaintiffs were entitled to that house as being the heirs of Bhagwanlal. This contention cannot be, however, accepted for the simple reason that the testator himself has provided in the will that "after the death of Bhagwanlal and his wife" his legitimate issue shall enter into possession and occupation of the properties. In other words, the wife Ramrati Kuer was given a life interest and it was on that basis that she came in possession of the said house. Her possession cannot be deemed to be adverse during that period.

24. Mr. Nageshwar Saran (learned counsel for the appellants) while replying to the contentions advanced on behalf of the respondents submitted that Ramrati Kuer being in continuous possession of the disputed house after the death of her husband had acquired an absolute interest in the same, according to the provisions of section 14 of the Hindu Succession Act. There is, however, one fallacy in this contention of learned counsel, inasmuch as absolute interest was in no event given to Ramrati Kuer by the will. The recital that "after the death of Bhagwanlal and his wife his legitimate male issue shall enter into possession and occupation thereof, as an absolute owner" cannot lead to the conclusion that the wife Ramrati Kuer got an absolute interest. It is true that section 14 (1) of the Hindu Succession Act, 1956, provides that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as limited owner. But according to sub-section (2) of that section, nothing contained in sub-section (1) shall apply to any property acquired under a will prescribing a restricted estate in such property. The object of sub-section (2) is that any such restricted estate created prior to the commencement of the aforesaid Act cannot be enlarged into full ownership by operation of sub-section (1). I am thus of the view that Ramrati Kuer did not acquire an absolute interest, and her interest was a limited one. The plaintiffs thus cannot take any advantage on account of the possession of Ramrati Kuer in respect of the disputed property described in schedule no. 2 of the plaint, and the finding of the learned Additional District Judge in this respect must be held to be correct.

25. Lastly, learned counsel for the appellants submitted that the learned Additional District Judge had erred in holding that the acquisition by Bhagwan Lal

of the southern and eastern portions which were parti lands had not been established. He made a grievance that the finding of the trial Court arrived at on a full consideration of the oral and documentary evidence adduced by the plaintiffs to the effect that Bhagwan had acquired those portions had been reversed summarily without dealing with the evidence on that point. The case of the plaintiffs was that Bhagwan had acquired those portions and had made some constructions with the result that the house of Bisheshwar Sah mentioned in schedule no. 1 of the plaint, and the portions acquired formed one compact block which was mentioned in schedule no. 2 of the plaint. In other words, the house mentioned in schedule no. 1 was included in schedule no. 2. In the trial Court issue no. 5 was as to whether any portion of the land mentioned in schedule no. 2 of the plaint was acquired by Bhagwanlal, and the Court held that that portion of land was acquired by him. In the appeal before the Additional District Judge only three points were argued by the learned Advocate for the appellants (of that appeal) and it will be relevant to quote the second point;

"..... on the evidence on the record it has been established that the part of schedule 2 lands had been acquired by Bhagwan Lal and only schedule 1 land was the property of Bisheshwar Sah but the same were so blended that the one could not be separated from the other". (This appears from the judgment itself). The position appears to be that the acquisition of the portion of Schedule No. 2 lands by Bhagwan Lal was conceded by the learned Advocate and he did not at all challenge the finding of the trial Court in that respect which was in favour of the plaintiffs. The only contention raised by him was that on account of the blending of those parts of Schedule No. 2 lands with the land mentioned in Schedule No. 1, those parts could not be separated from the other.

26. I would now refer to the conclusion of the learned Additional District Judge on this point:

"The north facing residential house in village Godana belonged to Bisheshwar Sah and stood on holding No. 1079 and all these facts are gathered from the schedules of the properties attached to the present will. There is no doubt therefore that the plaintiff's case that it was Bhagwan Lal who had acquired the lands of Jagu and Ganduar Mahto finds established by the schedule of the will. There is no doubt that the circumstances mentioned aforesaid support the case of the plaintiff but in the absence of even any sale deed obtained from Ganduar

Mahin and Ramnandan Gir it cannot be held specifically as to what area had been purchased by Bhagwan Lal. It was always for the plaintiffs to prove their claim with respect to the suit properties and in the absence of any conclusive evidence it cannot be held definitely that as to what portion has been purchased by Bhagwan Lal. Even the factum of sale has not been proved by the plaintiff nor the exact location of the land so purchased have been established by cogent and reliable evidence nor the identity of the purchased land could be ascertained in the absence of any conclusive evidence".

In the passage quoted above, the learned Additional District Judge seems to have believed the plaintiff's case that Bhagwan Lal had acquired the lands of Jaggu and Gaur Mahto. In any event, the finding of the trial Court with regard to the acquisition was not challenged in the lower appellate Court and as such the learned Judge unnecessarily looked for any evidence or conclusive evidence for establishing as to what portion was purchased by Bhagwan Lal. The finding regarding acquisition having been accepted, there was absolutely no question of proving the factum of sale. So far as the location of the lands acquired is concerned, it was made clear that on the eastern and southern portions of the house of Bisheshwar Sah some parti lands lay which were acquired by Bhagwan Lal. The position was that Bhagwan acquired title to the house of Bisheshwar by the will and apart from that he acquired those portions (all these were mentioned in schedule No. 2 of the plaint), with a total area of 4 kathas 5 dhurs. This entire area being in possession of Bhagwan at one time and later on in possession of his wife Ramrati Kuer, the question of inheritance arose after the death of Ramrati Kuer on 13-4-1958. There is no dispute that the plaintiffs are the heirs of Bhagwan and as such they are entitled to a decree in respect of schedule No. 2 lands. The trial Court was not right in mentioning in the order portion of the judgment that the plaintiffs' right, title and interest over schedules 1 and 2 properties of the plaint were being declared. Relief had been asked for in respect of schedule No. 2 properties alone, inasmuch as that schedule included the house mentioned in schedule No. 1. The learned Additional District Judge was entirely wrong in not granting a decree to the plaintiffs in respect of schedule No. 2 lands.

27. In the result, the appeal is allowed in part and the judgments and decrees of the Courts below are modified. The suit of the plaintiffs is decreed in part as against the defendants to this extent

that the title of the plaintiffs is declared in respect of the properties described in schedule No. 2 of the plaint and they are entitled to recover possession of the same with past mesne profits (as mentioned in schedule IV of the plaint). The plaintiffs are entitled to the costs throughout in proportion to their success.

28. DUTTA, J.:— I agree.

Appeal partly allowed.

AIR 1970 PATNA 159 (V 57 C 25)

B. P. SINHA, J.

Satyadeo Sah and another, Petitioners v. The State of Bihar, Respondent.

Criminal Revns. Nos. 1558 with 2051 of 1968, D/- 18-4-1969, against order of Addl. S. J., Saran Chapra, D/- 16-7-1968.

Criminal P. C. (1898), Ss. 251A, 190, 173, 2—Essential Commodities Act (1955), Ss. 11, 7 — Taking cognizance — Meaning — Charge-sheet submitted by police officer stating facts relating to commission of offence under S. 7 of 1955 Act— It is report of police officer within meaning of S. 190 (1) (b) fulfilling condition of S. 11 of 1955 Act at the same time — Trial must proceed under S. 251A. Criminal Revision No. 1235 of 1967 (Orissa) held not good law in view of AIR 1965 SC 1185.

Where a complaint alleging contravention of provisions of Imported Food Grains Order filed before the Additional District Magistrate by some villagers was forwarded to the Sub-divisional Magistrate and the Sub-divisional Magistrate passed an order directing the Sub-Inspector of police to seize the grains, it cannot be said that the Sub-divisional Magistrate had taken the cognizance of the offence. 'Taking cognizance' means 'taking notice of an offence' by applying mind for the purpose of proceeding to take action under the provisions of chapter 16 of the Code. When the Magistrate passed an order directing the Sub-Inspector of Police to seize the grains, it was in the nature of executive order and not for the purpose of proceeding under chapter 16 of the Code of Criminal Procedure and it did not amount to taking cognizance of the offence. AIR 1961 SC 986, Rel. on.

(Para 4)

It cannot be said that the charge-sheet submitted by the police after investigation was not a report under Section 173, Criminal P. C. but only a report under Section 11, Essential Commodities Act and as such application of Section 251A, Criminal P. C. was not attracted. The procedure under Section 251A is applicable to a case instituted on a police report which need not be a charge-sheet under

Section 173. What Section 11, Essential Commodities Act provides is that no cognizance of any offence punishable under that Act could be taken except on a report in writing of facts constituting offence made by a person who is public servant. It cannot be disputed that a police officer is a public servant as defined in S. 21, Penal Code. Therefore when cognizance was taken on the report of a police officer, the requirements of S. 11 of Essential Commodities Act were complied with. (Para 5)

Section 190, Criminal P. C. does not speak of a report under section 173 which is technically called a charge-sheet. The whole meaning of section 190 (1) (b) is that the report of the facts must be in writing made by any police officer. When a police officer submits a charge-sheet stating the facts relating to the commission of an offence under section 7 of the Essential Commodities Act it is a report of the police officer within the meaning of clause (b) of section 190 (1) at the same time fulfilling the condition laid down in section 11 of the Essential Commodities Act. If a charge-sheet fulfils the condition of section 11 of the Essential Commodities Act it does not cease to be a report by a police officer. A report by a public servant can at the same time be a report by a police officer if that public servant happens to be a police officer. It cannot be considered as a complaint as defined in Section 2 of the Code of Criminal Procedure. The prosecution in the case was therefore on a police report, as such the requirement of section 251-A was also fulfilled. That being so when the procedure prescribed under S. 251A was followed, the trial was not vitiated on that account. Criminal Revision No. 1235 of 1967 (Orissa) held not good law in view of AIR 1965 SC 1185; 1968 B. L. J. R. 197, Foll.; AIR 1966 Madh Pra 1 (FB), Referred to. (Paras 5, 7, 8)

Cases Referred: Chronological Paras

- (1968) 1968 BLJR 197 = ILR 46 Pat 1305, A. K. Jain v. Govt. of India 5, 7
- (1967) Criminal Revn. No. 1235 of 1967 (Orissa), Basudeo Prasad v. State of Bihar 7
- (1966) AIR 1966 Madh Pra 1 (V 53) = 1966 Cri LJ 29 (FB), Ashiq Miyan v. State of Madh Pra 6
- (1965) AIR 1965 SC 1185 (V 52) = 1965 (2) Cri LJ 250, Pravin Chandra v. State of Andh Pra 6, 7
- (1961) AIR 1961 SC 986 (V 48) = 1961 (2) Cri LJ 39, Gopal Das Sindhi v. State of Assam 4

In Cr. Rev. 1558/68: Nageshwar Prasad and Karuna Nidhan Keshav, for Petitioner; In Cr. Rev. 2051/68: Awdhesh Nandan Sahay and Upendra Prasad

Varma, for Petitioner; Shivanand Prasad Sinha, for State (in both appeals).

ORDER: These two Criminal Revisions Nos. 1558 and 2051 of 1968 arise out of the same judgment and as such they have been heard together and they will be governed by this order.

2. Satyadeo Sah petitioner in Criminal Revision No. 1558 of 1968 has a fair price grain shop in village Shitalpore, Police-Station Manjhi in the district Saran. On 24-10-1965 a petition was filed before the Additional District Magistrate by some of the villagers alleging that in the previous night at about 10 p.m. a bullock cart with seven bags of imported wheat was apprehended near Lal Gachi, about a mile away from Shitalpur Bazar. The cart was being driven by one Sukhdeo Singh, the petitioner in Criminal Revision No. 2051 of 1968. Satyadeo Sah was also going along with the cart. When the villagers flashed their torch light towards the cart, both the petitioners fled away leaving the loaded cart. The Additional District Magistrate forwarded the above petition to the Sub-divisional Magistrate, Chapra Sadar with the following notes:—

"Immediate. S. D. O. Sadar, please take immediate action in this case and let me know".

The Sub-Divisional Magistrate ordered the Sub-Inspector of Manjhi Police Station to seize the grains and institute a case. Accordingly a case was instituted and after completion of investigation, a charge-sheet was submitted against these two petitioners under Section 7 of the Essential Commodities Act for contravention of Clause 3 of the Imported Food Grains Order. Cognizance was taken and the petitioners were put on trial. The defence was that the petitioners were falsely implicated due to enmity.

3. The trial court found the prosecution story to be correct. It held that the two petitioners were in conscious possession of the imported wheat and they were not able to explain such possession. Accordingly the learned Magistrate found both the accused guilty of the offence charged with and sentenced Satyadeo Sah to undergo rigorous imprisonment for eight months and Sukhdeo Singh to undergo rigorous imprisonment for six months. The order was upheld on appeal. Hence these revisions have been filed.

4. The first contention of the learned Counsel for the petitioners is that the whole trial is vitiated inasmuch as cognizance in this case was taken on a complaint by private person in contravention of the provisions of section 11 of the Essential Commodities Act. He has submitted that when the Sub-divisional

Magistrate, on receipt of the complaint forwarded to him by the Additional District Magistrate, passed an order directing the Sub-Inspector of Police to seize the grains, it would mean that he took cognizance of the offence on that very date and that was on the basis of the petition filed by the villagers before the Additional District Magistrate. There is no substance in this contention. The expression 'taking cognizance of an offence' has not been defined in the Criminal Procedure Code. It has, however, been held in *Gopal Das Sindhi v. State of Assam*, AIR 1961 SC 986 that when a Magistrate applies his mind for the purpose of proceeding under the various sections of Chapter XVI then he takes cognizance of the offence, but if he does so for taking action of some other kind, e.g., ordering investigation under Section 156 (3) or issuing a search warrant for the purpose of investigation, he cannot be said to be taking cognizance of the offence.

That is to say, 'taking cognizance' means 'taking notice of an offence' by applying mind for the purpose of proceeding to take action under the provisions of Chapter XVI of the Code of Criminal Procedure. Therefore, when the Magistrate passed an order directing the Sub-Inspector of Police to seize the grains, it was in the nature of executive order and not for the purpose of proceeding under Chapter XVI of the Code of Criminal Procedure and it did not amount to taking cognizance of the offence. Cognizance of the offence was taken in this case only after the submission of charge-sheet by Police.

5. Next it has been contended that if it be assumed that the cognizance was taken on a charge-sheet submitted by the Police, then, though the requirements of Section 11 of the Essential Commodities Act that the cognizance can be taken only on a report by a Public servant may be taken to be complied with, it is not a case instituted on a report of Police under Section 173 of the Code of Criminal Procedure so as to attract the application of the provisions of Section 251-A of the Code of Criminal Procedure and as such the whole trial adopted in that way is vitiated. Section 11 of the Essential Commodities Act provides that no cognizance of any offence punishable under the Act could be taken except on a report in writing of facts constituting the offence made by a person who is a public servant. It is not disputed that a police officer is a public servant, as defined in Section 21 of the Indian Penal Code. Therefore, when cognizance was taken on the report of a Police Officer the requirement of Section 11 was complied with. What the learned Counsel

Officer on January 22, 1965, as well as in the meeting held on February 3, 1965, is held to be illegal and consequently set aside.

8. D. K. MAHAJAN, J.:— I agree.

9. SHAMSHER BAHADUR, J.:— I also agree.

Petition allowed.

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FULL BENCH

MEHAR SINGH, C. J., D. K. MAHAJAN
AND GURDEV SINGH, JJ.

Ujagar Singh, Petitioner v. State of Punjab and others, Respondents.

Civil Writ Nos. 2489 of 1967 and 416 of 1968, D/- 24-9-1969, decided by Full Bench on order of reference made by Shamsher Bahadur, J., D/- 19-4-1968.

(A) Panchayats — Punjab Gram Panchayat Act (4 of 1953), Ss. 102(1) and (2), Chapter IX — Power of Deputy Commissioner under S. 102(1) — Order from Government under S. 102(2) is condition precedent for his exercising power — Deputy Commissioner cannot hold enquiry with a view to suspend a panch — His powers under Chapter IX and Ss. 95 to 100 are independent and complete in itself.

Sub-sections (1) and (2) of Section 102 of the Act have to be read together so as to lead to the only conclusion that when an enquiry is ordered by the Government under sub-section (2), it is during the course of that enquiry that the Deputy Commissioner may exercise his power of suspension of a Panch under sub-sec. (1), and that, if there is no enquiry ordered by the Government under sub-sec. (2), occasion for the exercise of the power under sub-section (1) by the Deputy Commissioner does not arise. (Para 6)

The power to suspend a Panch under S. 102(1) of the Act can be exercised by a Deputy Commissioner only "for any of the reasons for which he can be removed" and "during the course of an enquiry". The reasons for which a Panch can be removed have been laid down by the Legislature in sub-section (2) of Section 102 of the Act which also envisages the holding of an enquiry before removing a Panch. There is no provision in the Act expressly authorising the Deputy Commissioner to hold an enquiry against a Panch or Sarpanch with a view to remove or suspend him from his office. The word "enquiry" has not been defined in the Act itself and construed in its general sense, it would include even an investigation and going into allegations against a Panch by any person to whom a complaint is made or to whose notice some lapse or misconduct on the part of a

Panch or Sarpanch comes. There is nothing in Section 102 or any provision of the Act which even remotely indicates that in the course of an enquiry other than the one prescribed under sub-section (2) of Section 102 a Panch or Sarpanch should be suspended. The powers of the Deputy Commissioner under Chapter IX and Ss. 95 to 100 of the Act are independent powers having nothing to do with an enquiry under sub-section (2) of Section 102. It may be that in consequence of the exercise of such power certain defects may come to light which may lead to Government ordering an enquiry against a Panch or a Sarpanch, but the power of control in those sections is not only independent but also effective and complete in itself. It cannot therefore be said that unless an implied power to hold a preliminary enquiry is not read in sub-section (1) of Section 102, the Deputy Commissioner's power of control under Chapter IX and Ss. 95 to 100 becomes meaningless. (1968) 70 Pun LR 341 & Civil Writ 18 of 1966, D/- 10-3-1966 (Punj), Rel. on. ILR (1966) 2 Punj 20, Explained. (Paras 9, 10, 4)

(B) Panchayats — Punjab Gram Panchayat (4 of 1953), S. 102 (1) and (2) — Nature and scope of enquiry under — Stated.

Even though under sub-section (2) of Section 102 of the Act the nature and scope of the enquiry is left entirely to the discretion of the Government, it still cannot do away with the bare minimum requirements of an enquiry. The bare minimums of an enquiry are (a) that clear and definite charge or charges must be given or stated to the delinquent, (b) that the material forming the basis of the charge or charges must be made known to him, and (c) that he must be given every opportunity to meet the charges and to defend himself.

(Para 4)

Even in a case where a ground exists as in clause (a) of sub-section (2) of Section 102, having regard to the grounds, (b), (e) and (i) of sub-section (5) of Section 6 of the Act and the matter is carried up to the Supreme Court (a) in which conviction for a criminal offence, involving moral turpitude, is maintained, or (b) in which the order for giving security for good behaviour is maintained, or (c) in which adjudication of an insolvent is upheld, even in such a case an enquiry must follow in the sense that the final decision to be used against a Panch for his removal must be put to him and he is asked to explain his position with regard to the same rendering any explanation which would either not justify his removal or would be some mitigation in his favour.

Civil Writ No. 2717 of 1965, D/- 28-2-1966 (Punj), Rel. on. (Para 4)

(C) Civil P. C. (1908), Pre. — Interpretation of Statutes— Provision to vest power in authority not expressly provided in Statute — Court cannot read the provision to vest power in authority on ground of inconvenience. (Para 4)

Cases Referred: Chronological Paras
(1968) 70 Pun. L. R. 341=ILR (1968)
2 Punj. 241, Ram Ditta Singh v.
Deputy Commr., Ferozepur 2, 3, 6, 9
(1966) ILR (1966) 2 Punj. 20, Piyare
Lal v. Deputy Commr., Hoshiar-
pur 2, 3
(1966) Civil Writ No. 18 of 1966,
D/- 10-3-1966 (Punj), Ajaib Singh
v. State of Punjab 10
(1966) Civil Writ No. 2717 of 1965,
D/- 28-2-1966 (Punj), Pirthi Singh
v. Deputy Commr., Rohtak 4, 9

S. S. Kang, for Petitioner; H. L. Sibal,
Advocate-General, Punjab assisted by J.
S. Raikhy and R. K. Chhibber and Mohin-
derjit Singh Sethi, for Respondent No. 4.

MEHAR SINGH, C. J.— The question that arises for consideration in these two petitions — Ujagar Singh v. State of Punjab, Civil Writ No. 2489 of 1987, and Bihari Lal Sarpanch v. Haryana State, Civil Writ No. 418 of 1968 — before this Bench, is the meaning and scope of enquiry in sub-sections (1) and (2) of Section 102 of the Punjab Gram Panchayat Act, 1952 (Punjab Act 4 of 1953), and the power and scope of the Deputy Commissioner to make an order of suspension under sub-section (1) of Section 102 of the very same Act.

2. It is common ground that in both the petitions the Deputy Commissioner concerned suspended each petitioner, who is a Sarpanch of his particular Gram Panchayat, under sub-section (1) of Sec. 102 of the Act, but without the State Government either exercising its own powers under sub-section (2) of Section 102 of the Act or the Director of Panchayats, as its delegate under Section 95 of the Act, exercising the same powers, having ordered an enquiry against the particular petitioner under sub-section (2) of Section 102 of the Act. Bihari Lal's case first came for hearing before my learned brothers Mahajan and Gurdev Singh, JJ., on February 27, 1968, who being of the opinion that there appeared to be a certain measure of inconsistency between Piyare Lal v. Deputy Commr., Hoshiarpur, ILR (1966) 2 Punj 20 and Ram Ditta Singh v. Deputy Commr., Ferozepur, (1968) 70 Pun. L. R. 341, on the question, as above, referred the matter to a larger Bench. In the wake of that reference, when Ujagar Singh's case came before Shamsher Bahadur J., for hearing on April 19, 1968, the learned Judge referred that case also to the same larger Bench. This is how these two cases have come before this Bench.

3. To appreciate the question that arises in these cases it is necessary to first make reference to the relevant parts of sub-sections (1) and (2) of Section 102 of the Act, which read—

"102. (1) The Deputy Commissioner may during the course of an enquiry, suspend a Panch for any of the reasons for which he can be removed, and debar him from taking part in any act or proceedings of the said body during that period and order him to hand over the records, money or any property of the said body, to the person authorised in this behalf.

(2) Government, may, after such enquiry as it may deem fit, remove any Panch — (then follow five grounds of removal)."

The first ground of removal in clause (a) of sub-section (2) of Section 102 has reference to the grounds mentioned in sub-section (5) of Section 6 of the Act. According to that sub-section a person cannot be a member of a Gram Panchayat because of grounds (a) to (l), among which are the grounds (b), if he has been convicted of any offence involving moral turpitude unless a period of five years has elapsed since his conviction; or (e), he has been ordered to give security for good behaviour under Section 110 of the Code of Criminal Procedure, 1898; or (i), he is an undischarged insolvent. In Ram Ditta Singh's case, (1988) 70 Pun. L. R. 341, what was held was that both sub-sections of Section 102 of the Act have to be read together so that the plain meaning of the same is that when an enquiry is ordered by the Government under sub-section (2), it is during the pendency of that enquiry that the Deputy Commissioner has the power to suspend a Panch under sub-section (1) and that if there is no enquiry ordered or started by the Government under sub-section (2), the power under sub-section (1) in the Deputy Commissioner does not become operative. It was pointed out that a Panch can be suspended only when an enquiry against him has been ordered by the Government and not in consequence of an enquiry not ordered or started by the State Government. It was also pointed out that the language of sub-section (1) does not justify that a Deputy Commissioner can order some enquiry against a Panch apart from that by the Government under sub-section (2) of the Act. It was further observed that the Legislature has designedly framed the two sub-sections in the manner in which the same are, leaving the power to order or start an enquiry against a Panch with the Government alone as a matter of policy so as not to leave interference with the elected bodies, such as Gram Panchayats, in the hands of local officers by way of starting enquiries against the elected members of such local bodies. It has been

said during the arguments that this observation was probably made because at the time the provisions of Section 95 of the Act were not placed before the Bench. It appears to be so. According to Section 95 of the Act the Government can delegate its powers under the Act to a Deputy Commissioner of a District, apart from the Director of Panchayats. So the Government can, having regard to this provision, delegate its powers under sub-section (2) of Section 102 of the Act to a Deputy Commissioner, though actually it has delegated its powers not to any Deputy Commissioner of any district in the State but to the Director of Panchayats, an officer at the centre who heads the Department of Panchayats. Sub-section (1) of Section 102 originally gave power to the Director of Panchayats to suspend a Panch but that has been amended to vest that power in the Deputy Commissioner, obviously in the wake of the number of cases and the volume of work involved in this respect. In spite of the power under Section 95 to delegate its powers under the Act to the Deputy Commissioner, the Government has not chosen to do so in so far as its power under sub-section (2) of Section 102 is concerned. It has delegated that power to the Director of Panchayats only, an official of top rank in the Department. So, while such a delegation to a Deputy Commissioner is possible, the action of the Government itself supports the inference that it has paid attention to the policy of the Legislature that such powers are not to be delegated to district officials so that they may not interfere with the working of local bodies as Panchayats. In *Piyare Lal's case*, ILR (1966) 2 Punj. 20, the precise question that arises for consideration in these two petitions and which was considered in *Ram Ditta Singh's case*, (1968) 70 Pun. L. R. 341, did not really arise. In that case the existence of a proper enquiry was never questioned. The argument was that for the validity of an enquiry it was to be held by the Deputy Commissioner and not by an officer subordinate to him such as a Sub-Divisional Magistrate, and this argument was repelled. In that case, however, the order of suspension was maintained, but the obvious explanation of that is that there was no argument in that case that no proper enquiry, according to sub-section (2) of Section 102 of the Act, was pending when the suspension of the Panch concerned was ordered by the Deputy Commissioner. When the two cases are considered together there might appear to be a seeming inconsistency, but, in substance, there is none. All the same, the question as posed above has been canvassed afresh before us and so it has been reconsidered.

4. Now, it is obvious that under sub-section (2) of Section 102 it is the power

of the State Government to remove a Panch and this the State Government can only do 'after such enquiry as it may deem fit.' The nature and scope of the enquiry is left entirely to the discretion of the State Government, but enquiry there must be, before removal of a Panch can be ordered by the Government. At one time the learned Advocate-General for Punjab did take up the position that where a ground exists as in clause (a) of sub-section (2) of Section 102, having regard to the grounds, (b), (e) and (i) of sub-section (5) of Section 6 of the Act, there can possibly be no room for any enquiry. His argument has been that if a case has been carried up to the Supreme Court (a) in which conviction for a criminal offence, involving moral turpitude, is maintained, or (b) in which the order for giving security for good behaviour is maintained, or (c) in which adjudication of an insolvent is upheld, then any enquiry under sub-section (2) of Section 102 would be a meaningless formality and, in substance, no such enquiry is called for. In any one of such cases the State Government can proceed straightway on the basis of the final decision of the Supreme Court to remove the Panch. However, during the hearing reference was then made to *Pirithi Singh v. Deputy Commr., Rohatak*, Civil Writ No. 2717 of 1965, D/- 28-2-1966 (Punj), in which a Division Bench consisting of Dua and Narula JJ., quite clearly and pointedly took a contrary view and held that even, in such a case an enquiry must follow in the sense that the final decision to be used against a Panch for his removal must be put to him and he is asked to explain his position with regard to the same rendering any explanation which would either not justify his removal or would be some mitigation in his favour. On this the learned Advocate-General of Punjab veered round to the position that an enquiry under sub-section (2) of Section 102 being a statutory requirement must be there before a Panch can be removed, though obviously, in the terms of the sub-section, the nature and form of the enquiry, having regard to the circumstances of a particular case, has entirely been left to the discretion of the Government. The bare minimums of an enquiry are (a) that clear and definite charge or charges must be given or stated to the delinquent, (b) that the material forming the basis of the charge or charges must be made known to him, and (c) that he must be given every opportunity to meet the charges and to defend himself. Even though under sub-section (2) of Section 102 of the Act the nature and scope of the enquiry is left entirely to the discretion of the Government, it still cannot do away with

those bare minimum requirements of an enquiry. Subject to that, the nature and scope of the enquiry is entirely in its discretion. So there is no longer any controversy over the meaning and scope of this sub-section. Then the power of the Deputy Commissioner to suspend a Panch only comes into existence if a pre-condition exists, that is to say, an enquiry is pending against the Panch. A Deputy Commissioner cannot suspend a Panch for the purpose of an enquiry. For him to invoke his power and jurisdiction of suspension of a Panch, an enquiry must be pending when an order to that effect is made. The words used are 'during the course of an enquiry'; but it is not said enquiry ordered by whom, enquiry to what end and for what purpose, and enquiry conducted by whom. These matters are not at all to be found in sub-section (1) of S. 102, and, to my mind, for an obvious reason, because both the sub-sections have dealt with only one enquiry, and that is the enquiry that the Government may order under sub-section (2), and it is during the pendency of that enquiry that power of suspension is given to the Deputy Commissioner to suspend a Panch. It is contended on the side of the States that that would lead to great inconvenience to the Government, because while the Deputy Commissioner takes steps to move the Government to make an order for an enquiry under sub-section (2) of S. 102, a Panch or a Sarpanch continuing in office may do incalculable and irretrievable harm to the institution of the village Gram Panchayat, as usually Government takes quite a time before making such orders. But I have not known that an argument of inconvenience entitles a Court to read a provision to vest a power in an authority where the language of the statute itself does not do so clearly. Another argument that has been urged on the side of the State Governments is that while the State Government has a power to order an enquiry under sub-section (2), the Deputy Commissioner has an independent power to order enquiry under sub-section (1) of Section 102. It has, however, been difficult to explain on the side of the two State Governments for what purpose does the Deputy Commissioner order an enquiry under sub-section (1) of S. 102, because his power of suspension of a Panch does not come into existence or operation till an enquiry is already pending before the exercise of such power. So he must have a power to order an enquiry before he makes an order of suspension. But there is no such power given to him under sub-section (1) of S. 102. The learned counsel for the State Governments have then urged that the nature and scope of enquiry that may be ordered by the Deputy Commissioner under sub-s. (1) of Section 102 is the same as of a preliminary

enquiry with the purpose and object of making up his mind whether or not to move the Government so that the latter may proceed to exercise its power of ordering an enquiry for the purpose of removal of a Panch under sub-section (2) of S. 102. If this was so, the Legislature would obviously not have used the expression 'during the course of an enquiry' in sub-section (1) of S. 102, for, it would have then said simply during the course of a preliminary enquiry in order to see whether or not a case or rather a prima facie case exists for the purpose of enabling the Government to reach the conclusion whether it would or would not exercise its powers under sub-section (2) of S. 102. In support of this argument the learned Advocate-General for Punjab has referred to Chapter IX in the Act and Sections 95 to 100 in the same. As has already been stated, under Section 95 the State Government has the power to delegate its own powers under the Act to a Deputy Commissioner or even a Sub-Divisional Officer or the Director. According to Section 96 a Gram Panchayat is to permit, at all reasonable times, any officer or other person whom the Director or the Deputy Commissioner or the Sub-Divisional Officer, as the case may be, may authorise in this behalf to have access to all its books, proceedings and records and to enter on and inspect any immovable property occupied by, or any work in progress under the orders of, or any institution controlled by it. Section 97 gives power to the Deputy Commissioner or the Sub-Divisional Officer, as the case may be, by order in writing to suspend the execution of any resolution or order of the Gram Panchayat other than order passed in judicial proceedings or prohibit the doing of any act which is about to be done or is being done under cover of the Act. All such acts or actions of the Deputy Commissioner or the Sub-Divisional Officer or the Director are subject to the authority and control of the Government according to Section 98. If a Gram Panchayat makes default in the performance of any duty other than judicial functions imposed upon it by or under the Act or under any law for the time being in force, the Deputy Commissioner or the Sub-Divisional Officer, as the case may be, has been given discretion to fix a period for the performance thereof according to Section 99. And under Section 100 the Government has the power to call for and examine the record of proceedings of any Gram Panchayat for the purposes of satisfying itself as to the legality or propriety of any executive order passed therein and may confirm, modify, or rescind the order, and there is similar power in the Government with regard to the record of any executive order

made under the Act. The learned Advocate-General for Punjab has contended that these sections make it clear that the Deputy Commissioner has almost complete control over the functioning of a Gram Panchayat, leaving out the judicial functions of the same, and the control goes to the extent of vesting power in him to suspend resolutions and orders of a Gram Panchayat. From this the learned counsel spells a power in the Deputy Commissioner to order a preliminary enquiry into the conduct of a Panchayat under sub-section (1) of S. 102, and he would read the word 'enquiry' in that sub-section as meaning preliminary enquiry for the purpose indicated in his argument as above. In Ujagar Singh's case Mr. Sukhdev Singh Kang, learned counsel for the petitioner, has pointed out the fallacy in this approach because he has said that if on consideration of these sections a power of enquiry of a preliminary nature is attributed to the Deputy Commissioner, why cannot the same be attributed to a subordinate officer like the Sub-Divisional Officer who figures in most of these sections along with the Deputy Commissioner in the matter of control of Gram Panchayats. It is apparent that there cannot be substance in the argument urged on the side of the respondents that if such an implied power to hold a preliminary enquiry is not read in sub-section (1) of S. 102, the Deputy Commissioner's power of control, as in the sections already referred to, becomes meaningless. This obviously is not so, for the powers of the Deputy Commissioner or the Sub-Divisional Officer in those sections are independent powers having nothing to do with an enquiry. It may be that in consequence of the exercise of such control certain defaults may come to light which may lead to the Government ordering an enquiry against a Panch or a Sarpanch, but the power of control in those sections is not only independent but also effective and complete in itself. So this argument on the side of the respondents is untenable. There is one other matter to which reference may be made at this stage for it was an argument urged on the side of the respondents that if a preliminary enquiry is held by the Deputy Commissioner and certain charges are proved against a Panch, the Government may proceed to act on that to take action under sub-section (2) of S. 102. It is an argument contrary to the express words of sub-section (2) of S. 102 and needs no further consideration.

5. The power under sub-section (1) of S. 102 to suspend a Panch originally residing in the Director, but by Section 6 of the Punjab Gram Panchayat (Amendment) Act, 1964 (Punjab Act 11 of 1964), for the word 'Director' were substituted the words 'Deputy Commissioner'. It was

this amendment which brought about this change. The objects and reasons explain this change in this manner — "The suspension of Sarpanch or Panch can at present be ordered by the Director. Experience has shown that it is physically impossible for one officer to deal expeditiously with the large number of cases on this subject. It is, therefore, proposed to empower the Deputy Commissioner to order the suspension." It is clear that the amendment in this respect results from the volume of work in such cases. The important part of the work affecting the very continuance of the Gram Panchayats has been retained in the hands of the highest officer of the Department, that is to say, the Director, in so far as the question of removal of a Panch is concerned but once that decision has been taken, the matter is, on account of the amendment, then left with the Deputy Commissioner concerned. This is the reason for the change. However, the conclusion is not available from the language of sub-sections (1) and (2) of S. 102 that the words 'during the course of an enquiry', in sub-section (1), mean an enquiry independent of and separate from the enquiry that the Government may make under sub-section (2) for the purpose of removal of a Panch. As has been pointed out, suspension under this particular provision can only take place when the enquiry has been ordered. There is nothing in sub-section (1) which gives the power for enquiry to a Deputy Commissioner apart from the Government's power to order an enquiry under sub-section (2). If such a power was conceded, it could only possibly have the end purpose of moving the Government to an enquiry as envisaged by sub-section (2) of Section 102, in other words, as suggested by the learned counsel for the respondents, it has to be a preliminary enquiry. But the language of sub-section (1), as already stated, does not justify such a reading of it which can only be done either by radical departure from the language or by addition to the language, neither of which course is permissible.

6. The consequence then is that the answer posed to the question, in my opinion, is the same as in Ram Ditta Singh's case, (1968) 70 Pun LR 341 that sub-sections (1) and (2) of S. 102 of the Act have to be read together, in which case the plain meaning of the same leads to only one conclusion, and no other, that when an enquiry is ordered by the Government under sub-section (2), it is during the course of that enquiry that the Deputy Commissioner may exercise his power of suspension of a Panch under sub-section (1) and that, if there is no enquiry ordered by the Government under sub-section (2), occasion for the exercise of the power under sub-section

tion (1) by the Deputy Commissioner does not arise.

7. It is not denied that in these two petitions no enquiry against the Sarpanch concerned was ordered by the Government under sub-section (2) of Section 102 when the Deputy Commissioner concerned proceeded to make an order of suspension against him under sub-section (1), with the result that the order of suspension has to be quashed, and it is accordingly quashed in each case. Respondent 1, the State, in each case shall bear the costs of the petition, counsel's fee being Rs. 100/- in each case.

8. D. K. MAHAJAN, J.: I agree.

9. GURDEV SINGH, J.:— I entirely agree with my Lord the Chief Justice that Ram Ditta Singh's case, (1968) 70 Pun LR 341 correctly lays down the scope and extent of the powers of the Deputy Commissioner to suspend a Panch under Section 102(1) of the Punjab Gram Panchayat Act, 1952 (IV of 1953). As expressly stated in this provision the power to suspend a Panch can be exercised by a Deputy Commissioner only "for any of the reasons for which he can be removed" and "during the course of an enquiry". The reasons for which a Panch can be removed have been laid down by the Legislature in sub-section (2) of Sec. 102 of the Act which also envisages the holding of an enquiry before removing a Panch. As has been laid down by a Division Bench of this Court in Civil Writ 2717 of 1965, D/- 28-2-1966 (Punj), it is incumbent upon the Government to hold an enquiry before removing a Panch. Both sub-sections (1) and (2) of Section 102 of the Act have to be read together as they relate to the manner and the process by which a Panch or Sarpanch, who is liable to be removed from his office, is to be proceeded against. The power to suspend a person holding a government or any other office during the pendency of an enquiry against him is well recognised and the authority vested in the Deputy Commissioner to suspend a Panch, who is liable to be removed, is a part of the same process as it is specifically provided that this power may be exercised "during the course of an enquiry" and for any of the reasons for which his removal can be ordered." As the language used in this provision is quite clear and admits of no ambiguity, the enquiry in the course of which the Deputy Commissioner is empowered to suspend a Panch cannot be any enquiry other than the one provided under sub-section (2) of the same section. It thus follows that the Deputy Commissioner can exercise his authority to suspend a Panch only after an enquiry under sub-section (2) of Section 102 has been ordered by the competent authority and is pending.

10. The contention put forward on behalf of the States of Haryana and Punjab that the enquiry during the course of which the Deputy Commissioner is authorised to suspend a Panch is not confined to the enquiry provided under sub-section (2) of Section 102, is untenable, as it is not only not borne by the context in which the expression "an enquiry" has been used in sub-section (1) of Section 102, but would also lead to anomalous results. Admittedly there is no provision in the Act expressly authorising the Deputy Commissioner to hold an enquiry against a Panch or Sarpanch with a view to remove or suspend him from his office. The word "inquiry" has not been defined in the Act itself and construed in its general sense, it would include even an investigation and going into allegations against a Panch by any person to whom a complaint is made or to whose notice some lapse or misconduct on the part of a Panch or Sarpanch comes. There is nothing in Section 102 or any provision of the Act which even remotely indicates that in the course of an enquiry other than the one prescribed under sub-section (2) of Section 102 a Panch or Sarpanch should be suspended. In fact it has been held by this Court recently in *Ajaib Singh v. State of Punjab etc.*, Civil Writ 13 of 1966, D/- 10-3-1966 (Punj) that the enquiry during the pendency of which a Deputy Commissioner can suspend a Panch does not include investigation into a criminal offence.

11. In view of what has been said above and for the reasons given by my Lord the Chief Justice on elaborate and careful consideration of the various contentions put forward before us, I am firmly of the opinion, in agreement with my learned brothers, that it is only in the course of an enquiry ordered by the competent authority under sub-section (2) of Section 102 of the Punjab Gram Panchayat Act, 1952, that a Deputy Commissioner can order the suspension of a Panch.

Petition allowed.

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(V 57 C 27)

FULL BENCH

D. K. MAHAJAN, SHAMSHER
BAHADUR AND R. S. NARULA, JJ.
Kishori Lal and another, Appellants v.
Nohria Lal and others, Respondents.

First Appeal No. 389 of 1964, D/- 13-3-1969, decided by Full Bench on order of reference made by D. K. Mahajan and P. C. Jain, JJ., D/- 13-8-1968.

Transfer of Property Act (1882), Ss. 109 and 91 — Tenants of mortgaged property

EM/KM/B952/69/GGM/2

attorning to mortgagee — No new tenancy is created — On redemption their tenancy with mortgagor revives.

Where a property in possession of tenants is mortgaged and the tenants attorn to the mortgagee no new tenancy comes into being between the mortgagee and the tenants. When, in such a case, the mortgage is redeemed, on redemption their tenancy under the mortgagor which had remained in abeyance, revives and they become the tenants of the mortgagor or his purchaser who may step into the shoes of the original mortgagor. AIR 1970 Punj & Haryana 104 (FB). Foll. (Para 5) Cases Referred: Chronological Paras (1970) AIR 1970 Punj & Haryana 104

(V 57)=Second Appeal No. 1 of 1967, D/- 13-3-1969 (FB), Jagan

Nath v. Mittar Sain 5

D. N. Aggarwal, with Puram Chand, Amar Datt and Ravi Karan Jain, for Appellants; D. S. Nehra, with G. P. Jain and G. C. Garg, for Respondents.

D. K. MAHAJAN, J.:— This first appeal arises out of a suit for possession of a shop together with four Chobaras situate in Saddar Bazar, Mandi Dhuri, District Sangrur.

2. Rulia Singh, the owner of the shop in dispute, rented it out to Kishori Lal sometime in 1937. On Rulia's death, his son, Balwant Singh, succeeded to him. On the 27th of October, 1941, Balwant Singh mortgaged the shop in suit to Roshan Lal Hukam Chand and Jagmohan Lal to secure an advance of Rs. 2,500/-. The mortgage amount was further increased to Rs. 5,000/- on the 3rd of June, 1945. On the 2nd of June, 1956, another sum of Rs. 1,000/- was taken and the shop was mortgaged with possession with the mortgagees, Roshan Lal and others. The plaintiffs, Nauhria Mal, Tej Pal and Prem Chand purchased the shop in suit from Balwant Singh for Rs. 9,500/- under a registered deed of sale dated the 19th of February, 1962. On the 14th of January, 1963, they redeemed the shop by paying Rs. 6,000/-, the mortgage money, to the mortgagees.

The present suit was filed by the plaintiffs against Kishori Lal and his son Prem Chand and Charanji Lal son of Bakhshu Mal. Charanji Lal is the brother of Kishori Lal. Balwant Singh, the original mortgagor, along with mortgagees, Roshan Lal and others, were impleaded as defendants. So also the firm Kishori Lal Prem Chand. Bakhshu Mal was stated to be a sub-tenant of defendants Nos. 1 and 2, Kishori Lal and Prem Chand. The suit was for possession by eviction of defendants Nos. 1, 2, 3 and 6. The suit was resisted by the defendants. The stand taken up by Balwant Singh was that defendants Nos. 1 and 2 were tenants of the shop together with the

Balakhanas before the mortgage; and at the time, when this property was mortgaged with defendants, Roshan Lal and others, with possession, defendants Nos. 1 and 2 were in possession of the same as tenants. The stand taken up by Kishori Lal and his son was that defendants Nos. 1 and 2, proprietors of the Firm Kishori Lal Prem Chand, have been doing business at the shop in suit since 1953 and right up to date; and they have been in possession of the shop as tenants since 1938. It was maintained that they being the tenants of the mortgagor attorned to the mortgagee and after the redemption of the mortgage, their tenancy under the mortgagor would revive.

3. The trial Court decreed the suit holding that:—

"From this evidence on record it is proved beyond doubt that Kishori Lal was a tenant of Rulia Singh father of Balwant Singh in 1934 B.K. x x x x x From 1947 to 1955, no rent deed has been produced which would show that Kishori Lal continued to be a tenant of Balwant Singh. On 5th August, 1956, Kishori Lal and Prem Chand executed a rent-deed in favour of the mortgagees for the first time though the mortgage subsisted from 1941. In 1948, Balwant Singh himself had executed a rent-deed, Exhibit P. 6, in favour of the mortgagees and have acknowledged them as his landlords. So the position of Kishori Lal was not that of a tenant, but could be considered as that of a sub-tenant; and when he executed the rent-deed in favour of the mortgagees, he did not merely attorn to the mortgagees but a new contract of lease was made.

4. Against this decision, the present appeal has been filed by the tenants, Kishori Lal and Prem Chand.

5. The only question, that requires determination, is, whether a new tenancy came into being between the mortgagees and Kishori Lal and Prem Chand? After going through the evidence, we are of the opinion that there was no new tenancy by Kishori Lal Prem Chand in favour of the mortgagees. The tenants, were to start with, the tenants of the mortgagor. After the mortgage, they attorned to the mortgagees; and on the redemption of the mortgage, their tenancy under the mortgagor, which had remained in abeyance, revived and they became the tenants of the plaintiff-mortgagors who had stepped into the shoes of the original mortgagor. We have taken this view of the matter for the reasons recorded in Jagan Nath v. Mittar Sain, Second Appeal No. 1 of 1967, decided today (13-3-1969)=(AIR 1970 Punj & Haryana 104) (FB).

6. The result, therefore, is that this appeal is allowed; the judgment and the decree of the trial Court is set aside and the plaintiffs' suit for possession is dis-

missed. However, there will be no order as to costs.

7. SHAMSHER BAHADUR, J.:— I agree.

8. R. S. NABULA, J.:— I concur.

Appeal allowed.

AIR 1970 PUNJAB & HARYANA 200
(V 57 C 28)

GOPAL SINGH, J.

Madan Lal Lamba, Petitioner v. Inderjit Mehta, Respondent.

Criminal Revn. No. 25-R of 1968, D/- 19-5-1969, from order of S. J., Bhatinda, D/- 28-12-1967

(A) Criminal P.C. (1898), S. 197(1)—Expression “while acting or purporting to act in discharge of official duty” — Interpretation of — For act to be official act there must be nexus between act and official obligation to be discharged by public servant — S.D.O. of P.W.D. charged to maintain Officer's Note Book — Incorrect entries in, made by him after substituting leaf in Note Book — Offence fell under S. 218 of Penal Code — Sanction for prosecution was condition precedent.

A public servant shall be treated to have acted or purported to act in the discharge of his official duty, if his official duties as a public servant enable him to justify the act falling within the scope of those duties. The act should be integrally connected with the authority of his office and should fall within the periphery of prescribed duties. There must be reasonable nexus between the act and the official obligation. A different or out of the way manner of doing an act if otherwise it falls within the scope of official duties cannot be treated as alien to the scope of such duty. Whether the act is done rightly or wrongly, correctly or incorrectly, if it is done in the discharge of official duty, it will be covered by S. 197.

(Para 10)

Where it was the official duty of the petitioner in his capacity as Sub-Divisional Officer of P.W.D. to maintain the Officer's Note Book and to make correct entries representing the actual supplies of material made by the respondent in execution of his contract work, and if the former while making entries therein made an incorrect entry, he had nonetheless so done while acting or purporting to act in the discharge of his official duty. If he after having prepared certain page of the Officer's Note Book containing the entry pertaining to certain supply replaced the leaf bearing that page by another leaf and made all the entries on that page except the entry pertaining to the respondent, he has while acting in his official

capacity omitted to make the entry, which he in that very capacity was under obligation to make. Omission to make entry by substitution of one folio for another is nothing but preparation of incorrect record. (Para 11)

The petitioner having prepared the incorrect record while acting or purporting to act in the discharge of his official duty as Sub-Divisional Officer, could not be proceeded against under S. 218, Penal Code unless sanction for his prosecution has been obtained under S. 197, Criminal P. C. AIR 1955 SC 309 & AIR 1966 SC 220, Disting. (Para 15)

(B) Penal Code (1860), S. 218— Framing of incorrect record — What is— Mode not material — Substitution of one leaf by another in Note Book is penal.

Under S. 218, Penal Code, it is not the replacement or substitution of one page by another, which is culpable or penal but it is the incorrect preparation or framing of the record or writing, which apart from the intention of causing loss for which the record is so prepared, makes the act penal. It is not material what mode is adopted for incorrect preparation of that record. Substitution of one leaf by another so as to omit a given entry from the page substituted is penal within the scope of second ingredient of S. 218. (Para 13)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 220 (V 53)=

1966 Cri LJ 179, Baijnath v. State of Madhya Pradesh 74

(1955) AIR 1955 SC 309 (V 42)=

1955 Cri LJ 865, Amrik Singh v. State of Pepsu 74

D. C. Ahluwalia, for Petitioner; K. C. Puri, for Respondent.

ORDER:— This is recommendation under Section 438, Criminal Procedure Code made by the Sessions Judge, Bhatinda in a revision petition filed by Madan Lal Lamba, Sub-Divisional Officer against Inderjit Mehta, contractor from the judgment dated February 6, 1967 given by Shri Dina Nath, Judicial Magistrate 1st Class, Bhatinda holding that sanction for prosecution of Madan Lal Lamba by a complaint filed by Inderjit Mehta for offence under Section 218, Indian Penal Code was not necessary.

2. Briefly stated, the facts are that Inderjit Mehta entered into a contract on April 25, 1964 for supply of stone ballast to the Public Works Department of the Punjab Government for construction of Lassara Nala and Bhatinda-Dabwali Road.

3. Inderjit Mehta supplied 1400 cubic feet of stone ballast to Madan Lal Lamba in his capacity as Sub-Divisional Officer in charge of the contract. The Sub-Divisional Officer checked the material on June 3, 1964. He made an entry at page 11 in the Officer's Note Book No. 35. The

running bill of the amount thus due was drawn up on February 23, 1965. The payment of the amount due is said to have been postponed by the Sub-Divisional Officer on one pretext or the other. On August 31, 1965, the contractor came to know that the Sub-Divisional Officer had replaced page 11 of the Officer's Note Book by inserting in that book another leaf bearing that page number. The page replaced did not contain the entry pertaining to the supply of 1400 cubic feet of stone ballast.

4. The contractor finding that the Sub-Divisional Officer had prepared the record in a manner knowing it to be incorrect with intent to cause loss to him and also had fabricated the record, filed on July 16, 1966 a complaint under Sections 218, 465 and 467, Indian Penal Code against the Sub-Divisional Officer. The trial Court summoned the accused only for offence under Section 218, Indian Penal Code. The accused made an application to the Court on December 12, 1966 contending that under Section 197 of the Criminal Procedure Code, no sanction having been obtained for his prosecution, he cannot be proceeded against under Section 218, Indian Penal Code.

5. It is admitted on behalf of the parties that the petitioner-accused is a public servant. It is contended on behalf of the petitioner that he having prepared incorrect record pertaining to the payment of price of the stone ballast supplied by the respondent while acting or purporting to act in the discharge of his official duty, the Court could not take cognizance of offence under Section 218, Indian Penal Code unless the previous sanction of the State Government is forthcoming and no sanction having been obtained, the complaint deserves dismissal.

6. Section 218, Indian Penal Code, under which the petitioner has been summoned, runs as follows:—

"Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

7. It is admitted by both the parties that the petitioner in his capacity as Sub-Divisional Officer was charged with the

preparation of the record or writing of the Officer's Note Book containing page 11. It is also conceded that whether it is the original leaf bearing page 11 or the one by which it has been substituted, both are written in the handwriting of the petitioner and were prepared by him. Thus, the preparation of page 11 as replaced with the entry pertaining to the supply of 1400 cubic feet of stone ballast omitted thereon is the official act of the petitioner performed in the discharge of his official duty as Sub-Divisional Officer. If the facts alleged on behalf of the complainant for prosecution of the petitioner are correct and at this stage I have, for the purpose of determination of the question of applicability of Section 197, Criminal Procedure Code, to assume that they are, subject to the defence, which may be offered at a later stage, then the act of preparation of page 11, whether the earlier one or the subsequent one, falls within the scope of official duty of the petitioner. According to the complaint, the petitioner has framed that record or writing in a manner which he knew to be incorrect and he did it with intent or knowing that he is likely thereby to cause loss to the respondent.

8. In order to find whether the act of preparation of the replaced page 11 of the Officer's Note Book in an incorrect manner falls within the ambit of Sec. 197, Criminal Procedure Code, it is necessary to consider the language of Section 197. Section 197(1), Criminal Procedure Code, which is relevant for the present case runs as follows:—

"197(1). When any person, who is a Judge within the meaning of Section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant, who is not removable from his office save by or with the sanction of a State Government or the Central Government is accused of any offence alleged to have been committed by him 'while acting or purporting to act in the discharge of his official duty', no Court shall take cognizance of such offence except with the previous sanction:—

(a) in the case of a person employed in connection with the affairs of the Union, of the Central Government; and

(b) in case of a person employed in connection with the affairs of a State, of the State Government."

9. The point of controversy hinges around the above underlined (here in ') portion of S. 197(1), Criminal P. C. vis-a-vis Section 218, Indian Penal Code.

10. A public servant shall be treated to have acted or purported to act in the discharge of his official duty, if his official duties as a public servant enable him to justify the act falling within the scope of those duties. In other words, the act should be integrally connected with the

authority of his office and should fall within the periphery of prescribed duties. If there is reasonable nexus between the act and the official obligation to be discharged by the public servant, the act shall be regarded as an official act. If the act is entirely unconnected with his office, it could not be deemed to be an official act within the scope of Section 197(1), Criminal Procedure Code. There must be a logical relation of the act with the discharge of official duties, which the office of a public servant enjoins upon him. A different or out of the way manner of doing an act if otherwise it falls within the scope of official duties could not be treated as alien to the scope of such duty. Whether the act is done rightly or wrongly, correctly or incorrectly, if it is done in the discharge of official duty, it will be covered by that section.

11. As referred to above, it was the official duty of the petitioner in his capacity as Sub-Divisional Officer to maintain the Officer's Note Book and to make correct entries representing the actual supplies of stone ballast made by the respondent in execution of his contract work. The petitioner prepared page 11 of the Officer's Note Book in his official capacity. If the petitioner while preparing page 11 of the Officer's Note Book or making entries therein made an incorrect entry, he had nonetheless so done while acting or purporting to act in the discharge of his official duty. If the petitioner either by erasure of an entry or by its omission prepared incorrect record, even then he would be acting within the scope of his official duty although he may be acting wrongly and not according to what he ought to act. If the petitioner after having prepared page 11 of the Officer's Note Book containing the entry pertaining to the supply of 1400 cubic feet of stone ballast replaced the leaf bearing page 11 by another leaf and made all the entries on that page except the entry pertaining to the respondent, he has while acting in his official capacity omitted to make the entry, which he in that very capacity was under obligation to make. Omission to make entry by substitution of one folio for another is nothing but preparation of incorrect record.

12. In order that Section 218, Indian Penal Code, may apply, the following three relevant essential ingredients of that Section must apply:—

(i) The public servant must be charged with the preparation of any record or other writing;

(ii) He must frame that record or writing in a manner, which he knows to be incorrect; and

(iii) He has done it with intent to cause or knowing it to be likely that he will

thereby cause loss or injury to public or to any person.

For making Section 218, Indian Penal Code applicable, the preparation of record or other writing must be the official duty of the public servant. In the present case, there is no gainsaying the fact that according to the case of the prosecution, it is the petitioner, who was to prepare the record of the Officer's Note Book and he in fact according to the case, himself in his own handwriting made the entries on page 11, both before and after its substitution. Thus, according to the first ingredient of Section 218, the petitioner prepared page 11 by omission of the relevant entry pertaining to the supply of stone ballast by the respondent from that page. The petitioner has done it in no other capacity except in his capacity as Sub-Divisional Officer. That act of the petitioner falls within the scope of discharge of his official duty. While replacing previous page 11 by a subsequent one with the difference of the omission therefrom of the entry of supply of the commodity by the respondent to the Government, the petitioner has all the same prepared the record in his official capacity except that he has prepared it incorrectly. Simply because, there is an omission from page 11 by the petitioner, it does not imply that the act of the petitioner ceases to partake the character of an official act. The act remains to be the official act except the manner of doing that act has been altered by omission of the entry from the record so prepared. The content and nature of the first two ingredients of Section 218, Indian Penal Code, as referred to above, which are relevant for the purpose of the determination of the question whether the act falls within the ambit of Section 197(1), Criminal Procedure Code, leave no doubt that the case of offence against the petitioner under that Section falls within the scope of the official act contemplated by Section 197(1), Criminal Procedure Code.

13. Shri K. C. Puri appearing on behalf of the respondent has contended that tearing of the leaf from the officer's Note Book and its replacement amounts to commission of offence of preparation of false record and consequently the act does not fall within the scope of the official duty contemplated by Section 197, Criminal Procedure Code. I am concerned only with the offence under Section 218, Indian Penal Code, for which the petitioner is being prosecuted and not with the offence pertaining to the preparation of false record. Under Section 218, Indian Penal Code, it is not the replacement or substitution of one page by another, which is culpable or penal but it is the incorrect preparation or framing of the record or writing, which apart from

the intention of causing loss for which the record is so prepared, makes the act penal. The second ingredient will be satisfied if the record prepared is erroneous. It is not material what mode is adopted for incorrect preparation of that record. Substitution of one leaf by another so as to omit a given entry from the page substituted is penal within the scope of second ingredient of Section 218. It will not be relevant to consider as to what method or means have been adopted for the incorrect preparation of the record to attain the end of omission of a given entry. Considering the scope of the two essential ingredients of Section 218, Indian Penal Code vis-a-vis Section 197(1), Criminal Procedure Code, the only view, in the premises of the facts of the present case, which these two Sections admit of, is that the petitioner acted or purported to act in the discharge of his official duty.

14. The counsel for the petitioner principally relied on *Amrik Singh v. State of Pepsu* reported in AIR 1955 SC 309 in support of his contention, whereas the counsel for the respondent placed reliance mainly on *Baijnath v. State of Madhya Pradesh* reported in AIR 1966 SC 220. Both these decisions of the Supreme Court pertain to cases of breach of trust under Section 409, Indian Penal Code. In the earlier decision, the view taken was that a Sub-Divisional Officer, who had shown in the acquittance roll drawn up by him payment of Rs. 51.00 to a labourer and affixed his own thumb-impression purporting to be the thumb-impression of that labourer and misappropriated the amount himself, did so in the discharge of his official duty. In the latter case, in which a cashier instead of depositing certain items of money, which he had to deposit in the treasury, did not deposit the same and converted it to his own use, it was held that Section 197, Criminal Procedure Code did not apply as the act of misappropriation under S. 409, Indian Penal Code did not fall within the scope of his official duty.

15. The facts of the present case are entirely different. The offence committed is not one under Section 409, Indian Penal Code but is one under Section 218, Indian Penal Code for which the petitioner is being proceeded against. The present case being distinguishable on the facts and dealing with entirely a different offence from the one with which these two Supreme Court decisions dealt, those cases are not analogous and applicable to the present case. As discussed above, the act of preparation of record by the petitioner and so also the act of preparation of incorrect record by him falls as much within the scope of Section 197, Criminal Procedure Code as it does within the scope of Section 218, Indian Penal

Code. The petitioner having prepared the incorrect record while acting or purporting to act in the discharge of his official duty as Sub-Divisional Officer, he cannot be proceeded against for prosecution under Section 218, Indian Penal Code unless sanction for his prosecution has been obtained under Section 197, Criminal Procedure Code. The sanction being a condition precedent for his prosecution and no sanction having been obtained, the petitioner cannot be prosecuted. I accept the recommendation made by the Sessions Judge, though for different reasons, and set aside the order of the trial Court dated February 6, 1967.

Reference accepted.

AIR 1970 PUNJAB & HARYANA 203
(V 57 C.29)

P. C. PANDIT, J.

Banta Singh Khushal Singh, Plaintiff-Appellant v. Anjuman Imdad Bahmi and Thrift Society, Tanoli, Defendant-Respondent.

Second Appeal No. 1648 of 1959, D/- 17-4-1969, from decree of Senior Sub-J., Hoshiarpur, D/- 21-7-1959.

Co-operative Societies — Co-operative Societies Act (1912), S. 17 — Audit notes prepared under section — There is no provision of law under which their contents could be presumed to be correct — Section 114, Evidence Act cannot be invoked firstly because the audit notes cannot be equated with judicial and official acts and secondly because the section does not raise a presumption regarding correctness of contents of documents — (Evidence Act (1872), S. 114).

(Para 8)

H. L. Soni, for Appellant; D. N. Aggarwal, for Respondent.

JUDGMENT:— This is a plaintiff's second appeal against the decree of the learned Senior Subordinate Judge, Hoshiarpur, confirming on appeal the decision of the trial Court dismissing his suit.

2. Banta Singh, a resident of village Tanoli, District Hoshiarpur, brought a suit against Anjuman Imdad Bahmi and Thrift Society of his village for a declaration to the effect that the decree obtained by the defendant on the basis of an award against him was illegal and void. He also prayed for an injunction restraining the defendant not to realise the said decretal amount from him in execution of the aforesaid decree. His allegations were that though he was a resident of village Tanoli, but he was living in Rajasthan since 1930 and used to visit his village off and on. About six months before the institution of the suit in May, 1958, when he visited his village, he came to know that the defendant had

IM/IM/E70/69/MKS/D

obtained a decree against him on the basis of an award and was going to execute the said decree by attaching and selling his immovable property. He was neither a member of the defendant-Society nor had he borrowed any money from it. He did not even stand surety for any member of the Society for any debt. It was also averred by him that he received no notice from the Arbitrator to appear before him.

3. The suit was contested by the defendant-Society on a number of pleas which led to the framing of the following issues:—

1. Whether the plaint is signed by the plaintiff?

2. Whether the plaintiff is or was a member of the defendant society?

3. If issue No. 2 is proved, whether civil court has no jurisdiction to try the suit?

4. If issue No. 2 is proved, whether the plaintiff was a debtor and a surety for a debtor of the defendant Society?

5. If issue No. 4 is proved, whether the proceedings before the arbitrator were illegal, unauthorised, inoperative for the reasons given in para No. 4 of the plaint?

4. The trial Judge held that the plaintiff was a member as well as a debtor of the defendant-Society. He further found under issue No. 3 that the civil Court had no jurisdiction to try the suit, because the plaintiff could file an appeal against the award to the Registrar, Co-operative Societies. He did not consider it necessary to give any finding on issue No. 5, in view of his finding on issue No. 3. As a result of these findings he dismissed the suit.

5. When the matter went in appeal before the learned Senior Subordinate Judge, he confirmed the findings of the trial Court on issues Nos. 3 and 4 and held that the plaintiff was a member as well as a debtor of the defendant-Society. Under issue No. 5, his finding was that the plaintiff did not produce any evidence to show that he was not served with a notice regarding the appointment of the Arbitrator. He had also not established that the Arbitrator did not issue any notice to him. The bare statement of the plaintiff that he was not served with any notice was, according to the learned Judge, not sufficient to hold that no notice was served on him. The award was, consequently, legal and binding on the plaintiff.

So far as issue No. 3 was concerned, the learned Judge observed that if issue No. 5 had been proved by the plaintiff, the Civil Court might have jurisdiction to decide this case. In view of his finding on issue No. 5, the Civil Court, according to the learned Judge, had no jurisdiction to try the suit. The appeal

was, consequently, dismissed. Against this decision, the present second appeal has been filed by the plaintiff.

6. It was conceded by the learned counsel for the respondent that if the appellant is held to be not a member of the defendant-Society, then the civil Court would have jurisdiction to try the present suit, because in that case the award given by the Arbitrator would obviously be without jurisdiction. The Arbitrator could decide disputes between the Society and its members and if the appellant was not a member, then the Arbitrator would have no jurisdiction to decide the alleged dispute and give the award in question.

7. It has been found by both the Courts below that the appellant was a member and a debtor of the defendant-Society. It has been alleged by the learned counsel for the appellant that this finding is vitiated, inasmuch as there was no legal evidence to support it. The trial Court, on this point, had observed that the records of the Society were alleged to have been lost. The defendant had proved from the statement of Manohar Lal, D.W. 1, who was a Clerk in the Central Co-operative Bank at Hoshiarpur, that the appellant was recorded as a debtor of the Society in the audit notes, which the witness had brought with himself. Those audit notes had been prepared under Section 17(2) of the Co-operative Societies Act, 1912, and as such, a presumption under Section 114 of the Evidence Act that all official acts were regularly done would apply. Since the appellant, according to D.W. 1, was recorded as a debtor of the Society in the audit notes, he must be, according to the trial Court, held to be a member of the Society.

The learned Senior Subordinate Judge also had given the finding, on this point, in favour of the Society, primarily on the evidence of D.W. 1. He had, however, observed that it was true that the defendant did not produce the register of members, but this omission was not fatal to its case, though to give a lie to the plaintiff's case, that register would have been a very important document. There was, according to the learned Judge, nothing on the record to show that the audit notes were incorrect. The original record was destroyed by a relative of the appellant and his bare statement was not, according to the learned Judge, sufficient to hold that he was not a member of the Society.

8. During the course of arguments, learned counsel for the respondent sought to support the finding of the Courts below on this point on the basis of the evidence of D.W. 1. It is significant to mention that the audit notes are not on the record of the case. It appears that D.W. 1

brought the notes, gave evidence with regard to them and then took them back. What is stated was that according to the audit notes brought by him in Court, the appellant was entered as a member of the Society at No. 22 and further that he had taken loan from it. In cross-examination, he admitted that he had given his entire evidence on the basis of the audit notes, which were not in his handwriting. He further admitted that in the said notes, there was no mention that any decree had been passed against the appellant in favour of the Society. Could it be said that there was any legal evidence in support of the finding that the appellant was a member of the Society? The audit notes, as I have said, were not produced on the record.

According to Section 59 of the Evidence Act, all facts, except the contents of documents, might be proved by oral evidence and documents under Section 64 of the same Act must be proved by primary evidence, except in the cases thereafter mentioned. It was not the position of the respondent that in the present case, the audit notes could be proved otherwise than by primary evidence. Learned counsel, however, submitted that the objection regarding the mode of proof should have been taken at the time when D.W. 1 was giving evidence.

Counsel for the appellant, on the other hand, contended that if the audit notes had been exhibited without any objection from their side, perhaps the submission of the learned counsel for the respondent in that case might have some force. But in the instant case, those audit notes were not produced and made a part of the record of the case by the defendant-Society.

This apart, assuming for the sake of argument, even if the audit notes had been brought on the record, could it be said that a presumption of correctness with regard to their contents also arise? All that Section 17(1) of the Co-operative Societies Act, 1912, says is that the Registrar shall audit or cause to be audited by some person authorised by him the accounts of every registered Society once at least in every year. According to sub-clause (2) of that section, the audit under sub-section (1) shall include an examination of overdue debts if any and evaluation of assets and liabilities of the Society. If the auditor, who had prepared those audit notes had appeared in the witness-box, he could be asked on what basis the entry regarding the appellant's membership of the Society was made therein. No law had been cited under which the contents of those audit notes could be presumed to be correct.

Section 114 of the Evidence Act, on which reliance was placed by the Courts below, would be of no assistance to the

respondent in that behalf. The entries in the audit notes cannot be equated with judicial and official acts. Moreover, Section 114 does not raise a presumption regarding the correctness of the contents of a document covered by it. It is noteworthy that D.W. 3, Jai Singh, admitted that there was in existence the register containing the names of the members of the Society and that it was kept in the office of the Society. Curiously enough that register was not produced. There must also be the form of membership which must have been signed by the appellant when he became a member of the Society. That form is also not forthcoming on the record. There is no convincing evidence in support of the fact that the original records of the Society had been destroyed by a relative of the appellant. Under these circumstances, I am of the opinion that there was no legal evidence in support of the finding that the appellant was a member of the defendant-Society. That being so, the finding of the Courts below on issue No. 2 is vitiated in law and cannot be sustained. I would, therefore, hold that it has not been proved on the record that the plaintiff was a member of the defendant-Society and, consequently, the award made against him by the Arbitrator was without jurisdiction and void.

9. In this view of the matter, no other question admittedly arises for decision in this appeal.

10. The result is that the appeal succeeds, the judgments and decrees of the Courts below are set aside and the plaintiff's suit decreed. In the circumstances of this case, however, the parties are left to bear their own costs throughout.

Appeal allowed.

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(V 57 C 30)

FULL BENCH

MEHAR SINGH, C. J., HARBANS
SINGH, D. K. MAHAJAN, GURDEV
SINGH AND BAL RAJ TULI, JJ.

Smt. Pritam Devi and others, Petitioners v. The Additional Director, Consolidation of Holdings, Punjab, Jullundur and others, Respondents.

Civil Revn. No. 82 of 1965, D/- 6-10-1969.

(A) Civil P. C. (1908), O. 32, R. 9 — Mother representing her minor children as next friend in writ petition — One major son also a party to writ petition — Mother not taking effective steps to prosecute the case—Mother removed as guardian and next friend — Notice issued to major son asking him to act as next friend. (Para 1)

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(B) Civil P. C. (1908), O. 41, R. 5 — Stay of proceedings — Mother including her six children only one of whom is major filing writ petition on behalf of herself and all — Applicants granted stay against an order granting dispossession of their property — Mother as next friend not taking effective steps to pursue her petition which remained pending for over four years — Omission of major son also to prosecute the petition — Held, there was no reason why major brother should not have acted in pursuing the case — Stay vacated as the applicants were using delaying tactics and taking undue advantage of stay. (Para 1)

Mela Ram Sharma, Deputy Advocate General (Pb.) (for Nos. 1-2); H. L. Sarin, Senior Advocate with A. L. Bahl, H. S. Awasthi and B. S. Malik, for Respondents.

ORDER:— This reference arises out of Civil Revision Application No. 82 of 1965 under Art. 227 of the Constitution, and there are seven applicants out of whom there are five minors, applicants 3 to 7, whose case has been represented by their mother as their next friend and guardian. Mr. Harbans Singh Gujral was advocate for the applicants. This case had been pending for quite a long time. When it was set in the list for hearing on September 29, 1969, he moved an application on September 25, 1969, that for reasons stated in the application he was not in a position to continue as a counsel for the applicants and wanted an order from the Court permitting him to withdraw from the case. His application was allowed on September 26, 1969. When the case came up for hearing on September 29, 1969, a relation of Pritam Devi, applicant 1, mother of the minor applicants, appeared and said that Pritam Devi, applicant 1, was ill and he wanted an adjournment for the case to be argued because his counsel Mr. Gujral had gone to Srinagar. He wanted an adjournment to enable him to have the case argued by Mr. Gujral. The case was adjourned day-to-day, but on the side of the applicants no counsel or party has appeared today. It is because out of the applicants five are minors that we have considered it necessary not to dismiss the application for non-prosecution. Pritam Devi, applicant 1, in the circumstances, is removed from her position as the next friend and guardian of the minor applicants, and we issue notice to their major brother, Gandharb Singh, applicant 2, whether he agrees to represent them in this application as their next friend and guardian and to make arrangement for the prosecution of the application on their behalf. Notice be now issued to Gandharb Singh, applicant 2, for October 27, 1969.

There is a stay order in this case made on February 3, 1965, as confirmed on August 29, 1966, staying dispossession in the case. If in this case Pritam Devi, ap-

plicant 1, was the only major applicant, and all the other applicants were under a disability, we might have taken a different view, but there is no justification for applicant 2, Gandharb Singh, who is major and whose interests are the same as those of the other applicants not appearing in this case. It appears to us obvious that these tactics are being employed on their side to have an undue advantage of the stay order, granted by this Court, which has lasted for a little over four years. In the circumstances, the stay order is vacated. This case will now come up on October 27, 1969.

Order accordingly.

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(V 57 C 31)

FULL BENCH

SHAMSHER BAHADUR, R. S. NARULA
AND BAL RAJ TULI, JJ.

M/s. Hari Chand Rattan Chand & Co.,
Petitioner v. The Deputy Excise & Taxation
Commissioner (Additional), Punjab,
Respondent.

Civil Writ Nos. 1232, 1686 of 1965 and
539 and 1819 of 1966, D/- 22-5-1969, decided
by Full Bench on Order of reference
made by R. S. Sarkaria, J., D/- 1-4-1968.

(A) Sales Tax — Punjab General Sales
Tax Act (46 of 1948), Ss. 21 (1) and 11-A
— Scope — Power of revision under Section
21 (1) is not subject to period of limitation
prescribed in S. 11-A.

The jurisdiction of the Commissioner
under Section 21 (1) is not subject to the
period of limitation prescribed in Section
11-A. AIR 1967 SC 681, Dist.; AIR
1965 SC 1585, Rel. on; AIR 1965 Punj 62
& (1963) 14 STC 610 (Punj), Held not im-
paired by AIR 1964 SC 1413 & AIR 1968
SC 843. (Paras 18, 24 and 25)

Section 11-A empowers the assessing
authority to reassess a dealer in respect of
any turnover which had escaped assess-
ment or which had been under-assessed
in consequence of any definite informa-
tion which comes into his possession after
the original order of assessment was made.
This power cannot be exercised either by
the appellate authority or the revisional
authority. The revisional authority is en-
titled to call for the record of any case
decided by the assessing authority or any
appellate authority in order to see whether
the order passed is proper or legal. Similarly
he can call for the record of any proceeding
pending before any assessing authority or
appellate authority in order to determine the
legality or propriety of the proceedings. (Para 8)

But, before he decides to exercise this
power, he must come to the conclusion
that the order or the proceedings suffer

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from the vice of impropriety or illegality and for this conclusion he has to confine himself to the record which is called by him and which was before the lower authority as the lower authority can be presumed to have applied his mind only to that record. He cannot take into consideration any fresh material in order to come to this conclusion. (Para 8)

After having come to that conclusion, he will be entitled to scrutinise the proceedings and the order passed in order to determine the correct turnover which should have been assessed to tax on the basis of that record. He cannot, however, bring to tax, in the purported exercise of revisional powers, any turnover which had not been disclosed to the assessing authority by the dealer or which was not discovered by him during the course of assessment and which has come to the notice of the revising authority after the expiry of three years following the close of the year to which the turnover proposed to be taxed relates. That is the function of the assessing authority under Section 11-A of the Act and cannot be exercised by the revising authority.

(Para 8)

But, if any enquiry is to be made or some evidence has to be examined in respect of the turnover which was the subject-matter of the proceedings before the assessing authority or the appellate authority, the revising authority will be at liberty to make such further enquiry or to take such further evidence as he considers fit to determine the legality or propriety of the order already passed. For example, and not meaning it to be exhaustive, he can determine whether the deductions or exemptions were correctly allowed or the tax was levied at the rate prescribed. The bogus nature or the falsity of the deductions or exemptions allowed can also be gone into. (Para 8)

To emphasize, such further enquiry or evidence must be germane to the turnover already on the record and not to the turnover which is sought to be brought in for the first time as a result of some information obtained from somewhere. That can be done by the revising authority only if on the date of hearing before him the period of limitation prescribed in Section 11-A has not expired. This is so because the revising authority has the power of calling the record of the original proceedings also and deciding the same. He can call for the record of a proceeding pending before an assessing authority and pass such order in respect thereof as he thinks fit according to Section 21 (1) of the Act. In exercise of that power he can also rely upon the information in his possession and enhance the assessment after giving notice to the dealer provided the period of limitation prescribed in Sec-

tion 11-A of the Act has not expired. There is no period of limitation prescribed in the Act or the Rules framed under the Act within which alone the revising authority can exercise its power of suo motu revision under Section 21 (1) of the Act on the basis of the record called by him nor can any such period of limitation be implied on the basis of Section 11-A of the Act. (Para 8)

(B) Sales Tax — Punjab General Sales Tax Act (46 of 1948), S. 11 — Assessment order by Assessing Authority — Finality.

The assessment order made by the assessing authority does not become final merely because no appeal has been filed against it. It remains final only so long as it is not revised. Once it is revised it loses its finality and the order passed in revision takes its place which order may be termed as final so far as the Act is concerned, but even that order is liable to be set aside or modified on a reference to the High Court under Section 22 of the Act or on a petition under Art. 32 or 136 or 226 of the Constitution made to the appropriate Court. (Para 7)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 843 (V 55) =
21 STC 383, Swastik Oil Mills Ltd. v. H. B. Munshi Deputy Commr. of Sales Tax, Bombay 4, 15
- (1967) AIR 1967 SC 681 (V 54) =
19 STC 144, State of Madras v. Madurai Mills Co., Ltd. 17
- (1965) AIR 1965 SC 1585 (V 52) =
16 STC 875, State of Kerala v. K. M. Cheria Abdulla and Co. 1, 9, 15, 23
- (1965) AIR 1965 Punj 62 (V 52) =
15 STC 746, National Rayon Corporation Ltd. v. Addl. Asst. Excise and Taxation Commr. Punjab 1, 3, 19, 24
- (1964) AIR 1964 SC 1413 (V 51) =
15 STC 153, State of Orissa v. Debaki Debi 1, 4, 12, 15, 19, 24
- (1963) 14 STC 610 (Punj), Narain Singh Mohinder Singh v. State of Punjab 3, 19, 24
- Bhagirath Das with S. K. Hiraji and B. K. Jhingan, for Petitioner; B. S. Dhillon, Advocate General, Punjab with B. S. Shant and Rattan Singh, for Respondent.

TULI, J.:— These four writ petitions (C. W. No. 1232 of 1965, Messrs. Hari Chand Rattan Chand and Co. v. The Deputy Excise and Taxation Commissioner, C. W. No. 1686 of 1965, Messrs. Kashmiri Lal Kasturi Lal and Co. v. The Deputy Excise and Taxation Commissioner, C. W. No. 539 of 1966, Messrs. Raj Brothers v. Asst. Excise and Taxation Commr. and C. W. No. 1819 of 1966, Messrs. Highway Motors v. Chief Enforcement Officer, Punjab, Patiala) came up for hearing before my learned brother Sarkaria, J.,

on April 1, 1968, and it was urged that a common question of law had arisen as to whether the Excise and Taxation Commissioner is competent under Section 21 (1) of the Punjab General Sales Tax Act, 1948, hereinafter called the Act, to reopen an assessment order after the expiry of the period prescribed in sub-section (6) of Section 11 of that Act. It was pointed out to the learned Judge that this very question arose in *National Rayon Corporation Ltd. v. Addl. Asst. Excise and Taxation Commr., Punjab*, 15 STC 746 = (AIR 1965 Punj 62), and the view taken by the Division Bench in that case was that the Legislature did not intend to fetter the power of the Commissioner under Section 21 by any rule of limitation and, therefore, left it to the Commissioner's discretion to exercise his power at any time. The correctness of this decision was doubted in view of the decision of their Lordships of the Supreme Court in *State of Orissa v. Debaki Debi*, 15 STC 153 = (AIR 1964 SC 1413), and it was pleaded that the Division Bench judgment of this Court required reconsideration. In view of the joint submission of the learned counsel for both the parties, the learned Judge directed that the papers in all these four cases be placed before my Lord the Chief Justice for constituting a larger Bench to reconsider the aforesaid Division Bench judgment and to determine the question: "Whether the jurisdiction of the Commissioner under Section 21 (1) of the Punjab General Sales Tax Act, 1948, is subject to the period of limitation prescribed in sub-section (6) of S. 11 of the Act". It is admitted by both the learned counsel that instead of sub-section (6) of S. 11 it should be Section 11-A so that the question referred will read as under:—

"Whether the jurisdiction of the Commissioner under Section 21 (1) of the Punjab General Sales Tax Act, 1948, is subject to the period of limitation prescribed in Section 11-A of the Act."

2. This is how these cases have been placed before us for deciding the point of law referred.

3. This precise point had arisen in an earlier Division Bench judgment of this Court in *Narain Singh Mohinder Singh v. State of Punjab*, (1963) 14 STC 610 (Punjab). The judgment in that case was delivered by Mehr Singh, J. (as my Lord the Chief Justice then was) with which my learned brother Shamsher Bahadur, J. agreed and it was held as under:—

"In so far as the first question is concerned it is obvious that the provisions of Section 11-A of the Act have no bearing on the revisional powers of the Commissioner under sub-section (1) of S. 21 of the Act for what the Commissioner does in exercising revisional powers is to satisfy himself as to the legality or pro-

priety of the record of any proceedings before or disposed of by the Assessing Authority or the Appellate Authority as the case may be, and he does not take proceedings for reassessment. Apart from this, Section 11-A applies only to an Assessing Authority and not to a Commissioner. Consequently Section 11-A of the Act has no bearing so far as the revisional powers of the Commissioner under Section 21 (1) of the Act are concerned and it follows that Section 11-A cannot possibly limit the revisional powers of the Commissioner under Section 21 (1). The obvious answer to the question is that the Commissioner is not bound to take into consideration the provisions of S. 11-A when exercising his revisional powers under Section 21 (1) of the Act."

This decision was delivered on July 17, 1962, and when this point of law was argued before the other Division Bench deciding the case of *National Rayon Corporation Limited*, 15 STC 746 = (AIR 1965 Punj 62) (Supra) on July 16, 1964, this judgment does not seem to have been brought to the notice of the learned Judges by the learned counsel for either of the parties. The judgment in that case was delivered by Dulat, J., with whom Pandit, J. agreed and it was held as under:—

"It is obvious that if the Legislature intended to limit the power of the Commissioner under Section 21 to a period of three years after the close of an assessment year or even after the disposal of the proceedings by an Assessing Authority, it could, and in the circumstances almost certainly would, have said so in Section 21, for the Legislature was aware that a period of limitation had for purposes of reassessment by an Assessing Authority been fixed in Section 11-A. The conclusion, in my opinion, must be that the Legislature did not intend to fetter the power of the Commissioner under Section 21 by any rule of limitation and, therefore, left it to the Commissioner's discretion to exercise his power at any time. Mr. Bhagrat Dass says that it is improbable that such power unlimited in time could have been entrusted to the Commissioner, but I can find nothing improbable about it, and the argument that the Commissioner may decide to reopen a matter settled twenty or thirty years previously, does not lead anywhere. The power of revision mentioned in Section 21 is altogether separate from and unconnected with the power of reassessment by an Assessing Authority under Section 11-A of the East Punjab General Sales Tax Act. In my opinion, therefore, the learned single Judge was right in holding that the Additional Assistant Excise and Taxation Commissioner had authority to revise the previous

orders made by the Assessing Authority in the present case".

4. It is thus obvious that the two Division Benches of this Court had independently come to the same conclusion on the question of law argued before them. It is now to be considered whether the correctness of this decision has been, in any way, impaired by the decisions of their Lordships of the Supreme Court in 15 STC 153 = (AIR 1964 SC 1413) (Supra) and Swastik Oil Mills Ltd. v. H. B. Munshi, Deputy Commr. of Sales Tax, Bombay, 21 STC 383 = (AIR 1968 SC 843).

5. Before proceeding to discuss the arguments of the learned counsel, I prefer to notice the relevant provisions of the Act as it applied to the cases in hand which relate to the years of assessment 1957-58, 1958-59 and 1959-60. The sales tax is levied under Section 4 of the Act. The rate of tax and the exemptions to be allowed are provided in Section 5 and tax-free goods are mentioned in Section 6. Section 10 provides for the filing of returns by the dealers with a view to enable the Assessing Authority to determine the sales tax payable. Section 11 deals with the assessment of tax and provides the period of limitation for making the assessment in certain cases. After a dealer furnishes the returns in respect of the periods of assessment and the Assessing Authority is satisfied with the same, he can assess the amount of tax due from the dealer on the basis of such returns and there is no period of limitation prescribed therefor. If the Assessing Authority is not satisfied with the returns filed by the dealer, he shall call upon the dealer to attend in person or to produce or cause to be produced any evidence in respect of any returns. The Assessing Authority, after hearing such evidence as the dealer may produce, and such other evidence as the Assessing Authority may require on specified points, shall assess the amount of tax due from the dealer. For such an assessment also there is no period of limitation provided, but, if a dealer does not comply with the terms of notice to produce the evidence, the Assessing Authority has the right to proceed to assess, to the best of his judgment, the amount of tax due from the dealer within three years of the expiry of the period to which it relates. If no returns are filed and the Assessing Authority proceeds to make the assessment on best judgment, he must do so within three years of the expiry of the period for which return has not been filed. Similarly if the Assessing Authority is satisfied from any information in his possession that any dealer who was liable to pay tax under the Act in respect of any period but had failed to apply for registration, the Assessing Authority can proceed to assess to the best of his judgment the amount of

tax from such dealer, after giving a notice, within three years of the expiry of such period. Section 11-A of the Act provides the period of limitation of three years for re-assessing the turnover of business of a dealer which had been under-assessed or escaped assessment in any year and is as under:—

"11-A(1) If in consequence of definite information which has come into his possession, the Assessing Authority discovers that the turnover of the business of a dealer has been under-assessed, or escaped assessment in any year, the Assessing Authority may, at any time within three years following the close of the year for which the turnover is proposed to be re-assessed, and after giving the dealer a reasonable opportunity, in the prescribed manner of being heard, proceed to reassess the tax payable on the turnover which has been under-assessed or has escaped assessment.

(2) An Assessing Authority or any such authority as may be prescribed, may, at any time, within one year from the date of any order passed by him and subject to such conditions as may be prescribed, rectify any clerical or arithmetical mistake apparent from the record."

6. The period of three years provided in sub-sections (4), (5) and (6) of S. 11 and Section 11-A of the Act was extended to four years with effect from January 10, 1963, and to 5 years with effect from April 1, 1966. The provision for an appeal is made in Section 20 of the Act and Section 21 (1) provides for the power of revision of the Commissioner in the following words:—

"21 (1) The Commissioner may, of his own motion or on application made to him, call for the record of any proceedings which are pending before, or have been disposed of by, any assessing or appellate authority appointed under this Act, for the purposes of satisfying himself as to the legality or propriety of such proceedings or of any order made therein and may pass such orders in relation thereto as he may think fit:

Provided that the application shall be made within a period of 180 days of the date of taking of the proceedings or of passing of the order, as the case may be."

7. The precise argument of the learned counsel for the petitioners is that in exercise of his revisional powers, the Commissioner cannot bring to tax the turnover which had escaped assessment or had been under assessed as that is the function exclusively assigned to the assessing authority by the Legislature under Section 11-A of the Act and if he does so, he shall be trenching upon the powers which have been expressly reserved to the assessing authority. If he is held competent to do so, he should be held

bound by the same letter as to the period of limitation to which the assessing authority is subject under Section 11-A of the Act. Since the effect of the order of the revising authority under Section 21 (1) of the Act, in case it goes against the dealer will be to increase his taxable turnover, it will amount to reassessment of the turnover which had either escaped assessment or had been under assessed by the assessing authority and the power of revision enabling the revising authority to do so must be held to be exercisable within three years following the close of the year to which it relates, as is provided in Section 11-A of the Act. It will also amount to reopening of a final assessment which cannot be done except by reassessment in the manner provided in Section 11-A of the Act. This argument did not find favour with the learned Judges of the Division Benches who decided the earlier two cases referred to above nor has it appealed to us. The assessment order made by the assessing authority does not become final merely because no appeal has been filed against it. It remains final only so long as it is not revised. Once it is revised it loses its finality and the order passed in revision takes its place which order may be termed as final so far as the Act is concerned, but even that order is liable to be set aside or modified on a reference to the High Court under Section 22 of the Act or on a petition under Art. 32 or 136 or 226 of the Constitution made to the appropriate Court.

8. In order to decide the point of law referred to us, in the context of the argument of the learned counsel, it is necessary to determine the respective scope of Sections 11-A and 21 (1) of the Act. Section 11-A empowers the assessing authority to reassess a dealer in respect of any turnover which had escaped assessment or which had been under-assessed in consequence of any definite information which comes into his possession after the original order of assessment was made. This power cannot be exercised either by the appellate authority or the revisional authority. The revisional authority is entitled to call for the record of any case decided by the assessing authority or any appellate authority in order to see whether the order passed is proper or legal. Similarly he can call for the record of any proceeding pending before any assessing authority or appellate authority in order to determine the legality or propriety of the proceedings.

But, before he decides to exercise this power, he must come to the conclusion that the order or the proceedings suffer from the vice of impropriety or illegality and for this conclusion he has to confine himself to the record which is called by him and which was before the lower

authority as the lower authority can be presumed to have applied his mind only to that record. He cannot take into consideration any fresh material in order to come to this conclusion.

After having come to that conclusion, he will be entitled to scrutinise the proceedings and the order passed in order to determine the correct turnover which should have been assessed to tax on the basis of that record. He cannot, however, bring to tax, in the purported exercise of revisional powers, any turnover which had not been disclosed to the assessing authority by the dealer or which was not discovered by him during the course of assessment and which has come to the notice of the revising authority after the expiry of three years following the close of the year to which the turnover proposed to be taxed relates. That is the function of the assessing authority under S. 11-A of the Act and cannot be exercised by the revising authority.

But, if any enquiry is to be made or some evidence has to be examined in respect of the turnover which was the subject-matter of the proceedings before the assessing authority or the appellate authority, the revising authority will be at liberty to make such further enquiry or to take such further evidence as he considers fit to determine the legality or propriety of the order already passed. For example, and not meaning it to be exhaustive, he can determine whether the deductions or exemptions were correctly allowed or the tax was levied at the rate prescribed. The bogus nature or the falsity of the deductions or exemptions allowed can also be gone into.

To emphasize, such further enquiry or evidence must be germane to the turnover already on the record and not to the turnover which is sought to be brought in for the first time as a result of some information obtained from somewhere. That can be done by the revising authority only if on the date of hearing before him the period of limitation prescribed in Section 11-A has not expired. This is so because the revising authority has the power of calling the record of the original proceedings also and deciding the same. He can call for the record of a proceeding pending before an assessing authority and pass such order in respect thereof as he thinks fit according to Section 21 (1) of the Act. In exercise of that power he can also rely upon the information in his possession and enhance the assessment after giving notice to the dealer provided the period of limitation prescribed in Section 11-A of the Act has not expired. There is no period of limitation prescribed in the Act or the Rules framed under the Act within which alone the revising authority can exercise its power of suo motu revision under Sec-

tion 21 (1) of the Act on the basis of the record called by him nor can any such period of limitation be implied on the basis of Section 11-A of the Act. I am, thus, in respectful agreement with the decisions of the two Division Benches of this Court noted above.

9. For coming to the above conclusion I have mainly drawn on the judgment of their Lordships of the Supreme Court in the State of Kerala v. K. M. Cheria Abdulla and Co., 16 STC 875 = (AIR 1965 SC 1585), wherein their Lordships defined the scope of revision under Section 12 (2) of the Madras General Sales Tax Act, 1939, which is in identical terms as Section 21 (1) of the Act. In that case, Rule 14-A had been framed providing as under:—

“Where the tax as determined by the initial assessing authority appears to the appellate authority under Section 11 or revising authority under Section 12 to be less than the correct amount of the tax payable by the dealer, the appellate or revising authority shall, before passing orders, determine the correct amount of the tax payable by the dealer, after issuing a notice to the dealer and after making such enquiry as such appellate or revising authority considers necessary”.

10. This rule had been declared ultra vires by the High Court of Kerala and the correctness of that decision was being examined by their Lordships of the Supreme Court. Their Lordships held the rule to be intra vires for the reason that the provision made in the rule to determine the correct amount of tax after issuing a notice to the dealer and after making such enquiry as the authority considers necessary was not contrary to any provision of the Act. Their Lordships observed that “it is usual in a taxing statute to confer such power on the appellate or revising authority” and that “investment of powers to make such enquiry as the appellate or the revising authority considers necessary can manifestly be made by Cls. (k) and (l) of Section 19, sub-section (2) and if such power is invested, the rule authorising the making of enquiry is not ultra vires”. In this judgment, their Lordships determined the scope of the revising authority in these terms:—

“Turning then to the jurisdiction which the revising authority may exercise under Section 12 (2), attention must first be directed to the phraseology used by the Legislature. The Deputy Commissioner is thereby invested with power to satisfy himself about the legality or propriety of any order passed or proceeding recorded by any officer subordinate to him, or the regularity of any proceeding of such officer, and to pass such orders with respect

thereto as he thinks fit. For exercising this power, he may suo motu or on application call for and examine the record of any proceeding or order. There is no doubt that the revising authority may only call for the record of the order or the proceeding, and the record alone may be scrutinised for ascertaining the legality or propriety of an order or regularity of the proceeding. But there is nothing in the Act that for passing an order in exercise of his revisional jurisdiction, if the revising authority is satisfied that the subordinate officer has committed an illegality or impropriety in the order or irregularity in the proceeding, he cannot make or direct any further enquiry. The words of sub-section (2) of Section 12 that the Deputy Commissioner “may pass such order with respect thereto as he thinks fit” mean such order as may, in the circumstances of the case for rectifying the defect, be regarded by him as just. Power to pass such order as the revising authority thinks fit may in some cases include power to make or direct such further enquiry as the Deputy Commissioner may find necessary for rectifying the illegality or impropriety of the order, or irregularity in the proceeding. It is, therefore, not right baldly to propound that in passing an order in the exercise of his revisional jurisdiction, the Deputy Commissioner must in all cases be restricted to the record maintained by the officer subordinate to him, and can never make enquiry outside that record”.

11. It will be noticed that the power to hold further enquiry was conferred by Rule 14-A on the revising authority and it was held by their Lordships that—

“But the power conferred by R. 14-A by the use of the expression “making such enquiry as such appellate or revising authority considers necessary” must be read subject to the scheme of the Act. It would not invest the revising authority with power to launch upon enquiries at large so as either to trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities or to ignore the limitations inherent in the exercise of those powers. For instance, the power to reassess escaped turnover is primarily vested by R. 17 in the assessing officer and is to be exercised subject to certain limitations, and the revising authority will not be competent to make an enquiry for reassessing a taxpayer. Similarly the power to make a best judgment assessment is vested by Section 9 (2) (b) in the assessing authority and has to be exercised in the manner provided. It would not be open to the revising authority to assume that power. The revisional power has to be exercised for ascertaining whether the order passed is illegal or improper or the proceeding recorded is irregular and it is in aid of

that power that such orders may be passed as the authority may think fit. One of the inquiries in considering the legality or propriety of the orders passed by the subordinate officer which the revising or the appellate authority may make is about the correctness of the tax levied and if, after perusing the record, the authority is *prima facie* satisfied about the illegality or impropriety of the order or about the irregularity of the proceeding, it may in passing its order direct an additional enquiry. Neither Section 12 nor Rule 14-A authorises the revising authority to enter generally upon enquiries which may properly be made by the assessing authorities and to reopen assessments."

12. I now proceed to consider the judgment of their Lordships of the Supreme Court in 15 STC 153—(AIR 1964 SC 1413) (Supra), which related to the Orissa Sales Tax Act 14 of 1947, Section 12 (6) of that Act runs thus:—

"12. (6) Any assessment made under this section shall be without prejudice to any prosecution instituted for an offence under this Act;

Provided that when the Collector has imposed a penalty in addition to the amount assessed under this section, no further proceedings, either revenue or criminal, shall be taken against the dealer.

Provided further that no order assessing the amount of tax due from a dealer in respect of any period shall be passed later than thirty-six months from the expiry of such period."

13. Sub-section (7) of S. 12 provided "if for any reason the turnover of a dealer has escaped assessment or has been under-assessed, the Collector may call for a return within thirty-six months of the end of the period in question and may proceed to assess the amount of tax in the manner laid down in sub-section (5)". It is thus evident that sub-section (7) of S. 12 of the Orissa Act corresponds to Section 11-A of the Act. Section 23 (3) of the Orissa Act gives the power of revision to the Collector and the Revenue Commissioner in the following terms:—

"23 (3) Subject to such rules as may be prescribed and for reasons to be recorded in writing, the Collector may, upon application, or of his own motion, revise any order passed under this Act or the rules thereunder by a person appointed under Section 3 to assist him, and, subject as aforesaid, the Revenue Commissioner may, in like manner, revise any order passed by the Collector".

14. Their Lordships of the Supreme Court held that proviso to sub-section (6) of S. 12 prescribed a period of limitation which was applicable to all orders of assessment, whether made by the assessing

authority or the appellate authority or the revisional authority. For this reason it was held that the revisional powers could not be exercised after the period of thirty-six months prescribed in that proviso. It is admitted by the learned counsel for the parties before us that there is no provision in the Act prescribing the period of limitation for the exercise of revisional powers. The proviso to sub-section (1) of S. 21 of the Act prescribed a period of limitation of 180 days for the exercise of revisional powers on an application but there is no period of limitation prescribed for the exercise of revisional powers *suo motu*. It is, therefore, evident that this judgment of their Lordships does not, in any way, affect the correctness of the Bench decisions of this Court noticed above.

15. The judgment of their Lordships of the Supreme Court in 21 STC 383 = (AIR 1968 SC 843) (Supra) also does not go counter to the decisions of this Court referred to above. In my opinion this judgment positively supports those decisions, as I shall presently show. In that case the Sales Tax Officer had rejected the claims of the dealer for exemption from tax in respect of the turnover representing the despatches or transfer of goods from his head office in Bombay to its various depots or branches in other States in India and the sales which were alleged to have taken place in the course of Inter-State trade after 26th January, 1950. The assessments related to the periods 1st April, 1948, to 31st March, 1950, and 1st April, 1950, to 31st March, 1951. The order was made by the Sales Tax Officer on 2nd January, 1954. The dealer went up in appeal before the Assistant Collector of Sales Tax, who, by his appellate order dated 29th October, 1956, accepted the claim of the dealer in respect of despatches to its various depots or branches in other States of India and disallowed it in respect of the alleged Inter-State sales. While the revisions filed by the dealer against the rejection of its claim in respect of Inter-State claims were still pending, the Deputy Commissioner of Sales Tax issued a notice on January 7, 1963, under S. 31 of the Bombay Sales Tax Act, 1953, intimating that he proposed to revise *suo motu* the appellate order passed by the Assistant Collector, Sales Tax, in so far as he allowed deductions in respect of the entire goods despatched to its branches in other States outside Maharashtra, because, in so doing, he had overlooked the provisions contained in Proviso (b) to sub-clause (ii) of R. 1 under sub-section (3) of S. 6 of the Bombay Sales Tax Act of 1946 as amended by the Bombay Act 43 of 1949. The dealer filed a petition under Art. 226 of the Constitution in the High Court of Bombay challenging that notice with the prayer that

the notice be quashed and the respondent be restrained from taking any action against the dealer in pursuance thereof. The petition was dismissed by the High Court and the dealer filed an appeal in the Supreme Court on a certificate granted by the High Court. It was submitted before their Lordships that the notice could not be issued by the Deputy Commissioner of Sales Tax, Bombay, after the expiry of 5 years as was provided in Section 57 of the 1959 Act which was in force at the time the notice was issued in 1963. Reliance was also placed on the judgment of their Lordships in 15 STC 153 = (AIR 1964 SC 1413) (Supra). Dealing with that case, their Lordships observed that it had no relevance at all, because, in the Orissa Sales Tax Act there was a proviso in general terms laying down that "no order assessing the amount of tax shall be passed after the lapse of 36 months from the expiry of the period", and it was held that "this provision was in substance not a real proviso to the section in which it was placed, but was, in fact, a period of limitation prescribed for all orders of assessment made under any other provision of the Act. In the Bombay Sales Tax Acts, 1946, and 1953, there is no such general provision prescribing the period of limitation for making an assessment and, even though the effect of the order of the Deputy Commissioner passed in revision may be to bring about an assessment to tax of a turnover which was set aside by the Assistant Collector in appeal, such an assessment does not come under any provision relating to limitation".

Their Lordships also referred to K. M. Cheria Abdulla & Company's case 16 STC 875 = (AIR 1965 SC 1585) (Supra) and observed:—

"The case before us relates to exercise of revisional powers and does not deal with the question of the first assessment to be made when the return is initially filed by an assessee. In fact, when a revisional power is to be exercised, we think that the only limitations, to which that power is subject, are those indicated by this Court in K. M. Cheria Abdulla & Co. case, 16 STC 875 = (AIR 1965 SC 1585). These limitations are that the revising authority should not trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities and should not ignore the limitations inherent in the exercise of those powers. In the present case, the Deputy Commissioner, when seeking to exercise his revisional powers, is clearly not encroaching upon the powers reserved to other authorities. Under the Act of 1946, the first assessment is made by the Sales Tax Officer under S. 11. If information comes into his possession that any turnover in respect of sales or supplies of any goods chargeable to tax has escaped

assessment in any year or has been under-assessed or assessed at a lower rate or any deductions have been wrongly made therefrom, proceedings can be taken afresh under Section 11-A. On the face of it, if a first assessment order is made under Section 11 and any turnover escapes assessment, the appropriate provision, under which action is to be taken for assessing that turnover to tax, is Section 11-A. There is, however, no provision under which the power now sought to be exercised by the Deputy Commissioner in the case before us could have been exercised by any other authority. In this case, as we have indicated earlier, the first assessment of tax was made by the Sales Tax Officer, and the turnover now in question was assessed to tax by him. Having once assessed that turnover to tax, he could not initiate a fresh proceeding in respect of it under Section 11-A. The assessment by him was set aside in appeal by the Assistant Collector and it is this order of the Assistant Collector which is sought to be revised by the Deputy Commissioner. This is, therefore, not a case where the powers are being exercised for the purpose of assessing or reassessing an escaped turnover. The case is one where the revisional powers are sought to be exercised to correct what appears to be an incorrect order passed in appeal by the Assistant Collector, and, for such a purpose, proceedings could not possibly have been taken under Section 11-A. In exercising his revisional powers, therefore, the Deputy Commissioner is not encroaching upon the jurisdiction of any other authority specially entrusted with taking such proceedings."

16. After referring to some other case, their Lordships gave the opinion that "the ultimate decision in that case was perfectly correct, but we are unable to affirm the view that the revisional power is governed by any period of limitation laid down in Section 11-A for proceedings for reassessment of escaped turnover".

17. The judgment of their Lordships of the Supreme Court in *State of Madras v. Madurai Mills Co., Ltd.*, 19 STC 144 = (AIR 1967 SC 681) relied upon by the learned counsel for the petitioners, is clearly distinguishable and does not help the learned counsel for the petitioners. In Section 12 (4) of the Madras General Sales Tax Act, 1939, a period of four years from the date on which the order, sought to be revised, was communicated to the assessee was provided for a revision. On the basis of that provision it was held that the order passed by the Board of Revenue on August 25, 1958, revising the order of the Deputy Commercial Tax Officer dated November 28, 1952, was invalid. Their Lordships expressly held that "it follows that the order of the Board of Revenue

was made beyond the limit of four years prescribed by Section 12 (4) (b) of the Act and it is, therefore, invalid".

18. In the light of the above discussion and the judgments of their Lordships of the Supreme Court I have no hesitation in holding that the two Bench decisions of this Court, referred to above, were correctly decided. Consequently my answer to the question of law referred to us for decision is in the negative, that is, the jurisdiction of the Commissioner under Section 21 (1) of the Act is not subject to the period of limitation prescribed in Section 11-A of the Act. The cases will now be placed before a learned Single Judge for decision on merits in accordance with law. In the circumstances I make no order as to costs of this reference.

19. SHAMSHER BABADUR, J.:— I concur with the answer proposed to be given to the reference by my learned brother Tuli, J. It seems clear to me that the provisions of the Punjab General Sales Tax Act, 1948, as amended up-to-date (hereinafter called the Act) are capable of no other construction but the one placed on these by the two Division Benches of this Court in (1963) 14 STC 610 (Punjab) (Mehar Singh, J. and myself) and (1964) 15 STC 746 = (AIR 1965 Punjab 62) (Dulal and Pandit JJ.). The seemingly contrary decision of the Supreme Court in (1964) 15 STC 153 = (AIR 1964 SC 1413), was given on its own facts relating to the Orissa Sales Tax Act of 1947.

20. Section 11 of the Act deals with the various situations which may arise for the "Assessing Authority" which is defined to mean "any person authorised by State Government to make any assessment under this Act". If the registered dealer has filed a return in response to the statutory notice, to the satisfaction of the Assessing Authority, the amount of tax may be computed on its basis under sub-section (1). Should the Assessing Authority so desire, evidence may be called from the dealer by issuing a notice to this effect under sub-section (2). Now, if a dealer either fails to file a return altogether or does not comply with the requirement of producing further evidence in consequence of the notice under sub-section (2), the Assessing Authority may proceed to make a "best judgment assessment" under sub-sections (4) and (5) respectively and in both cases within three years (now five) of the expiry of the assessment period. The same fetter of limitation of three years (now five) is placed under sub-section (6) in respect of assessment as a result of "information" which has come into possession of the Assessing Authority about liability for payment of a dealer who has "failed to apply for registration." The constraint

of limitation for each of the three contingencies envisaged under sub-sections (4), (5) and (6) of Section 11 in respect of the assessment years in the reference before us, is prescribed by statute to be three years (now five years) by Punjab Amendment Act No. 28 of 1965).

21. Precisely the same period of three years (now five) is provided as limitation for orders made again by the Assessing Authorities under Section 11-A of the Act pertaining to assessments made "in consequence of definite information" leading to the discovery by the Assessing Authority that the dealer has been under-assessed or has escaped assessment altogether.

22. Sections 11 and 11-A exhaust the possibilities of assessments made by the Assessing Authorities and the action to be taken under these provisions of law within the time or limitation expressly provided in the statutory provisions, to which reference has been made.

23. The powers, under Section 21 of the Act, of the Commissioner which are separate and distinguishable from those of the Assessing Authorities, are not cabined and confined by the impediment of limitation period. The powers of the revising authority under Section 21 do not trench upon the powers which are expressly reserved by the Act under Sections 11 and 11-A of the Act for the Assessing Authorities alone, and indeed the essential and the only limitation on the revising powers of the Commissioner is expressly laid down in sub-section (1) of S. 21 of the Act, this being "the purpose of satisfying himself as to the legality or propriety of such proceedings" which are "pending before, or have been disposed of by" any assessing or appellate authority appointed under this Act. It is not that the powers which are to be exercised without regard to the period of limitation are concurrent with those specified in Sections 11 and 11-A of the Act. It is only the record of pending or disposed of proceedings which can be enquired into at any time. The scope of such an enquiry under Section 21 has been amplified by Mr. Justice Shah, who delivered the Supreme Court judgment in (1965) 16 STC 875 = (AIR 1965 SC 1585). His Lordship was no doubt dealing with the Madras Act but the principle enunciated in the judgment is fully applicable to the facts of the cases relating to the Punjab Act. As observed at page 883 by the learned Judge:—

".....There is no doubt that the revising authority may only call for the record of the order or the proceeding, and the record alone may be scrutinised for ascertaining the legality or propriety of an order or regularity of the proceeding. But there is nothing in the Act that

for passing an order in exercise of his revisional jurisdiction, if the revising authority is satisfied that the subordinate officer has committed an illegality or impropriety in the order or irregularity in the proceeding he cannot make or direct any further enquiry It is therefore, not right baldly to propound that in passing an order in the exercise of his revisional jurisdiction, the Deputy Commissioner must in all cases be restricted to the record maintained by the officer subordinate to him, and can never make enquiry outside that record."

Section 21 of the Act, like the Madras Act, authorises the Commissioner either suo motu or on an application made to him, to call for the record of any proceedings, and in the proviso the time-limit for an application is 180 days of the date of taking the proceedings or the passing of an order. For action taken of his motion, the Commissioner is not circumscribed by any limitation whatsoever.

24. I am, therefore, in complete agreement with the view so elaborately propounded by Tuli, J. that the validity and integrity of the Division Bench authorities of this Court in (1963) 14 STC 610 (Punj) and (1964) 15 STC 746 = (AIR 1965 Puni 62), is not affected in any manner by the decision of the Supreme Court in (1964) 15 STC 153 = (AIR 1964 SC 1413). Reference should, therefore, be answered as proposed.

25. R. S. NARULA, J.:— I also agree with the answer proposed to be given by my Lord Tuli, J. to the question referred to us.

Reference answered in negative.

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(V 57 C 32)

FULL BENCH

D. K. MAHAJAN, P. C. PANDIT AND
H. R. SODHI, JJ.

Hazari and others, Appellants v. Zila Singh and others, Respondents.

Ex. Second Appeals Nos. 1131, 1132 and 1133 of 1968, D/- 30-5-1969, decided by Full Bench on order of reference made by D. K. Mahajan, J., D/- 30-9-1968.

Civil P. C. (1908), O. 21, R. 16, Ss. 146, 47 and O. 20, R. 14 — Decree for pre-emption — Compliance with O. 20, R. 14 by pre-emptor — Subsequent sale of land under decree — Recital in sale-deed as to delivery of possession to vendee — Vendee cannot execute decree — Proper remedy is to file suit for possession. 94 Pun Re 1902 & 78 Pun Re 1896, Overruled — (Punjab Pre-emption Act (1 of 1913), Ss. 15, 16).

JM/KM/F41/69/YPB/M

(Per Majority, Mahajan, J., contra): Where a pre-emptor in whose favour a decree for pre-emption is passed and who has complied with O. 20, R. 14 sells the land under decree and the sale-deed recites that the pre-emptor has given possession of land to the vendee, the vendee cannot execute the decree. Neither S. 146 nor O. 21, R. 16 can be invoked by the vendee in such case. The proper remedy for him is to file a separate suit, which is not barred under S. 47, on the basis of the sale-deed in his favour. 94 Pun Re 1902 & 78 Pun Re 1896, Overruled; AIR 1953 Punj 163 & AIR 1922 Lah 300, Approved.

(Paras 47, 50, 99)

During the pendency of a pre-emption suit, a pre-emptor cannot transfer the pre-emptional property in any manner inconsistent with the object of the suit for pre-emption. If he does that, he loses his pre-emptive right. Even after the pre-emption suit is decreed, the decree being personal in character cannot be transferred so as to entitle the purchaser to obtain possession of the property by executing it. Then again, after the title to the property has accrued to the pre-emptor on his complying with the terms of the decree, when he sells the property to another person, the transferee's rights will be determined on the basis of the sale-deed in his favour. If the vendee has been given only the title to the property and not the right to take its possession by executing the pre-emption decree, then he cannot obtain possession by that method. Everything will depend on what actually has been validly transferred by the pre-emptor decree-holder in his favour. (Para 87)

Under the provisions of Order 20, Rule 14, Code of Civil Procedure, after the deposit of the purchase money, the pre-emptor gets two rights— (1) his title to the property accrues from the date of such payment and (2) he gets entitled to the possession thereof from the vendee, judgment-debtor. The sale of the proprietary rights in the land to him by the pre-emptor does not clothe the vendee with the right to obtain possession thereof by the execution of the decree because such a right has not been transferred to him by the pre-emptor although it has already accrued to him at the time the sale was made. To allow him such a right will mean that the Court considers the pre-emption decree to be transferable or assignable, in other words, it will have to be held that the pre-emptor decree-holder is competent to create rights in respect of the decree in favour of strangers and this will hit the law of pre-emption, according to which a pre-emption decree is not transferable. If in spite of the sale-deed, the pre-emptor has not delivered possession of the land to

the vendee after having obtained it from the first vendee, his remedy would be to file a suit for possession against him.

(Paras 47, 48, 50, 64, 95)

It is plain that each and every party to a decree is not authorised in law to execute it. It is only that person in whose favour the decree has been granted, or in certain cases his legal representative or the valid assignee of the decree, who can execute it. The vendee can execute the pre-emption decree if he can show that his case is governed by the provisions of either O. 21, R. 16, or S. 146, Code of Civil Procedure. Where the transfer is not, by the operation of law and there is no assignment of pre-emption decree in writing, the vendee cannot take advantage of the provisions of O. 21, R. 16. Even if the pre-emptor wanted to transfer the decree by assignment, it could not be done under the law and such a transfer would be invalid.

(Paras 43, 51, 55, 56, 57)

After having categorically stated in the sale-deed that the pre-emptor has handed over the possession of the land, he himself cannot execute the decree. That being so no person claiming under him can have better rights than him and execute it. Even assuming that the pre-emptor can execute the decree, the vendee cannot say that he is claiming under the pre-emptor, decree-holder under S. 146. He can only rely on the registered sale-deed executed by the pre-emptor. The sale-deed, however, does not say that the vendee has been given the right to execute the pre-emption decree. No right whatever in the decree has been, as a matter of fact, created by the decree-holder in favour of his vendee. It cannot, therefore, be said that the vendee can seek the assistance of the Court and get possession of the land in dispute by executing the decree claiming under the pre-emptor.

(Paras 59, 61)

S. 146 is expressly made subject to the other provisions of the Code or of any law for the time being in force. If by applying the provisions of this Section and thus permitting the vendee to execute the pre-emption decree some other principle of law is offended, namely, that a decree for pre-emption cannot be transferred, then this section will not be made applicable to such a case. Moreover, an application for execution by the transferee or assignee of a decree is covered by O. 21, R. 16, which is a specific provision in the Code and wherein a definite procedure is prescribed for that purpose. One cannot by-pass that specific provision, by taking recourse to a general provision, like S. 146. Section 146 will apply to a case, only where O. 21, R. 16 is inapplicable. It applies to those cases in which the subject-matter of the suit, which ultimately results in the decree

sought to be executed, as well as the decree itself are transferable. It does not apply where the subject-matter of the proceedings cannot be transferred.

(Paras 64, 66, 67)

In the case of a pre-emption decree, the right to execute the same, after the death of the pre-emptor decree-holder, will vest in his personal legal representatives by operation of law, because the continuity of the decree-holder will be presumed in his case. The same cannot be said where the rights in the decree are assigned by the decree-holder. In favour of third parties, because the decree-holder has no right to transfer a pre-emption decree. The right to execute the decree not having been under the sale-deed, transferred by the pre-emptor in favour of the vendee, the same would devolve on the legal representatives of the pre-emptor after the latter's death.

(Paras 71, 76)

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Satya Parkash with G. C. Garg, for
Appellants; U. D. Gaur, for Respondents.

D. K. MAHAJAN, J.:— This order will dispose of three Execution Second Appeals Nos. 1131, 1132 and 1133 of 1968, arising out of execution proceedings, in which important questions of law have arisen. All these appeals will get settled by the answer that is given to these questions of law. They were initially placed before me in Single Bench; and by my order dated the 30th of September, 1968, I referred them to a Full Bench in view of the fact that the questions of law, that required determination, were of considerable importance. Moreover, it was contended that the Single Bench decision of this Court in Ram Singh v. Gaiinda Ram, AIR 1953 Punj 163, and the decision of the Lahore High Court, which the learned Single Judge followed, namely, Mehr Khan and Shah Din v. Ghulam Rasul, ILR 2 Lah 282=(AIR 1922 Lah 300), were expressed in too wide a language; and, in any case, did not lay down the correct rule of law.

2. Before proceeding to state the facts, I may state the principal question of law afresh which requires determination:—

"Whether the purchaser of land from a pre-emptor of which the pre-emptor has become the owner in pursuance of a pre-emption decree after complying with the provisions of Order 20, Rule 14, Civil Procedure Code, could execute the decree in order to obtain possession of the land purchased by him?"

The other questions of law are subsidiary to this question and will be dealt with at their proper place.

3. The facts, which have given rise to these appeals, may now be stated: Dhara Singh, respondent, effected three sales of agricultural land. The first sale was of 27 Kanals 4 Marlas and was effected on the 20th September, 1960. The second sale was of 36 Kanals and 19 Marlas and was effected on the 23rd of November, 1960; and the third sale was of 33 Kanals 18 Marlas and was effected on the 26th March, 1961. The vendees were Hazari, Amar Singh and Bhan Singh — the present appellants. Neki, father's brother of Dhara Singh, vendor, filed three suits for pre-emption; they being suits Nos. 313, 369 and 368 of 1961 regarding the first, the second and the third sale respectively. On the 31st of October, 1962, the suit regarding the first sale was decreed on payment of Rs. 3,500/- to be deposited on or before the 15th of January, 1963. On the 7th of November, 1962, the remaining two suits were also decreed on payment of Rs. 5,000/- and Rs. 8,000/- respectively to be deposited on or before the 15th of January, 1963. The pre-emptor deposited the amounts in terms of Order 20, Rule 14 of the Code of Civil Procedure, on the 23rd of December, 1962, that is, before the 15th of January, 1963, the last date fixed for deposit. Three appeals were preferred by the vendees against the pre-emption decrees. The learned Senior Subordinate Judge dismissed the appeals in Suits Nos. 313 and 369 of 1961; but modified the decree in Suit No. 368 of 1961. The pre-emptor was asked to deposit an additional sum of Rs. 2,000/- on or before the 1st of March, 1963. This amount too was deposited by Neki within the time prescribed. On the 5th of December, 1962, Neki transferred the lands, which were the subject-matter of the decrees, to Zile Singh and his co-vendees. Against the decision of the lower appellate Court, four Second Appeals were preferred; three by the first vendees and one by Neki. The appeals preferred by the first vendees were Regular Second Appeals Nos. 280 to 282 of 1963 and that by Neki was Regular Second Appeal No. 830 of 1963. His appeal was in Suit No. 368 of 1961. On the 7th of April, 1963, Neki died and Dhara Singh, Ram Kishan and Balbir Singh were brought on the record as his legal representatives by the vendees by an application under Order 22, Rules 3 and 4 of the Code of Civil Procedure. They are the father and his two sons. Dhara Singh was impleaded as the legal representative being the nearest collateral of the deceased. One of his sons was impleaded as there was a will by Neki in his favour. The second son

was also impleaded along with his father and his brother. It may also be mentioned that the vendees from Neki, who may, for the sake of convenience, be described as the second vendees, became parties only at the stage of the second appeals. They made an application under Order 22, Rule 10 of the Code of Civil Procedure on 29th of May, 1963. In this application, it was stated that "Neki had sold the suit land along with some other land to the undermentioned 10 persons, according to the shares noted in the registered deed No 2783 dated the 15th of February, 1963." Thereafter, the names of Zile Singh and his co-vendees are stated. In paragraph 3, it was prayed that—

" * * The following persons may please be brought on record as respondents being successors-in-interest of the said Neki. * * "

This application was allowed by Gurdev Singh J. on the 13th of July, 1963. The learned Judge passed the following order:—

"Allowed subject to all just exceptions, on the condition that a separate application for the appointment of guardian ad litem of the minors, who are sought to be impleaded, is made within a fortnight." On the 13th of August, 1963, an application was made under Order 32, Rules 1 and 3, as contemplated in the order of Gurdev Singh J. This application was allowed on the 24th of September, 1963, by Harbans Singh J., subject to all just exceptions. On the 17th of September, 1964, all the three second appeals were dismissed. The vendees then preferred three appeals under Clause 10 of the Letters Patent. In the appeal, that was filed by Hazari and others, the first vendees, Zile Singh and his co-vendees, that is, the set of second vendees, were impleaded as respondents along with Dhara Singh and his two sons who had been brought on the record by the learned Single Judge as the legal representatives of Neki deceased. Dhara Singh was represented before the learned Single Judge by Mr. Parkash Chand Jain; and Zile Singh and others were represented by Mr. U. D. Gaur. In the Letters Patent, the same counsel represented the parties. These appeals were rejected by a Division Bench on the 27th of July, 1965; and this judgment is reported as Hazari v. Neki, (1966) 68 Pun LR 29=(AIR 1966 Punj 348). Against the decision of the Letters Patent Bench, appeals were taken to the Supreme Court. The Supreme Court also dismissed those appeals; and the decision of the Supreme Court is reported as Hazari v. Neki (dead), 1968 Cur LJ 703=(AIR 1968 SC 1205). Both before the Letters Patent Bench and the Supreme Court, the second vendees were parties. In fact, in the Supreme Court, only they

contested the appeals filed by the first vendees. Thus the decree for pre-emption in favour of Neki became final; Neki being also represented by the second vendees by the order of the learned Single Judge of this Court.

4. After the decision of the Supreme Court, three execution applications were filed by the second transferees. Dhara Singh preferred three execution applications for the execution of the decree on the ground that he is entitled to execute the same in place of Neki, decree-holder, being his legal representative. Dhara Singh is the same person who was the vendor in the original suits and had sold the land to Hazari, Amar Singh and Bhan Singh, which had been successfully pre-empted by Neki. Later, Shri Ved Parkash, counsel for Dhara Singh, made a statement that he did not want to proceed with the executions and that he had no claim to the property; and thus the three execution applications filed by Dhara Singh were dismissed. The vendees, however, objected to the execution applications filed by the second transferees. The objections were:—

(1) that Risal Singh (who was one of the second set of vendees) had no right to execute the decree, as the decree in question had not been assigned to him;

(2) that the pre-emption amount had not been deposited in Court in time;

(3) that Risal Singh was not legal representative of Neki deceased;

(4) that the sale of the property by Neki was fictitious; and

(5) that Neki had no right to transfer the property.

These objection petitions were contested by Risal Singh (second vendee). The executing Court framed the following issue:—

"Whether decree in question is not executable on the grounds stated in the objection petition?"

The trial Court dismissed the objection petitions on the 30th of March, 1968, holding that the second vendees were entitled to execute the decree. Before the executing Court, the learned counsel for the judgment-debtor, Shri Raghbar Dayal, Advocate, Jhajjar, only argued one point and conceded all the other points. He only pressed the point that the decree was not executable under Section 47 of the Code of Civil Procedure. No contest was raised—

(a) regarding the validity of the sale; and

(b) regarding the deposits having not been made within time, as directed by the pre-emption decree.

5. The principal point, that was canvassed in the executing Court, was that the second transferees cannot execute the

decree under Section 47 of the Code of Civil Procedure; inasmuch as they were not successors-in-interest of the decree-holders. It was also urged that the purchasers from the pre-emptor are not otherwise entitled to execute the decree because the transfer of the decree obtained in a pre-emption suit is invalid; and, therefore, the second vendees could not execute the decree. Their only remedy was by a regular suit for possession. Against the decisions of the executing Court, appeals were taken to the learned Additional District Judge, Rohtak. Before the learned Judge, the counsel for the appellants did not dispute that the additional pre-emption amount of Rs. 2,000/- in Suit No. 368 of 1961 was deposited in the Treasury in time. The only point, that was argued before him, was that vendees from Neki, that is the second vendees, are not entitled to execute the pre-emption decree, as they cannot be said to be representatives of Neki. And in support of this contention, reliance was placed on the decision of the Punjab High Court in Ram Singh's case, AIR 1963 Punj 163.

6. On this matter, the learned Judge took the view that it was not necessary to discuss whether the second vendees could execute the decree under Order 21, Rule 16, Civil Procedure Code because, in his opinion, they were entitled to do so under Section 146 of the Code of Civil Procedure. And for this view, the learned Judge relied on the decisions in Satyanarayan v. Sindhu Bai Sharma, AIR 1965 Andh Pra 81; Chinnan Kesavan v. Gouri Amma, AIR 1959 Ker 180, and Ravi Parkash v. Chuni Lal, AIR 1967 Punj & Haryana 268. He also referred to the decisions in Ambika Prosad v. Bhagirathi Debi, AIR 1968 Cal 242 and Ponniah Pillai v. T. Natarajan Asari, AIR 1968 Mad 190. In this view of the matter, he dismissed the appeals of the first vendees.

7. The first vendees have come up in second appeal to this Court.

8. The contentions of the learned counsel for the appellants are:—

(1) That the pre-emption decree is a personal decree; and, therefore, it cannot be transferred. The sale deed Exhibit D. 1, though purporting to be the sale of land, is, in fact, a sale of the decree. Therefore, the second vendees have no right to execute the decree as the transfer in their favour, on the basis of which they have come to Court, is not valid in law,

(2) That the second vendees are not the representatives of Neki, the decree-holder; and, therefore, they cannot execute the decree and their remedy is by a separate suit;

(3) That, in any case, the decree could only be executed under O. 21, R. 16, Civil Procedure Code and not under Section 146 of that Code; and as the requirements of O. 21, R. 16 have not been complied with, the execution application has no merit and must fail.

9. Before I deal with the above contentions, it will be proper to reiterate the well-settled propositions of law which admit of no dispute. The vendor has no right to pre-empt his own sale. It is well established that the right of pre-emption is a personal right and its basis is, to put it in the words of Mahmood, J. (1885) ILR 7 All 107, *Ram Sahai v. Gaya*—

“* * * the exclusion of such strangers as are objectionable to the pre-emptive co-sharers of the vendor. * * *”

10. Though the right is personal, it cannot now be urged that it does not attach to land and, therefore, would not pass to the next heirs by inheritance. It was so held by the Supreme Court in 1968 Cur LJ 703 = (1968) 70 Pun LR 823 = (AIR 1968 SC 1205). The relevant observations are quoted below:—

“* * * The statutory right of pre-emption, though not amounting to an interest in the land, is a right which attaches to the land and which can be enforced against a purchaser by the person entitled to pre-empt. * * *”

It was further held, that:—

“* * * We are of the opinion that if an involuntary transfer takes place by inheritance, the successor to the land takes the whole bundle of the rights which go with the land including the right of pre-emption.”

Again it is well settled that the right of pre-emption is a right of substitution. Reference in this connection may be made to the decision of Mahmood, J. in *Gobind Dayal v. Inayatullah*, (1885) ILR 7 All 775 (FB), wherein the learned Judge observed as follows:—

“* * * The right of pre-emption is not a right of re-purchase either from the vendor or from the vendee involving any new contract of sale; but it is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale deed, the vendee's name were rubbed out and the pre-emptor's name inserted in its place. * * *”

These observations have stood the test of time. There is no reported decision which has ever doubted them. These observations were relied upon in the Full Bench decision of this Court in *Hukam Singh v.*

Hakumat Rai, (1957) 69 Pun LR 743 = (AIR 1958 Punj 110).

11. The right of pre-emption in regard to rural property, that is agricultural land and village immovable property, is based on different foundation to that in regard to urban property. Originally this right was exercised on the basis of custom. But in Punjab, the basis of the right of pre-emption, as now administered, is statutory. (See Punjab Pre-emption Act No. 1 of 1913). This Act has been radically amended by the Punjab Pre-emption (Amendment) Act 10 of 1950, whereby further limitations have been placed on the exercise of that right by reducing the category of persons in whom it vested under the original Act and also the qualifications on which its exercise depended.

12. It will be proper at this stage to set out the relevant provisions of the Statute so far as they have bearing on the present controversy. They are Sections 4, 6 and 10 and are reproduced below for facility of reference:—

"(4)—The right of pre-emption shall mean the right of a person to acquire agricultural land or village immovable property or urban immovable property in preference to other persons and it arises in respect of such property only in the case of sales or of foreclosures of the right to redeem such property. Nothing in this section shall prevent a Court from holding that an alienation purporting to be other than a sale is in effect a sale.

(6) A right of pre-emption shall exist in respect of village immovable property and, subject to the provisions of Cl. (b) of Section 5, in respect of an agricultural land, but every such right shall be subject to all the provisions and limitations in this Act contained.

(10) In the case of sale by joint-owners, no party to such sale shall be permitted to claim a right of pre-emption.

It is also to be kept in mind that one cannot travel outside the provisions of the Act and draw from the decisions in other States where the law of pre-emption is not codified and is founded on custom and Mohammedan law. In this connection, I may refer to the observations of the Supreme Court in Hazari's case, 1958 Cur LJ 703 = 70 Pun LR 823 = (AIR 1958 SC 1205) namely:—

"It is necessary to emphasise that we are dealing in this case with the statutory right of pre-emption under Punjab Act I of 1913 and its subsequent amendment and not with the right of pre-emption under the Mohammedan law."

13. In the light of what has gone above, I propose to deal with the contentions of the learned counsel for the appellants.

14. Contention No. 1.

It is not necessary to embark upon the decision of the question, whether the pre-emption decree is a purely personal decree. I will assume, for the purposes of this case, that it is a personal decree. So far as the Pre-emption Act is concerned, there is no statutory prohibition regarding its transfer. The argument of the learned counsel for the appellants is that it is a well-known rule of pre-emption law that the pre-emptor cannot, in the guise of his pre-emptive right, bring in a stranger and substitute him in his place as the decree-holder. It is maintained that this device will defeat the very objection of pre-emption law which is to keep out the introduction of strangers in the village community.

15. So far as this contention is concerned, no exception can be taken to it. I am prepared to agree with the learned counsel that the pre-emptor cannot transfer his rights during the pendency of the pre-emption suit to a stranger so as to enable the stranger to get substituted in his place and thereby become the decree-holder in the pre-emption suit. The only question is, up to what stage this cannot happen? In my view, the answer to the problem is furnished by Order 20, Rule 14, Civil Procedure Code, the relevant part of which is quoted below:—

"Order 20, Rule 14 (1) — Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

(a) specify a day on or before which the purchase money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) * * * * *

16. It will appear from the language of this rule that a pre-emption decree is passed before the pre-emption money has to be paid in Court on or before a date specified by the decree. Till the amount is so paid, the right of pre-emption can be said to be a purely personal right and in that sense not transferable. One may even proceed further and hold that up to the stage of the decree and before the money is deposited, as contemplated by Order 20, Rule 14, Civil Procedure Code, the decree itself remains a personal decree and objection can be taken to its transfer because the same result follows when

the pre-emptor transfers his right to the stranger to continue the suit or when he transfers the decree. But moment the provisions of Order 20, Rule 14, Civil Procedure Code are complied with, a different situation comes into being. The decree no longer remains a personal decree. The pre-emptor becomes the owner of the property with all the incidence of ownership. Therefore, any transfer of property by the pre-emptor or even the transfer of the decree by the pre-emptor, after he has complied with the provisions of O. 20, R. 14, Civil P. C., would not be open to question. The burden of the argument of the learned counsel for the appellants, however, was that the transferee of a pre-emptor, after the pre-emptor has complied with O. 20, R. 14, has no right to execute the decree. This argument is merely based on the contention that the decree is a personal decree.

To me, this argument appears to be wholly fallacious. After compliance with O. 20, R. 14, Civil P. C., the decree ceases to be a personal decree and no longer remains a purely personal decree. This argument of the learned counsel can also be demonstrated to be palpably wrong in another manner. I put it to the learned counsel, what would happen when the pre-emptor sells the property pre-empted by him after he had obtained possession in execution having complied with the provisions of Order 20, Rule 14? The learned counsel had to admit that such a sale would be a valid sale. If such a sale is a valid sale and is not hit by any rule of pre-emption, I fail to see how a sale of the property, the title to which has passed on to the pre-emptor under O. 20, R. 14, would not be a valid sale, merely because the pre-emptor has not obtained possession of the property in execution of the decree. In my opinion, it was open to the pre-emptor after he had complied with the provisions of O. 20, R. 14, Civil P. C. either to sell the property or to sell the decree.

It is of little consequence as to whether the decree is executed by the pre-emptor or by his transferee. Execution of the decree in this situation has no bearing on the question of the validity of the transfer. Execution is merely a mode to get assistance from the Court. If the transaction of transfer is valid and which, in my opinion, must be held to be valid as indicated above, it hardly matters whether the decree is executed by the pre-emptor or by his transferee.

17. The learned counsel for the appellants while admitting, that the pre-emptor who had successfully pre-empted the property and obtained possession of the same could validly transfer the same to a stranger, vehemently urged that he could

not transfer it to a stranger before he takes possession of the same after complying with the provisions of O. 20, R. 14, Civil P. C. In other words, the contention is that the sale of property, after complying with the provisions of O. 20, R. 14 and without obtaining possession of the same by the pre-emptor decree-holder, is not open to a pre-emption suit. I fail to understand the logic of this argument. All sales of agricultural land or village immovable property are liable to be pre-empted. The essential requirement is that there has to be a sale; and, in the present case, there was a sale. The sale was by a person in whom the title of the property had vested. Therefore, it is idle to suggest that under the pre-emption law, the same could not be pre-empted. An owner of property can sell the property which is not in his possession; and it cannot be urged that only those sales can be pre-empted in which the possession has been delivered by the vendor to the vendee. The right of pre-emption arises as soon as a sale is effected. Just as a sale after obtaining possession could have been pre-empted, similarly a sale without delivery of possession to the vendee could have been pre-empted. In principle, delivery of possession does not effect the right of pre-emption.

18. The learned counsel for the appellants urged that for all suits of pre-emption, limitation is prescribed either in Section 30 of the Pre-emption Act or in Art. 10 of Limitation Act of 1908 which has now been replaced by Art. 97. Section 30 of the Pre-emption Act is in the following terms:—

"30.— In any case not provided for by Art. 10 of the Second Schedule of the Indian Limitation Act, 1908, the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act shall, notwithstanding anything in Art. 120 of the said schedule, be one year—

"(1) In the case of a sale of agricultural land or of village immoveable property,

from the date of attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of mutation maintained under the Punjab Land Revenue Act, 1887,

or, from the date on which the vendee takes under the sale physical possession of any part of such land or property, whichever date shall be the earlier;

(2) In the case of foreclosure of the right to redeem village immovable property or urban immovable property, from the date on which the title of the mortgagee to the property becomes absolute;

(3) In the case of a sale of urban immovable property, from the date on which the vendee takes under the sale physical possession of any part of the property."

And Arts. 10 and 97 of the relevant Limitation Acts are as follows:—

"Article 10 of the old Limitation Act :

Description of suit.	Period of Limitation.	Time from which period begins to run.
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To enforce right of pre-emption whether the right is founded on law or general usage or on special contract.	One Year.	From the time purchaser takes, under the sale, sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered."
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"Article 97 of the Amended Limitation Act :

Description of suit.	Period of Limitation.	Time from which period begins to run.
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To enforce right of pre-emption whether the right is founded on law or general usage or on special contract.	One Year.	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered."
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19. If a reference is made to the terminus a quo in these provisions, it will be found that under Section 30 of the Pre-emption Act, in the case of agricultural land, it is from the date of attestation of the mutation or from the date on which the vendee takes, under the sale, physical possession of any part of such land or property, whichever date is earlier. Thus, under Section 30, in the instant case, the limitation to pre-empt the sale will only start either from the date of the attestation of the mutation or when the vendee takes, under the sale, physical possession of any part of the land. In the case of Art. 10, the terminus a quo starts whether the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold and where such property does not admit of physical possession, when the instrument of sale is registered. And the only innovation made in Art. 97 of the 1963 Limitation Act is that the terminus a quo starts whether the purchaser has taken physical possession of the whole or part of the property sold. Thus, the difference between the two Articles is that under Art. 10, whole of the property has to be taken physical possession of by the vendee; whereas in the case of Art. 97, terminus a quo will start from the date when the vendee takes physical possession of the whole or even part of the property sold. But one fact is clear that a suit for pre-emption would not be barred unless it is brought after the period prescribed with reference to the terminus a quo.

20. So far as the present case is concerned, the sale was by a registered deed and its subject-matter was capable of physical possession and its physical possession could not be taken because of the objection of the first vendees. I am told that the physical possession has now been taken in execution proceedings. Therefore, limitation to pre-empt the sale would start from the date the physical possession of the land was taken. I may also

state that the land, in the instant case, is capable of physical possession and it has not been urged that it is not so capable of. All that is said is that it was in possession of the vendees at the time of the sale. The position of the first vendees, after the transfer of the title of the land to the pre-emptor, became that of a trespasser and, therefore, the rightful owner or his successor-in-interest could take possession of the land and he did take possession in execution, though after a considerable time; and, therefore, it cannot be suggested that because considerable period had expired between the sale and the taking of possession, the suit for pre-emption would be barred.

In any event, all that has to be seen is, whether a transaction is a sale; and once it is held to be a sale, it ipso facto follows that it can be pre-empted under the pre-emption law, that is, the Punjab Pre-emption Act No. 1 of 1913. The question of limitation will only arise when somebody takes into his head to pre-empt the sale. Limitation merely bars a remedy and does not confer a right. The right was conferred by the Punjab Pre-emption Act and nothing has been shown which takes away that right. Therefore, this argument of the learned counsel is pointless.

21. Another argument of the learned counsel for the appellants was that the pre-emption decree, even after compliance with O. 20, R. 14, Civil P. C., was subject to appeal and, therefore, the pre-emptor's title was precarious. How does the argument affect the question, that falls for determination, is beyond my comprehension? If a person buys property which is subject to litigation, he takes the consequences. But that has nothing to do with the validity of the transfer. If ultimately, the title of the vendor is established, the title of the vendee per se is established; the transaction being between the vendor and the vendee. If, on the other hand, the vendor fails in the

litigation, the title of the vendee will also fail because he has purchased only the right, title and interest of his vendor; and if the vendor has none, he also gets none. Therefore, the consideration of lis pendens has no bearing on the question of the validity of the transfer.

22. I now proceed to deal with the cases on which the entire foundation of the argument of the learned counsel for the appellants rested for the contention that the sale of the property by the pre-emptor, after he has complied with the provisions of O. 20, R. 14, Civil P. C., is invalid because the transfer is, in fact, the transfer of a decree—the decree being purely personal. The basic case, on which reliance has been placed, is the decision of Mahmood, J. in (1885) ILR 7 All 107. Reliance has been placed on the observations of the learned Judge at page 111 of the Report, which are quoted below:—

"A decree once passed cannot, as we have already said, be questioned by any of the parties thereto when the decree is being executed, and if a decree for pre-emption could be validly transferred, the effect would be to place the transferee in possession without the trial of the question whether such transferee had the pre-emptive right in preference to the vendee against whom the decree was obtained. Nor could the sale of a pre-emptive decree be regarded as giving rise to a fresh cause of action for a separate suit to enforce pre-emption, and it follows that, not only the rights of the vendee-judgment-debtor, but also those of other co-sharers, might be injured by allowing the transferee of a pre-emptive decree to take out execution. On the other hand, in a case like the present, where the pre-emption property and not the decree has been transferred, the effect of executing the decree can only be to place the pre-emptor-decree-holder in possession of the pre-emptional property, and the sale-deed executed by him, if valid, would give rise to a separate cause of action for a pre-emptive suit to be instituted by any person or persons who may consider the sale as having infringed their pre-emptive right. In the present case, whether the sale-deed of the 29th November, 1883, be valid or invalid, it must necessarily remain in abeyance till the pre-emptor-decree-holder obtains possession of the pre-emptional property under the decree, and, under this view, the present case is analogous to one in which the pre-emptor-decree-holder, immediately after obtaining possession under the decree, sells the property."

23. In order to appreciate the above observations, it will be necessary to state the facts of the case in which the observations were made. They are as under:—

"The respondents in this case obtained a decree for pre-emption on the 30th June, 1883, under the terms of which the purchase-money was to be paid into Court within two months from the date of the decree becoming 'final'. This decree was appealable to the High Court, but before the expiry of the period of limitation prescribed by law for the appeal, the High Court was closed on account of the long vacation and did not re-open till the 19th November, 1883, when no appeal was preferred. On the 29th November, 1883, the respondents executed a sale-deed conveying the property (to which the decree of the 30th June, 1883, related) to one Ambika Prasad. On the same day, the respondents filed an application for execution of the decree, and, after reciting that they had sold the property included in the decree to Ambika Prasad, prayed that the latter might be allowed to deposit the purchase-money, and that they (the decree-holders) might be placed in possession, in order that they might make over possession of the property to the new vendee. The Court below accepted the deposit, and allowed execution of the decree in the manner prayed."

24. It will be seen from the facts stated above that the sale was effected after a decree for pre-emption had been passed and before complying with the provisions of Order 20, Rule 14, Civil Procedure Code. Thus what was sold was merely the vendor's right to get title to property under the pre-emption decree and not the property because, on the date of the sale, the title to the property did not vest in the vendor. That is why, the decree-holder's application for execution was allowed to proceed; and that is why, the learned Judge emphasised.

"** That sale deed did not transfer the decree, but the property, to the proprietary possession of which the pre-emptor decree-holder was entitled subject only to the payment of the purchase-money within time. * * *"

25. Thus it would be seen that this case is no authority for the proposition that the sale of property, after the pre-emptor has complied with the provisions of Order 20, Rule 14, Civil Procedure Code, is not a valid sale. I have no quarrel with the actual decision because in the circumstances of that case the transferee from the pre-emptor could not be permitted to execute the decree because the sale deed did not transfer the property to the transferee as the transferor had no title in the property on the date when he executed the sale deed. The observations of the learned Judge must necessarily be confined to the facts of that case; and if the learned Judge was laying down that such a sale would be invalid, even after the title to property had fully vested in the pre-emptor as is contended for by the

learned counsel for the appellants, with utmost respect to the learned Judge and with great humility, I would venture to disagree with him. It is a well-known proposition of law 'that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.

I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all' (vide the observations of the Lord Chancellor, Earl of Halsbury in *Quinn v. Leatham*, 1901 AC 495 at p. 506). Moreover, at the time, when the decision in *Ram Sahai's case*, (1885) ILR 7 All 107 was rendered, the Civil Procedure Code of 1882 was in force. Section 214 of that Code was in these terms:—

"214.—Suit to enforce right of pre-emption:

When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid, the suit shall stand dismissed with costs."

In the Code of Civil Procedure, which was enacted in 1908, this provision was replaced by O. 20, R. 14; and the words "whose title thereto shall be deemed to have accrued from the date of such payment" are new. This makes all the difference. The title of property did not accrue to the pre-emptor under Section 214 of 1882 Code on the date of the payment. He merely got a right to obtain possession under the decree. If this is kept in view, the observations of Mahmood, J. present no difficulty and would not militate with the view, I have taken of the matter on the basis of Order 20, Rule 14, Civil P. C. of 1908.

26. The next case cited is ILR 2 Lah 282 = (AIR 1922 Lah 300). The facts of this case are analogous to the facts of the case in *Ram Sahai's decision*, (1885) ILR 7 All 107. The pre-emption decree was passed on the 17th of June, 1918; and the decree directed the payment of the balance of the sale price within one month. The decree-holder sold his rights in the

decree on the 6th of July, 1918; and the execution application was presented on the 8th of July, 1918, on which the deposit of the balance of the sale price was also made. There is no discussion in this judgment and the learned Judges merely followed the decision in *Ram Sahai's case*, (1885) ILR 7 All 107 and what I have said regarding that decision equally applies to this case.

27. The next case relied upon is reported as *Lashkari Mal v. Ishar Singh*, 94 Pun Re 1902. In this case, the pre-emptor obtained a decree for pre-emption on the 28th of February, 1898. The decree directed the deposit of Rs. 1,840. On the 1st of March, 1898, the decree-holder executed a deed of transfer purporting to gift all his rights under the decree in favour of his grandson, who was to pay the decretal money into the Court and execute the decree and take possession of the land. The transferee, after paying the money into Court, sought execution of the decree; and it was observed by Rattigan, J. as follows:—

"* * * As under the provisions of Section 214 of the Civil Procedure Code, a pre-emptor's right to or in the property do not accrue until he complies with the terms of the decree, the sale by the former pre-emptor to his grandson was merely a transfer of the right to obtain the property by compliance with the conditions of the decree and not the property itself, and was therefore, not a sale of immovable property subject to the right of pre-emption within the meaning of Section 9 of the Punjab Laws Act. * * *"

28. These observations support the view I have taken while dealing with the decision in *Ram Sahai's case*, (1885) ILR 7 All 107. On facts, the case is similar to the facts of that case.

29. The next case relied upon is the decision of *Kapur, J.*, (as he then was), AIR 1953 Punj 163. The facts of this case are similar to the facts of the present case; and the learned Judge applied to these facts the rule in *Mehr Khan's case*, ILR 2 Lah 282 = (AIR 1922 Lah 300). There is no discussion about this matter and it was not brought to the notice of the learned Judge that the rule in *Mehr Khan's case*, ILR 2 Lah 282 = (AIR 1922 Lah 300) applied to a different set of facts. In my view, the observations in this case based on *Mehr Khan's case*, ILR 2 Lah 282 = (AIR 1922 Lah 300) with utmost respect to the learned Judge, cannot be accepted as laying down the correct rule of law; and I have no hesitation, whatever, from disagreeing with it.

30. The only other case, to which a reference need be made, is the decision of *Stogdon, J.* in *Jowala Sahai v. Ram Rakha*, 78 Pun Re 1896. While dealing with the question that the right to execute the decree for pre-emption could

not be assigned, it was observed while dealing with the case—*Sarju Prasad v. Jamna Prasad*—an unreported decision of the Allahabad High Court, that—

“* * * The case, therefore, differs from that of *Sarju Prasad v. Jamna Prasad* in which the proprietary right in the property appears to have been transferred. Even if such right had been transferred in the present case we see no reason why the transferee should not be entitled to execute the decree. Such transfer would have operated as fresh sale of the property and would have conferred a fresh cause of action upon pre-emptors. If the transfer in the present case had been one of sale the judgment-debtors, if they are pre-emptors as against the transferee, could not have resisted his right to present possession though they might have recovered the property from him by a suit for pre-emption. It may be that the transaction between the decree-holder and his transferee is one of sale of the property, though ostensibly it is not so, but it is clear that questions of this nature and questions as to preferential right of pre-emption cannot be gone into by a Court executing the decree. The decree-holder had a perfect right to sell his property subject to the right of pre-emptors to buy it, such rights must be asserted by separate suit and cannot be alleged as a bar to the transferee's claim to present possession * *”

30. These observations are in line with the view that I have taken in this case; and the fact, that this case took a different view from *Mehr Khan's case*, ILR 2 Lah 282 = (AIR 1922 Lah 300) was noticed by *Mehr Singh, J.*, (as he then was), in *Hazari's case*, 68 Pun LR 29 = (AIR 1966 Punj 348).

31. Barring the decision of *Kapur, J.*, no case has been cited at the bar, wherein it has been held that the sale of property by the pre-emptor, after he has obtained a decree for pre-emption and has complied with the provisions of O. 20, R. 14, Civil P. C., is bad or illegal and is not liable to pre-emption. It is now well settled that the title to the property passes to the pre-emptor when he complies with the provisions of O. 20, R. 14, Civil P. C.; and the pre-emptor can deal with it in the same manner as a full owner. See in this connection the decision of the Punjab & Haryana High Court in AIR 1968 Punj and Haryana 110 (FB). This decision referred to another Full Bench decision of this Court in *Ganga Ram v. Shiv Lal*, (1964) 66 Pun LR 251 = (AIR 1964 Punj 260 (FB)). The latter decision was approved by the Supreme Court in *Hazari's case*, 1968 Cur LJ 703 = 70 Pun LR 823 = (AIR 1968 SC 1205).

32. Moreover, if the contention of the learned counsel for the appellants, that the transfer in question offends the letter

and spirit of the Pre-emption Law, is examined with reference to the well known rule of pre-emption law that the right of pre-emption is a right of substitution, the invalidity of the argument becomes apparent. It cannot be said in the instant case that the second vendee has been substituted for the pre-emptor in the sale deed executed by the vendor in favour of the first vendee. The pre-emptor has effected a fresh sale to the second vendee. Thus the sale by the pre-emptor being an independent transaction does not offend the rule. The second vendee does not take the property under the first sale. He takes it under the second sale. So far as the first sale is concerned, substitution of the pre-emptor has taken place by virtue of the compliance with the provisions of O. 20, R. 14, Civil P. C., that is, the pre-emptor will be read as the vendee instead of the vendor. But on the facts of the case before the Allahabad High Court in *Ram Sahai's case*, (1885) ILR 7 All 107 and the decisions in which the facts were similar to those of that case, the rule will definitely be offended. What happened in all these cases was that instead of the pre-emptor, his transferee, in reality, got substituted and no new transaction of sale came into being. This consideration also supports the view which I have taken of the matter.

33. In my opinion, there can be no manner of doubt that in the instant case, the sale of the property or even that of the decree to the transferee of the pre-emptor cannot be held to be invalid or contrary to any principles of the pre-emption law. I would, therefore, repel the first contention of the learned counsel for the appellants.

34. Contentions Nos. (2) and (3):

So far as these contentions are concerned, there are two aspects of the matter. In the first instance, the second vendees were brought on the record as the representatives of the pre-emptor and were the only contesting parties in the Supreme Court. Undoubtedly, they are parties to the decree and, as such, have the right to execute the decree. It cannot be doubted that they are the representatives of their transferor within the meaning of S. 146 and also within the meaning of Section 47 of the Civil P. C. One cannot lose sight of the fact that in view of Section 47, a separate suit by the second transferees would be barred. They being parties to the decree, all questions relating to the execution, discharge or satisfaction of the decree have to be determined in accordance with the provisions of Section 47 of the Civil Procedure Code by the executing Court and not by a separate suit. In any event, they are the representatives of the pre-emptor within the meaning of Section 146; and I need only refer to the

two decisions of the Supreme Court which fully support this conclusion:—

(1) Jugalkishore Saraf v. M/s. Raw Cotton Co Ltd., AIR 1955 SC 376; and (2) Saila Bala Dassi v. Nirmala Sundari Dassi, AIR 1958 SC 394.

In the latter case, the decision of the Madras High Court in Moidin Kutty v. Doraiswami Aiyar, AIR 1952 Mad 51, was approved.

35. The only other argument of the learned counsel for the appellants with regard to this contention, which must be noticed, is that, in fact the transfer by the pre-emptor to the second vendees was an assignment of the decree; and, therefore, the provisions of Order 21, Rule 16, Civil Procedure Code, should have been complied with. I am unable to agree with this contention. What the pre-emptor transferred was the property of which he had become the full owner under the sale deed, Exhibit D. 1. This transfer incidentally gave the decree-holder the right to the benefits of the decree. The transferee of the decree-holder would also get the benefits of the decree under the statutory provisions of Section 146 of the Civil Procedure Code. In the present case, the decree as such was not assigned. The property was sold. The decree was merely the evidence of title to the property of the decree-holder. In any event, I have already held, that even if the decree-holder had transferred the decree, there could be no legal objection to it. But in order to apply a particular provision of law, one must look to the real nature of the transaction; and the real nature of the transaction is out and out a sale and not an assignment of the decree. Therefore, the contention that Order 21, Rule 16, Civil Procedure Code, has not been complied with, is really spurious.

36. After giving the matter my careful consideration, I am of the view that the transferees of the decree, in the facts and circumstances of this particular case, were entitled to execute the decree and obtain possession of the land which they had purchased from the pre-emptor decree-holder. In this view of the matter, I would dismiss all the three appeals with costs.

37. PREM CHAND PANDIT, J.:— I have perused the judgment prepared by D. K. Mahajan, J. With great respect to him, I have not been able to persuade myself to agree with him. I am, therefore, writing my separate judgment.

38. The facts giving rise to these three connected Execution Second Appeals Nos. 1131 to 1133 of 1968 are not in dispute and are as under:

Dhara Singh, respondent No. 11, sold 98 Kanals and 1 Marla of agricultural land situate in village Badhani, District Rohtak,

to Hazari and his brothers Amar Singh and Bhan Singh, appellants, by means of three deeds dated 20th September, 1960, 23rd November, 1960, and 6th March, 1961, in respect of 27 Kanals and 4 Marlas, 36 Kanals and 19 Marlas and 33 Kanals and 18 Marlas, respectively. These three sales gave rise to three pre-emption suits Nos. 313, 369 and 368 of 1961, which were filed by Neki, father's brother of Dhara Singh, vendor, in 1961, on the ground of his relationship with the vendor. After contest, suit No. 313 of 1961 was decreed on 31st October, 1962, and the others on 7th November, 1962. The vendees filed appeals and during their pendency, on 5th December, 1962, by a registered deed, Neki transferred the entire land measuring 98 Kanals and 1 Marla, which was the subject-matter of the three suits, to Zila Singh and others, respondents Nos. 1 to 10, after he had deposited the pre-emption money in all the suits within time.

The learned Senior Subordinate Judge, Rohtak, dismissed the appeals against the decrees in suits Nos. 313 and 369 of 1961, but modified the decree in suit No. 368 of 1961 by directing the plaintiff to deposit a further sum of Rs. 2,000 on or before 1st March, 1963. The vendees then filed regular second appeals in this Court and the pre-emptor preferred a cross-appeal challenging the increase of Rs. 2,000. During the pendency of these appeals, Neki died on 7th April, 1963. Thereupon the vendees moved an application under Order 22, Rule 4, Code of Civil Procedure, to bring on record the legal representatives of Neki, deceased, namely, Dhara Singh, vendor, respondent No. 11, and his two sons Ram Kishan and Balbir Singh, respondents Nos. 12 and 13. That application was granted. Zila Singh and others, respondents Nos. 1 to 10, claiming themselves to be the successors-in-interest of Neki, made an application under O. 22, R. 10, Code of Civil Procedure, praying that they be impleaded as parties to the second appeal. Their prayer was granted subject to all just exceptions. All the four appeals were dismissed by Khanna, J. on 17th September, 1964. Against that decision, Letters Patent Appeals were filed but they also failed. The case is reported as (1966) 68 Pun LR 29 = (AIR 1966 Punj 348). The matter was then taken to the Supreme Court, by special leave, which affirmed the decision of this Court and dismissed the appeals on 25th January, 1968, (vide 1968 Cur. L J 703 = (AIR 1968 SC 1205)).

39. Dhara Singh and his sons Ram Kishan and Balbir Singh, respondents Nos. 11 to 13, the legal representatives of Neki, deceased, then filed execution applications. Their counsel however, subsequently, made a statement that he did not want to proceed with the said applications. The second vendees then applied

to the executing Court that they had a right to continue the execution applications. Objections were taken by Hazari, Amar Singh and Bhan Singh, the first vendee, inter alia on the grounds that the second vendees had no right to execute the decrees as the same had not been assigned in their favour and that they were not the legal representatives of Neki, deceased. It was also contended that the sale of the land in dispute by Neki was fictitious and, in any case, he had no right to transfer the said property. The objections of the first vendees were dismissed both by the executing Court and later, on appeal, by the learned Additional District Judge, Rohtak.

40. Against that decision the present three execution second appeals were preferred by Hazari and his two brothers, Amar Singh and Bhan Singh, the first vendees. These appeals came up for hearing before Mahajan, J. in the first instance. According to the learned Judge, the question that required determination in these cases was whether the purchaser of land from a pre-emptor was entitled to obtain possession of the same from the vendees in execution of the decree for pre-emption passed in his favour. Since, according to him, the correctness of the decisions of a learned Single Judge of this Court in AIR 1953 Punj 163, and a Division Bench of the Lahore High Court in ILR 2 Lah 282 = (AIR 1922 Lah 300), was in question, he referred these cases to a Full Bench. That is how the matter has been placed before us.

41. I wish to make it clear that in these appeals, we are not concerned with the validity of the sale effected by Neki in favour of the second vendees. The only question for decision is whether the second vendees can get the assistance of the Court in obtaining possession of the land in dispute from the first vendees by executing the pre-emption decrees passed in favour of the pre-emptor or they will have to file a separate suit on the basis of the registered sale-deed executed in their favour on 5th December, 1962.

42. One of the arguments raised on their behalf was that on the death of Neki, during the pendency of the second appeals in this Court, they applied under O. 22, R. 10, Code of Civil Procedure, for being impleaded as parties, since they claimed themselves to be the successors-in-interest of Neki. This prayer was granted subject to all just exceptions, with the result that they remained parties to the litigation right upto the Supreme Court stage and as a matter of fact, it were they who contested the appeal of the other side before the Supreme Court. That being so, according to the learned counsel, as they were parties to the decrees, they could execute the same.

43. On the death of Neki, the appellants (first vendees) made an application under O. 22, R. 4, Code of Civil Procedure, to bring on record his legal representatives, namely, Dhara Singh, respondent No. 11, and his two sons Ram Kishan and Balbir Singh, respondents Nos. 12 and 13. This application was accepted. It is true that the second vendees also moved an application under O. 22, R. 10, Code of Civil Procedure, and they too were impleaded subject to all just exceptions. Obviously, they wanted to safeguard their own interests as well and see that Neki's legal representatives did not let them down during the progress of the litigation. It is significant to mention that in the lifetime of Neki, they made no efforts at any stage to substitute themselves in his place, even though Neki had sold the land in dispute to them on 5th December, 1962, after depositing the purchase money. It is plain that each and every party to a decree is not authorised in law to execute it. It is only that person in whose favour the decree has been granted, or in certain cases his legal representative or the valid assignee of the decree, who can execute it. As a matter of fact, in the case in hand, nothing was said about the rights of the second vendees to execute the decrees in the previous litigation. It is pertinent to mention that even while giving the history of the case, the Supreme Court did not even make a reference to the sale of the land in dispute made by Neki pre-emptor in their favour. The only question determined by the Supreme Court was whether the right of pre-emption survived even after the death of Neki. In the Letters Patent Appeals, which are reported as (1966) 68 Pun LR 29 = (AIR 1966 Punj 348) towards the end of the judgment, this is what was said about the second vendees and their rights—

"The only other matter to which a brief reference may be made is that before his death the deceased-plaintiff transferred his right to the respondents other than Dhara Singh vendor and his two sons, and in this connection the learned counsel for the appellants-vendees refer to ILR 2 Lah 282 = (AIR 1922 Lah 300), to contend that a decree for pre-emption is not transferable and the transferee cannot execute it. Somewhat different opinion was expressed by the learned Judges in 78 Pun Re 1896. But it is not necessary to go into this matter in these appeals for the estate of the deceased-plaintiff is being represented by Dhara Singh and his sons as his legal representatives and that is in law sufficient representation of him. The second vendees can have recourse to any proceedings, in regard to which they are advised, to enforce the transfer in their favour. The question of a decision, in so far as the transfer in their favour is

concerned, does not arise in these appeals."

44. A perusal of the above would thus show that the question as to whether the decrees for pre-emption were transferable or not and whether the transferees could execute them, was left open to be determined in some further proceedings at their instance.

45. For deciding the point in controversy, I shall assume and proceed on the basis that the sale of the land in dispute made by the pre-emptor by virtue of the deed dated 5th December, 1962, in favour of the second vendees was valid.

46. Let us first see what actually was transferred by Neki to the second vendees under the sale-deed in question. It was produced before us by the learned counsel for the appellants and was duly perused. It did not mention that the decrees passed in favour of the pre-emptor on 31st October, 1962, and 7th November, 1962, had been assigned in favour of the second vendees. The sale-deed only stated that land measuring 98 Kanals 1 Marla had been sold to them. It was mentioned therein that the pre-emptor had got the said land by virtue of the three pre-emption decrees. It is noteworthy that regarding the possession of the land in dispute, it was specifically mentioned in the deed that the same had been given to the second vendees after having received the purchase money from them and the vendor, thereafter, had no connection with the land. Under the registered sale-deed, therefore, the pre-emptor transferred only the title of the land to the second vendees and stated therein that its possession had also been handed over to them.

47. Under the provisions of Order 20, Rule 14, Code of Civil Procedure, after the deposit of the purchase money, the pre-emptor got two rights—(1) his title to the property accrued from the date of such payment and (2) he got entitled to the possession thereof from the vendee judgment-debtor. One of the rights, namely, the title to the property (i.e., ownership rights), Neki did transfer by the sale-deed to the second vendees. With regard to the other, it was not so transferred. It was not said that the right to get possession of the land by executing the decree was also given to them. On the other hand, it was specifically mentioned that possession had already been delivered to the second vendees on the receipt of the purchase money from them. On the averments in the sale-deed, therefore, it could not be said that the second vendees were given the right to get possession of the land by executing the decrees. They could not, consequently, exercise that right under the decrees.

On the other hand, when Neki himself had stated in the registered sale-deed that he had banded over possession of the land to the second vendees, it is doubtful if he too could get possession of the land by executing the decrees, because he could have been met with the plea that he had already got its possession and transferred the same to the second vendees. At any rate, the second vendees could not seek the assistance of the Court for obtaining possession of the land by executing the decrees on the basis of the sale-deed in their favour. It is not their case that subsequent to the execution of the sale-deed, Neki had, by another deed, transferred the right to get possession of the land also to them. For that purpose, another registered deed had to be executed since this was also a right in immovable property of the value of more than Rs. 100/-.

48. From the contents of the sale-deed, it is apparent that Neki represented that he had secured the full fruits of the decrees and nothing remained to be achieved by executing them. He thus did not transfer the right to take possession from the first vendees, though the same had vested in him. So, it cannot be held that the second vendees can obtain possession from the first vendees by executing the decrees on the plea that they are claiming under the decree-holder, Neki. The sale of the proprietary rights in the land to them by Neki did not clothe them with the right to obtain possession thereof by the execution of the decrees, because such a right was not transferred to them by Neki, although it had already accrued to him at the time the sale was made. Even if the decrees were transferable, after the purchase money had been deposited in Court, in the absence of the assignment of that right, it could not be said to have vested in and exercisable by the second vendees. If at all, in the absence of an assignment, this right would devolve on the personal legal representatives of Neki and not the second vendees, who could not be said to be claiming that right under Neki. Their proper remedy was by way of a suit.

49. If the assertion in the sale-deed is taken to be correct, the second vendees had taken possession from the pre-emptor decree-holder and the decrees did not require to be executed by obtaining possession. After all the charter of rights of the second vendees was the sale-deed in their favour and according to it, no execution of the decrees was required as the vendor stated that he had given possession to the vendees, which statement was accepted by them. He did not tell them that the possession was with the first vendees, which he had yet to take and the same could be taken by them by executing the decrees.

50. If in spite of the sale-deed, Neki had not delivered possession of the land to the second vendees, after having obtaining it from the first vendees, their remedy would have been to file a suit for possession against him. Why should they not do so by instituting a suit against the first vendees and why should they be allowed the better and higher right of obtaining possession by the execution of the decrees?

51. It is common ground between the parties that the second vendees can execute the pre-emption decrees if they can show that their case is governed by the provisions of either Order 21, Rule 16, or Section 146, Code of Civil Procedure. If they cannot take advantage of either of these two provisions, undoubtedly, they would not be able to execute the decrees and get possession of the land in dispute from the first vendees. Let us consider as to whether Order 21, Rule 16, applies to their case. The relevant part of Order 21, Rule 16 reads—

"Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution."

52. A bare reading of this provision would show that where a decree has been transferred by assignment in writing or by operation of law, the transferee can execute such a decree, provided that where the decree has been transferred by an assignment, notice of the execution application shall be given to the transferor and the judgment-debtor and the decree will not be executed until the Court has heard their objections, if any, to the execution.

53. In the instant case, it is not the position of any party that the interest of the decree-holder in the decrees had been transferred by operation of law, and, therefore, the only question is whether that had been transferred by assignment in writing. From the perusal of the sale-deed dated 5th December, 1962, as I have already mentioned above, it would be clear that decrees passed in favour of the pre-emptor had not been assigned to the second vendees. So it has to be con-

cluded that there was in fact no assignment of the pre-emption decrees in favour of the second vendees. This point was more or less conceded by the learned counsel for the respondents, who, however, submitted that the second vendees could execute the decrees under the provisions of Section 146, Code of Civil Procedure.

54. This apart, even under the law, a pre-emption decree being a personal one is not capable of being transferred. It was held by Mahmood J. in a Bench decision in (1885) ILR 7 All 107—

"And if a decree for pre-emption were capable of transfer, so as to enable the transferee to obtain possession of the pre-emptible property in execution of that decree, it is clear that the object of the right of pre-emption would be defeated, for the transferee of the decree may be as much a stranger as the vendee against whom the decree was obtained, or that the latter may be a pre-emptor of a lower grade than the pre-emptor who originally obtained the decree."

55. This decision was followed by a Bench of the Lahore High Court consisting of Broadway and Harrison JJ. in ILR 2 Lah 282=(AIR 1922 Lah 300). So even if the pre-emptor wanted to transfer the decrees by assignment, it could not be done under the law and such a transfer would be invalid.

56. A pre-emption decree is, under the law, either transferable or not. I am of the view that it cannot be transferred. Even if it be assumed for the sake of argument that it is transferable, in the case in hand, I have already held above as a fact, that it had not been so transferred.

57. The Courts below have also not said that the second vendees could execute the decrees by virtue of the provisions of Order 21, Rule 16, Code of Civil Procedure. That is why the procedure prescribed in that rule was not followed. It is, therefore, to be held that the second vendees cannot take advantage of the provisions of Order 21, Rule 16, Code of Civil Procedure.

58. Let us now examine the provisions of Section 146, Code of Civil Procedure, and see whether the second vendees can derive any benefit therefrom. Section 146 is in these terms—

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken on application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Under this section, if any proceeding can be taken by 'A', then the same proceeding can also be taken by other person claiming under 'A'. The argument raised on

behalf of the second vendees is that if the pre-emptor could execute the decrees, they, being persons claiming under him, could also do so by virtue of the provisions of this section.

59. In the instant case, leaving aside the second vendees, I am doubtful if the pre-emptor himself could execute the decrees. After having categorically stated in the sale-deed dated 5th December, 1962, that he had handed over the possession of the land to the second vendees after having received the purchase money from them, how does it then lie in his mouth to say, after a number of years that he wanted to get possession of the land after executing the pre-emption decrees? If I am right in saying so, then the question of the execution of the decrees by the second vendees will obviously not arise. If the pre-emptor himself cannot execute the decrees, no person claiming under him can have better rights than him and execute them.

60. Now let us assume that the pre-emptor in the present case could execute the decrees. The question to be seen is whether the second vendees can, for the purpose of execution of the pre-emption decrees, be considered to be persons claiming under the pre-emptor decree-holder.

61. On what basis can the second vendees say that they are, for the purpose of the execution of the decrees, claiming under the pre-emptor decree-holder? They can only rely on the registered sale-deed executed by the pre-emptor in their favour on 5th December, 1962. That is the only document which is the repository of their rights. It, however, does not say that the second vendees had been given the right to execute the pre-emption decrees, although it had been executed after the passing of the decrees and depositing the purchase money to be paid thereunder. No right whatever in the decrees was, as a matter of fact, created by the decree-holder in favour of his vendees. It cannot, therefore, be said that the second vendees could seek the assistance of the Court and get possession of the land in dispute by executing the decrees claiming under the pre-emptor. For the purpose of executing the decrees, they could not, therefore, be said to be claiming under the pre-emptor decree-holder.

62. Secondly, as I have already said above, in the sale-deed, it was specifically mentioned by the pre-emptor that he had handed over the possession of the land in dispute to the second vendees after having received the purchase price from them. If they had already taken possession on 5th December, 1962, what other possession were they seeking from the executing Court by making an application for execution of the pre-emption decrees?

63. Thirdly, as I mentioned above, after the deposit of the purchase money, the pre-emptor under Order 21, Rule 16, Code of Civil Procedure, got two rights—(a) title to the land and (b) the right to receive its possession from the first vendees. By the sale-deed, he parted only with one right namely, the first one. He did not transfer the second right, but on the other hand said that the possession of the land had already been given to the second vendees. In other words, he did not, in the circumstances, feel the necessity of transferring the other right. How can then the second vendees seek possession of the land by executing the decrees claiming under the pre-emptor?

64. Fourthly, as I have already said above, the pre-emption decrees were not under the law, transferable and no rights in the decrees could be created in favour of the vendees and, consequently, they could not claim to obtain possession of the land in execution of those decrees. To allow them such a right will mean that the Court considers the pre-emption decrees to be transferable or assignable. In other words, it will have to be held that the pre-emptor decree-holder is competent to create rights in respect of the decrees in favour of strangers and this will hit the law of pre-emption, according to which a pre-emption decree is not transferable. Section 146 starts with the words "Save as otherwise provided by this Court or by any law for the time being in force" The section is expressly made subject to the other provisions of the Code or of any law for the time being in force. If by applying the provisions of this Section and thus permitting the transferees (second vendees) to execute the pre-emption decrees, some other principle of law is offended, namely, that a decree for pre-emption cannot be transferred, then this section will not be made applicable to such a case.

65. If a pre-emption decree is transferable, then, I have already held above, that in the instant case it was not so transferred.

66. Fifthly, an application for execution by the transferee or assignee of a decree is covered by Order 21, Rule 16, which is a specific provision in the Code and wherein a definite procedure is prescribed for that purpose. One cannot bypass that specific provision, by taking recourse to a general provision, like Section 146. It was not disputed that O. 21, Rule 16 is a special provision, while Section 146 a general one. As I have already said, Section 146 is expressly made subject to other provisions of the Code of Civil Procedure also; one cannot thus override the provisions of Order 21, Rule 16 by applying Section 146.

67. Sixthly, Section 146 will apply to a case, only where Order 21, Rule 16 is

inapplicable. It applies to those cases in which the subject matter of the suit, which ultimately results in the decree sought to be executed, as well as the decree itself are transferable. It does not apply where the subject-matter of the proceedings cannot be transferred.

68. Learned counsel for the second vendees, however, referred to a decision of the Supreme Court in AIR 1955 SC 376, which was followed in AIR 1958 SC 394. In Jugalkishore Saraf's case AIR 1955 SC 376, it was held that a transferee of a debt, in respect of which a suit was pending, was entitled to execute the decree which was subsequently passed therein, under Section 146 of the Code of Civil Procedure, as a person claiming under the decree-holder even though an application for execution by him would not lie under Order 21, R. 16. and it was further observed that the words "save as otherwise provided" only barred proceedings which would be obnoxious to some provision of the Code. It would thus be seen that the transfer in the Supreme Court case was of the subject-matter of the suit before the decree was passed. Besides, even when the decree was ultimately made in that case, it could not be argued that that particular decree was not transferable under the law, like a decree for pre-emption. It was under those circumstances that the Supreme Court held that Section 146, Code of Civil Procedure, would be applicable. In the instant case, the sale-deed was executed in favour of the second vendees after the pre-emption suits had been decreed. Moreover, as I have already said above, a pre-emption decree, under the law, could not be transferred.

69. In Smt. Saila Bala Dassi's case, AIR 1958 SC 394, reliance was placed on Jugalkishore Saraf's case, AIR 1955 SC 376 and it was held:

"Section 146 was introduced for the first time in the Civil Procedure Code, 1908, with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision, should be construed liberally and so as to advance justice and not in a restricted or technical sense."

70. The distinguishing features pointed out by me regarding Jugalkishore Saraf's case, AIR 1955 SC 376 equally apply to this ruling as well. According to the second authority, the point to be determined is whether the second vendees have come to be vested with the right to execute the pre-emption decrees either by devolution or assignment. It is only then that they can exercise that right under Section 146, Code of Civil Procedure. Assignment, undoubtedly, takes effect by some positive voluntary

act. As I have already held above, the right to execute the decrees had not been assigned by the pre-emptor decree-holder in their favour in the sale-deed dated 5th December, 1962. Let us now see whether that right had devolved upon them. Devolution is involuntary and by operation of law. The word "devolve" has been defined in "The Law Lexicon of British India" by P. Ramanatha Iyer, at page 330, as follows:—

"A term used where an estate devolves upon another by operation of law, and without any voluntary act of the previous owner, passes from one person to another. 'Devolve' means to pass from a person dying to a person living; the etymology of the words shews its meaning" (per Leach M. R., *Parr v. Parr*, (1833) 1 My & K. 648). An estate is said to "devolve" on another when, by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; but it does not devolve from one person as the result of some positive act or agreement between them. The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. (*Francisco v. Agüree*, 29 Pac. 495, 497= 94 Calif. 180)."

71. The right to execute the pre-emption decrees, on the death of Neki, devolved on his personal legal representatives and not on the second vendees. We should not confuse the rights in the land in dispute with the rights under the pre-emption decrees. The right to execute the decrees was not, under the sale-deed, transferred by the pre-emptor in favour of the second vendees. The same would, therefore, devolve on the legal representatives of Neki after the latter's death. In the pre-emption suits, the right of Neki to pre-empt the land was being challenged by the first vendees. After Neki's death, it was only his legal representatives who could continue the suits and say that they had a superior right of pre-emption as against the first vendees. The second vendees, however, could not take up that plea. When this case went to the Supreme Court at the earlier stage, it was observed by the learned Judges that if an involuntary transfer took place by inheritance, the successor to the land took the whole bundle of the rights which went with the land including the right of pre-emption. Moreover, the Letters Patent Bench refused to determine the question whether the second vendees had the right to execute the pre-emption decrees after the death of Neki and they held that it was not necessary to go into that matter in those appeals, for the estate of Neki deceased was being represented by Dhara Singh and his two sons, as his

legal representatives, and that was in law sufficient representation of him. The second vendees, according to the Bench, could have recourse to any proceedings in regard to which they were advised.

72. In the above Supreme Court case, the transfer was of the subject-matter of the suit before the decree was passed. In those cases, even the decree, after it was made, was transferable and did not suffer from the vice of non-transferability.

73. In view of what I have said above, those authorities, therefore, were of no assistance to the second vendees.

74. As, I may say with respect, rightly pointed out by G. R. Jagadisan J. in *K. N. Sampath Mudaliar v. Sakunthala Ammal*, (1964) 2 Mad LJ 563—

"A proper and harmonious construction of the two provisions, Section 146 and Order 21, Rule 16 of the Civil Procedure Code, the one general and the other special, would be that while Order 21, R. 16, applies to a case of a transfer by assignment in writing or by operation of law of an actual existing decree, Section 146 would apply to a case where mere rights are transferred before they culminate and merge into a decree, in favour of the transferor. An assignee who falls within the terms of Order 21, Rule 16, can only proceed under that provision to work out his rights in respect of the decree, and he cannot circumvent it by resorting to any general provision under the Code.

The word 'decree-holder' in Order 21, Rule 16, means the actual decree-holder on the date of the assignment and not a person, who may, after the so-called assignment, get a decree in his favour."

75. It is noteworthy that in *K. N. Sampath Mudaliar's case*, (1964) 2 Mad LJ 563, the learned Judge had made these observations relying on the Supreme Court decision in *Jugalkishore Saraf's case*, AIR 1955 SC 376.

76. Seventhly, in the case of a pre-emption decree, the right to execute the same, after the death of the pre-emptor decree-holder, will vest in his personal legal representatives by operation of law, because the continuity of the decree-holder will be presumed in his case. The same cannot be said where the rights in the decree are assigned by the decree-holder in favour of third parties, because the decree-holder has no right to transfer a pre-emption decree. The second vendees cannot thus execute the decrees in the instant case. They can, however, obtain possession of the land by filing a separate suit on the basis of the registered sale-deed in their favour.

77. In view of the foregoing, I hold that the second vendees cannot execute the decrees even under the provisions of Section 146, Code of Civil Procedure.

78. In my opinion, the proper remedy for them is to file a separate suit on the

basis of the sale-deed in their favour. Prima facie, it does appear to be somewhat hard that they are driven to do so, but the law must have its course and if there is no provision in the Code on the basis of which they can derive a right to execute the decrees, they have to be left to adopt that procedure which is available to them under the law, i.e., institute a suit on the basis of their title. There, the question left open by the Letters Patent Bench would also be determined.

79. Let us now examine a few authorities to which reference was made during the course of arguments. The principal subject of discussion was the Bench decision of the Allahabad High Court to which Mahmood J. was a party in *Ram Sahai's case*, (1885) ILR 7 All 107. There, the pre-emptors' right of pre-emption had already been established by a decree which had become final before the pre-emptors executed the sale-deed. That sale-deed did not transfer the decree but the property, to the proprietary possession of which the pre-emptors decree-holders were entitled, subject only to the payment of the purchase money within time. On the same day, when the sale-deed was executed, the pre-emptors decree-holders filed an application for the execution of the decree and after reciting that they had sold the property included in the decree to *Amhika Prasad*, prayed that the latter might be allowed to deposit the purchase money and they (the decree-holders) might be placed in possession, in order that they might make over possession of the property to the new vendee. The Court below accepted the deposit and allowed execution of the decree in the manner prayed. When the matter went in appeal to the Allahabad High Court, at the instance of the vendee, the appeal was dismissed by the learned Judges.

In the course of the Bench decision, Mahmood J. approved of the two earlier decisions given by that Court in *Rajjo v. Lalman*, (1883) ILR 5 All 180 and *Sarju Prasad v. Jamna Prasad*, which was not reported. In the earlier case, the Court had laid down the principle that when a pre-emptor, in anticipation of the success of his pre-emptive claim transferred the pre-emptible property in any manner inconsistent with the object of the suit for pre-emption, such transfer operated as forfeiture of the pre-emptive right, and the suit for pre-emption must, therefore, be dismissed. In the latter case, it was held that a decree for pre-emption, being purely personal in its character, could not be transferred so as to entitle the purchaser to execute the decree and thus obtain possession of the pre-emptible property. In the former authority, the transfer had been made by the plaintiff-pre-emptor before his suit was decreed and the question was whether the plain-

tiff pre-emptor, who had himself infringed the right of pre-emption in connection with the property in suit, should be allowed to obtain a decree for pre-emption.

In the latter ruling, the person who was seeking to execute the decree was not the pre-emptor decree-holder, but the person to whom the decree had been transferred and the effect of that authority was to uphold the principle, that no decree of Court passed in a suit for pre-emption could be so transferred as to invest the transferee with the right of obtaining possession of the pre-emptional property by executing that decree. During the course of this judgment, Mahmood J. observed—

"That decree-holder, and not Ambika Prasad, is the person who, in the proceedings from which this appeal has arisen, is seeking to obtain possession of the property, and it is of no consequence that the purchase-money was deposited by the latter on behalf of the former. For it is clear that the pre-emptor-decree-holder, and not Ambika Prasad, is the person to whom possession must be delivered in execution of the decree, and that if Ambika Prasad has any valid rights under the sale-deed, he can enforce them only by a separate suit.

This last circumstance distinguishes the present case in principle from the ruling in the case of Sarju Prasad v. Jamna Prasad. If in the present case Ambika Prasad were the transferee of the pre-emptive decree, seeking by virtue of that decree to obtain possession of the pre-emptional property, we should have disallowed his application for execution. But such is not the case, and the authority referred to does not, therefore, govern this case. The distinction which we have thus drawn is not merely technical but is based on fundamental principles of the law of pre-emption. The sole object of the right of pre-emption is the exclusion of such strangers as are objectionable to the pre-emptive co-sharers of the vendor x x x (part of this portion has already been quoted above) and if a decree for pre-emption could be validly transferred, the effect would be to place the transferee in possession without the trial of the question whether such transferee had the pre-emptive right in preference to the vendee against whom the decree was obtained. Nor could the sale of a pre-emptive decree be regarded as giving rise to a fresh cause of action for a separate suit to enforce pre-emption, and it follows that, not only the rights of the vendee-judgment-debtor, but also those of other co-sharers, might be injured by allowing the transferee of a pre-emptive decree to take out execution. On the other hand, in a case like the present, where the pre-emptional property

and not the decree has been transferred, the effect of executing the decree can only be to place the pre-emptor decree-holder in possession of the pre-emptional property, and the sale-deed executed by him, if valid, would give rise to a separate cause of action for a pre-emptive suit to be instituted by any person or persons who may consider the sale as having infringed their pre-emptive right. In the present case, whether the sale-deed of the 29th November, 1883, be valid or invalid, it must necessarily remain in abeyance till the pre-emptor-decree-holder obtains possession of the pre-emptional property under the decree; and, under this view, the present case is analogous to one in which the pre-emptor decree-holder, immediately after obtaining possession under the decree, sells the property.

For these reasons, and without prejudice to any rights that may arise out of the sale-deed of the 29th November, 1883, we hold that the Court below was right in allowing the execution of the decree at the instance of the plaintiff-pre-emptor, and we dismiss this appeal with costs."

80. Learned counsel for the second vendees tried to distinguish Ram Sahai's case, (1885) ILR 7 All 107, by submitting that in that case, the sale was made by the pre-emptors-decree-holders before they had deposited the purchase money in Court for being paid to the vendee. The argument raised was that it was only after the purchase money had been deposited in Court that the right of the pre-emptor to the property accrued and he could, thereafter, sell the property to anybody he liked. The new sale would then be subject to the right of pre-emption.

81. In my opinion, the distinction pointed out by the learned counsel would have made no difference so far as the decision by Mahmood J. was concerned. The learned Judge did not decide the case on that basis at all. The line of his reasoning has already been quoted by me above in extenso. It is true that at the time when that decision was given, the Code of Civil Procedure of 1882 was in force and Section 214 of that Code was in these terms:—

"214. Suit to enforce right of pre-emption: When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase money has not been paid into Court, the decree shall specify a date on or before which it shall be so paid, and shall declare that on payment of such purchase money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not

so paid, the suit shall stand dismissed with costs."

82. This provision was replaced by Order 20, Rule 14, in the Code of Civil Procedure of 1908 and the words "whose title thereto shall be deemed to have accrued from the date of such payment" were added. In my opinion, the addition of these words would not make any difference. Even under the old Sec. 214, when the pre-emptor paid the purchase money, as directed by the decree passed in his favour, he became entitled to obtain possession of the property from the vendee, meaning thereby that he got title to the property on the payment of the purchase money. It was only then and on the basis of his title that he was able to claim possession of the property from the vendee. If the pre-emptor failed to pay the purchase money, his suit was to stand dismissed. It could not be argued that previous to the introduction of the provisions of Order 20, Rule 14 by the Code of Civil Procedure of 1908, the pre-emptor's title to the property never accrued, because our attention was not invited to any other provision of the old Code of 1882 under which the pre-emptor's title to the property accrued. I am of the opinion that after the compliance with the provisions of Section 214 of the old Code, the pre-emptor got a firm title to the property for which he had brought a suit for pre-emption. The distinction pointed out by the learned counsel for the second vendees, therefore, in my view, is of no consequence.

83. According to the decision in Ram Sahai's case, (1885) ILR 7 All 107, a vendee from the pre-emptor-decree-holder can obtain possession of the land by filing a separate suit on the basis of the transfer in his favour and not by executing the decree under which the decree-holder obtained the right to the land. It further follows from that decision that if Neki had remained alive after selling the land to the second vendees, he alone, and not the second vendees, would have been entitled to execute the decrees for obtaining possession from the first vendees. After his death, this right to execute the decrees for obtaining possession had devolved on Neki's personal legal representatives, namely, Dhara Singh and his two sons, and not on the second vendees. So the second vendees had no right to execute the decrees in order to obtain possession of the land from the first vendees under the pre-emption decrees.

84. In 94 Pun Re 1902, the facts were that the plaintiff claimed pre-emption of certain property on the ground that the defendant who had obtained a decree for pre-emption of the same property had transferred his decree to his grandson who having paid the decretal price into

Court had obtained possession of the land. Under these circumstances, a Division Bench of the Punjab Chief Court, consisting of Johnstone and Rattigan JJ, held as under:—

"That as under the provisions of Section 214 of the Civil Procedure Code a pre-emptor's rights to or in the property do not accrue until he complies with the terms of the decree, the sale by the former pre-emptor to his grandson was merely a transfer of the right to obtain the property by compliance with the conditions of the decree and not the property itself, and was, therefore, not a sale of immovable property subject to the right of pre-emption within the meaning of Section 9 of the Punjab Laws Act."

85. In 78 Pun Re 1896, Stogdon and Chatterji JJ. approved of the unreported Bench decision of the Allahabad High Court in Sarju Prasad v. Jamna Prasad, quoted in Ram Sahai's case, (1885) ILR 7 All 107. The said judgment, according to Mahmood J., held that a decree for pre-emption, being purely personal in character, could not be transferred, so as to entitle the purchaser to execute the same. The person, who was seeking to execute the decree in that case, was not the pre-emptor decree-holder, but the person to whom the decree had been transferred. The effect of that ruling, according to Mahmood J., was to uphold the principle that no decree of a Court passed in a suit for pre-emption could be so transferred as to invest the transferee with the right of obtaining possession of the pre-emptional property by executing the decree.

86. In AIR 1953 Punj 163, Kapur J. observed:—

"A transferee from a pre-emptor who has obtained a pre-emption decree and deposited the decretal price, is not a representative of that pre-emptor within the meaning of the word representative as used in Section 47 (1) C.P.C. because pre-emption decree is a personal decree."

87. I wish to make it clear that I have purposely avoided discussing cases, not dealing with pre-emption law, because I do not consider them to be quite relevant for determining the point in controversy. I place pre-emption suits in a class by itself. The reason is simple. In such a suit, the plaintiff-pre-emptor, before getting possession of the property, has first to establish his title to it and that he does only after obtaining a decree for pre-emption and then complying with its terms. After he secures a decree in his favour, he has to deposit the purchase money within a fixed time. On his doing so, he gets two rights—(a) title to the property and (b) right to get its possession from the vendee. Even after obtaining a decree, he may change his mind and

refuse to deposit the purchase money within the prescribed period. In that case, his suit will be dismissed and he will not get any rights in the property. Such a situation does not arise in cases of other kinds. There when the plaintiff brings a suit for possession of certain property on the basis of his title, that title to the property, unlike that of a pre-emptor, is already with him. The pre-emptor's title to the property, as I have already said, accrues under Order 20, Rule 14, Code of Civil Procedure, on the date when he deposits the purchase money in accordance with the pre-emption decree. Similarly, during the pendency of a pre-emption suit, a pre-emptor cannot transfer the pre-emptional property in any manner inconsistent with the object of the suit for pre-emption. If he does that, he loses his pre-emptive right. Even after the pre-emption suit is decreed, the decree being personal in character cannot be transferred so as to entitle the purchaser to obtain possession of the property by executing it. Then again, after the title to the property has accrued to the pre-emptor on his complying with the terms of the decree, when he sells the property to another person, the transferee's rights will be determined on the basis of the sale-deed in his favour. If the vendee has been given only the title to the property and not the right to take its possession by executing the pre-emption decree, then he cannot obtain possession by that method. Everything will depend on what actually has been validly transferred by the pre-emptor decree-holder in his favour. All these are the special characteristics of a pre-emption suit and a pre-emption decree and they are not to be found in cases of other kind. It is because of these reasons that I am of the view that other cases are of no assistance in solving the present dispute.

88. Before parting with the case, I may notice one argument raised by the learned counsel for the first vendees. He submitted that it was not possible to fix the starting point of limitation regarding the suit for pre-emption, if one was to be filed qua the registered sale-deed dated 5th December, 1962, executed by the pre-emptor decree-holder in favour of the second vendees, wherein he had stated that possession had been delivered to the vendees on receipt of the purchase price from them. Admittedly, Article 10 of the old Limitation Act of 1908 would apply to the instant case and the property sold was capable of physical possession, even though as a matter of fact it was in possession of the first vendees when the deed dated 5th December, 1962, was written. The question for decision would be as to when the second vendees took physical possession of the same under

the sale, because, according to Article 10, the limitation of one year for filing the suit for pre-emption would start from that date. According to the averments in the sale-deed, possession was given by the pre-emptor decree-holder on 5th December, 1962, to the second vendees on receipt of the purchase price from them.

Factually that statement was incorrect, because in reality the possession was with the first vendees. It was stated at the bar by the learned counsel for the second vendees that they had recently taken possession of the land from the first vendees during the course of the execution proceedings relating to the three pre-emption decrees. How could that possession, which was taken by the second vendees not from their vendor (pre-emptor decree-holder) but from the first vendees and not under the sale-deed dated 5th December, 1962, but by executing the pre-emption decrees, be said to comply with the requirements of the terminus a quo as fixed under Article 10?

89. The argument raised by the learned counsel for the appellants, in my opinion, does require serious consideration. But it is needless for me to decide whether it should succeed or not, because as I look at the matter this point is not necessary to be determined for resolving the controversy arising in the present appeals.

90. In view of what I have said above, I am of the opinion that in the facts and circumstances of this case, the second vendees cannot get possession of the land in dispute by executing the pre-emption decrees.

91. The result is that the appeals are accepted and the judgments of the Courts below are set aside. In the peculiar circumstances of this case, however, the parties are left to bear their own costs throughout.

92. H. R. SODHI, J.:— I have had the privilege and benefit of going through the judgments of my learned brethren D. K. Mahajan and P. C. Pandit, JJ. The facts have been stated very elaborately by both of them and it is pointless to recapitulate the same. It is equally unnecessary for me to refer to the various rulings cited at the bar.

93. The sole question arising for determination as formulated by D. K. Mahajan, J. is:—

"Whether the purchaser of land from a pre-emptor, of which the pre-emptor has become the owner in pursuance of a pre-emption decree after complying with the provisions of Order XX, Rule 14, Civil Procedure Code, could execute the decree in order to obtain possession of the land purchased by him?"

Suffice it to state that when a decree in any suit has been passed, it is normally only the decree-holder who can execute

the decree. The expression "decree-holder" has been defined in Section 2(3) of the Code of Civil Procedure and means "any person in whose favour a decree has been passed or an order capable of execution has been made." A decree can also be transferred and the transferee can as well execute it when the transfer is by assignment in writing or by operation of law. As for instance, in the case of a deceased decree-holder, his legal representatives to whom the decree stands transferred by operation of law, can also execute the decree. There are several other modes of transfer by operation of law but no reference to them is necessary for the purposes of the present case. Order XXI, Rule 16 of the Code of Civil Procedure, is relevant in this regard and may be quoted in extenso:—

"16. Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others."

94. In the case before us, we have looked into the terms of the sale-deed executed in favour of the second transferee, and it does not purport to effect a sale of the decree but transfers the land only. It is not possible to agree with the learned counsel for the appellants and to hold that the sale, though purporting to be of the land, is also of the decree. If once it is held that the sale is of the decree, the provisions of Order XXI, Rule 16 are attracted which necessitates certain procedure to be followed, and it is conceded before us that it was not so done. I however agree with his contention that a pre-emption decree, which, beyond any manner of doubt, is a personal decree, cannot be transferred so as to enable the transferee to execute the same. A right to pre-empt whether based on Mohammedan law, custom or a statute, depends on a pre-emptor possessing certain personal qualifications. It is inconceivable that just by transferring the decree, the pre-emptor decree-holder

can substitute the transferee in his place and confer on him those personal qualifications which are basis of the right to pre-empt. In Punjab, the Punjab Pre-emption Act, 1913 (hereinafter called the Act), as amended up-to-date, is in force and Sections 15 and 16 thereof give the classes of persons in whom right to pre-empt vests in respect of sales of agricultural land and village immovable property or of urban immovable. These provisions of law are reproduced below for facility of reference:—

"15. (1) The right of pre-emption in respect of agricultural land and village immovable property shall vest—

(a) where the sale is by a sole owner,—
First, in the son or daughter or son's son or daughter's son of the vendor;

Secondly, in the brother or brother's son of the vendor;

Thirdly, in the father's brother or father's brother's son of the vendor;

Fourthly, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof;

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly,—

First, in the sons or daughters or sons' sons or daughters' sons of the vendor or vendors;

Secondly, in the brothers or brother's sons of the vendor or vendors;

Thirdly, in the father's brothers or father's brother's sons of the vendor or vendors;

Fourthly, in the other co-sharers;

Fifthly, in the tenants who hold under tenancy of the vendor or vendors the land or property sold or a part thereof;

(c) where the sale is of land or property owned jointly and is made by all the co-sharers jointly,—

First, in the sons or daughters or sons' sons or daughters' sons of the vendors;

Secondly, in the brothers or brothers' sons of the vendors;

Thirdly, in the father's brother's or father's brother's sons of the vendors;

Fourthly, in the tenants who hold under tenancy of the vendors or any one of them the land or property sold or a part thereof.

(2) Notwithstanding anything contained in sub-section (1)—

(a) where the sale is by a female of land or property to which she has succeeded through her father or brother or the sale in respect of such land or property is by the son or daughter of such female after inheritance, the right of pre-emption shall vest,—

(i) if the sale is by such female in her brother or brother's son;

(ii) if the sale is by the son or daughter of such female, in the mother's brothers

or the mother's brother's sons of the vendor or vendors;

(b) where the sale is by a female of land or property to which she has succeeded through her husband, or through her son in case the son has inherited the land or property sold from his father, the right of pre-emption shall vest,—

First in the son or daughter of such husband of the female;

Secondly, in the husband's brother or husband's brother's son of such female.

16. The right of pre-emption in respect of urban immovable property shall vest in the tenant who holds under tenancy of the vendor the property sold or a part thereof."

95. To hold that a transferee of a pre-emption decree gets a right to execute a decree and obtain possession of the property, no matter he is an utter stranger and not possessed of the qualifications as required by the aforesaid two sections, will be contrary to the scheme and object of the law of pre-emption. The language of Order XXI, Rule 16 does not, of course, lay down any fetters on the right to transfer a decree and if the language of this provision alone were to be kept in view, there should be no bar to the transfer of a decree for the restitution of conjugal rights. To my mind, it makes no difference whether the pre-emptor in a pre-emption suit deposits the purchase money as enjoined in the decree passed under Order XX, Rule 14, Code of Civil Procedure, and acquires title to the land before he transfers the decree. A right to the title of the land and a right to transfer a pre-emption decree so as to entitle the transferee to execute it are two distinct matters and one cannot be confused with the other. The question before us is a very short one, namely whether the transferee should be permitted to execute the pre-emption decree on the basis of the transfer made in his favour.

I am in most respectful agreement with the view of law taken in ILR 2 Lah 282= (AIR 1922 Lah 300), and the observations made by Mahmood J. in (1885) ILR 7 All 107, on which reliance has been placed by my brother P. C. Pandit, J. There was no such question about the transfer of a decree before their Lordships of the Supreme Court in (1968) 70 Pun LR 323 = (AIR 1968 SC 1205), wherein it has been held that when involuntary transfer takes place by inheritance, the successor to the land takes the whole bundle of the rights which go with the land including the right of pre-emption. What is intended to be laid down is only this much that when a plaintiff pre-emptor in a pre-emption suit, who has deposited the necessary purchase money in terms of Order XX, Rule 14, and acquired a

title to the land, has heirs and legal representatives on whom the property devolves by inheritance, the latter are entitled to continue the appeal in which the decree had been passed, if the pre-emptor dies during the pendency of that appeal. In my opinion, because of this decision of their Lordships of the Supreme Court, it cannot be held that a pre-emption decree has ceased to be a personal decree in all respects and becomes transferable as any other decree so as to clothe the transferee with a right to execute the same.

96. If a pre-emption decree is held not to be transferable and the transferee cannot execute the same under O. XXI, Rule 16, a question then arises whether the same result can be achieved by the plaintiff decree-holder who could have transferred the decree, but chooses only to transfer the land. I cannot visualise that Section 146 of the Code of Civil Procedure permits any such course. The Supreme Court has held in AIR 1955 SC 376, that Section 146 must be given a wider meaning and that a person who is transferee of the debt for the recovery of which a suit has been instituted, becomes the real owner of the decree when it is passed, and is in law deemed to be the person claiming under the decree-holder, so as to have a right to execute the decree in which he alone has the real interest. It is an extension of the equitable doctrine that a man who contracts to transfer any interest or property which has not yet come into existence must in equity be treated to be intending to transfer that interest or property when it really comes. Such an equitable doctrine as enunciated by their Lordships cannot apply to transfer of every subject-matter of a suit, irrespective of the nature of the right involved therein, thereby giving a right to the transferee to execute a decree that may eventually be passed or has already been passed. Each case will depend upon its own facts and circumstances.

For instance, can it ever be said with any reasonableness that in a suit for maintenance by a wife, the right to further maintenance can be transferred or in a suit for conjugal rights the parties can transfer their respective rights. There are certain rights which are inherently not transferable because of their nature and the case before their Lordships of the Supreme Court was only that of a right to recover a debt. Section 146, Code of Civil Procedure, itself lays down limitations on a transferee in the matter of executing a decree. The transfer must be such which does not come in conflict with any other provision in the Code of Civil Procedure and is not prohibited by any law for the time being in force. In other words, the general enabling provi-

sion as contained in Section 146 must give way to special provisions relating to the same subject-matter or to any other provision which prohibits the transfer. Section 146 cannot also come into operation when a decree has been passed and could be transferred, but has not, in fact, been transferred. After the passing of the decree, the only relevant provision directly relating to the question of transfer is the special one as given in O. XXI, Rule 16 and a transfer must be under that provision of law only if a decree is sought to be executed by one other than the decree-holder. Section 146 cannot be pressed into service at such a stage. I am in full agreement with the reasoning in the Single Bench judgment of Madras High Court reported in (1964) 2 Mad LJ 563. Since I am of the view that a transferee of a pre-emption decree cannot execute the decree, the transfer of the subject-matter of the pre-emption suit cannot be held to give a better right to the transferee so as to enable him to execute the decree.

97. The contention of the learned counsel for the respondents second vendees is that the sale of the land in such circumstances can be pre-empted by any person having a legal right to do so under the Act and that there is no circumvention of any law of pre-emption by allowing transferee of the land, during the pendency of the appeal, to execute the decree. I am again in agreement with my brother Pandit J. that this contention is wholly irrelevant for the purpose of answering the question referred to us. What we are concerned with is as to whether the transferee of land, in respect of which a pre-emption decree has been passed, can execute a decree as such under Section 146 or under Order XXI, Rule 16, Code of Civil Procedure. Whatever be the rights of any person, arising out of a sale, can be enforced in a Court of law by a separate suit, where defences available to the respective parties can be taken. In my opinion, it is doubtful if a remedy by way of suit for pre-emption in such a situation when after the passing

of the decree for pre-emption appeals are still pending and rights are in a fluid state, is available to the person entitled to pre-empt the second sale.

No doubt by depositing the purchase money the plaintiff pre-emptor acquires the title to the land which he can transfer but pre-emptor must have terminus a quo from which period of limitation for instituting a pre-emption suit can be reckoned. The provisions of law regarding limitation are contained in Sec. 30 of the Act and Article 10 of the Indian Limitation Act, 1908, which Article now stands replaced by Article 97 of the Indian Limitation Act, 1963 (36 of 1963). As regards this provision, there is no difference of language in the earlier and the latter Acts. Section 30 of the Act reads as under:—

"30. In any case not provided for by Article 10 of the Second Schedule of the Indian Limitation Act, 1908, the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act, shall, notwithstanding anything in Article 120 of the said schedule, be one year:—

(1) in the case of a sale of agricultural land or of village immovable property; from the date of the attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of mutation maintained under the Punjab Land Revenue Act, 1887, or from the date on which the vendee takes under the sale physical possession of any part of such land or property; whichever date shall be the earlier;

(2) in the case of a foreclosure of the right to redeem village immovable property or urban immovable property; from the date on which the title of the mortgagee to the property becomes absolute;

(3) in the case of a sale of urban immovable property, from the date on which the vendee takes under the sale physical possession of any part of the property."

98. Article 97 of the Limitation Act, 1963, is as under:—

Time from which period begins to run.

Description of suit.	Period of Limitation.
"97. To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract.	One Year.

When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered."

A bare reading of these provisions will show that when the vendor is not in actual physical possession of the suit property, the time will commence to run from the date the purchaser takes physical possession of the whole of the property sold under the sale sought to be impeached. The only question debated before us was as to whether the purchaser

of the suit land can be said to have taken possession under the sale when he takes such possession after executing the decree by virtue of Section 146, Civil Procedure Code. Assuming that the transferee of the suit land can execute the decree, can it be said that when he takes the possession he takes it under the sale. He takes possession by execution of the decree

either because he is transferee of the decree or is deemed to be such a transferee by operation of Section 146, Civil Procedure Code. It then is not a possession under the sale within the meaning of Section 30 of the Act or Article 97 of the Indian Limitation Act, 1963.

99. After giving my careful thought to the matter, I am in full agreement with the reasoning and conclusions of my learned brother Pandit J. and hold that it is not open to the second vendees to get possession of the land in dispute by executing the decrees. They can, of course, file a separate suit which is not barred under Section 47, Code of Civil Procedure. The appeals must, therefore, be allowed and the judgments of the Courts below set aside. I also agree with Pandit J. that, in the peculiar circumstances of the case, the parties must be left to bear their own costs throughout.

100. ORDER OF THE COURT: In view of the majority decision, Execution Second Appeals Nos. 1131, 1132 and 1133 of 1968 are allowed and the decisions of the Courts below are set aside. The Execution Applications filed by the purchaser from the pre-emptor are dismissed. The parties are left to bear their own costs throughout.

Appeals allowed.

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(V 57 C 33)

FULL BENCH

SHAMSHER BAHADUR, R. S. NARULA
AND BAL RAJ TULI, JJ.

The Assessing Authority, Amritsar and another, Appellants v. Om Parkash Seth, Respondent.

Letters Patent Appeal No. 188 of 1964, D/- 22-5-1969, decided by Full Bench on order of reference made by S. B. Kapoor and R. S. Narula, JJ., D/- 26-9-1968.

Sales Tax — Punjab General Sales Tax Act (46 of 1948), Ss. 11, 11-A and 21 (1) — Best judgment assessment — Revisional authority exercising powers under S. 21 (1) suo motu setting aside assessment and remanding case for fresh assessment according to law — Fresh proceeding for assessment — Limitation prescribed by S. 11-A or by S. 11 (4), (5) and (6) applies.

The proceedings taken for fresh assessment by the assessing authority in pursuance of the order of remand made by the Commissioner in exercise of revisional powers is governed by the period of limitation provided in Section 11-A of the Act. Even though the original assessment order was passed on best judgment and

even if the nature of the proceedings after remand remained the same, the same period of limitation is provided in sub-sections (4), (5) and (6) of Sec. 11 which govern the orders of assessment based on best judgment. AIR 1965 SC 1213, Rel. on; AIR 1964 SC 766, Ref.

(Paras 2, 7)
Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1213 (V 52) =
(1965) 16 STC 494, Jaipuria Brothers Ltd. v. State of Uttar Pradesh 2, 7
(1964) AIR 1964 SC 766 (V 51) =
(1963) 14 STC 976, Ghanshyamdas v. Regional Asst. Commr. of Sales Tax, Nagpur 6
(1938) AIR 1938 PC 175 (V 25) =
65 Ind App 236 = 6 ITR 414,
Commr. of Income-tax, Bombay
Presidency and Aden v. Khemchand Ramdas (a Firm) 4

B. S. Dhillon, Advocate General (Punjab) with B. S. Shant and Rattan Singh, for Appellants; Bhagirath Das with B. K. Jhigan and S. K. Hiraji, for Respondent.

BAL RAJ TULI, J.:— This appeal under Cl. 10 of the Letters Patent has been placed before us for decision in pursuance of the order of S. B. Kapoor and R. S. Narula, JJ. of September 26, 1968. When this appeal came up for hearing before the learned Judges, it was considered that the legal question arising in this appeal was the same as was referred by Sarkaria, J. on April 1, 1968, in C. W. 1232 of 1965. That is how this appeal has come before us for decision.

2. In fact, the point of law that arises for decision in this appeal is not the same as arose in C. W. 1232 of 1965 as observed by the learned Single Judge in his judgment as under:—

"I am not determining question whether there is any period of limitation prescribed for the Commissioner within which he can exercise his powers under S. 21."

The question of law that was referred in C. W. 1232 of 1965 to a Full Bench was "Whether the jurisdiction of the Commissioner under Section 21 (1) of the Punjab General Sales Tax Act, 1948, is subject to the period of limitation prescribed in Section 11-A of the Act". The question of law that arises in this appeal is whether the proceedings for fresh assessment taken by the assessing authority in pursuance of the directions made by the Commissioner while disposing of a revision petition under Section 21 (1) of the Act setting aside the order of assessment and ordering the assessing authority to make a fresh assessment in accordance with law are governed by the period of limitation prescribed in sub-ss. (4), (5) and (6) of S. 11 or S. 11-A of the Punjab General Sales Tax Act, 1948, hereinafter called the Act. The learned Judge has taken the view that the proceedings taken

for fresh assessment by the assessing authority in pursuance of the order of remand made by the Commissioner in exercise of revisional powers is governed by the period of limitation provided in sub-sections (4), (5) and (6) of S. 11 or Section 11-A of the Act. This view of the learned Judge is well founded and finds support from a judgment of their Lordships of the Supreme Court in *Jaipuria Brothers Ltd. v. State of Uttar Pradesh*, (1965) 16 STC 494 = (AIR 1965 SC 1213). Their Lordships were dealing with the provisions of U. P. Sales Tax Act, 1948. Sub-section (3) of S. 10 of that Act provides:—

"The Revising Authority may in his discretion at any time suo motu or on the application of the Commissioner of Sales Tax or the person aggrieved, call for and examine the record of any order made by any Appellate or Assessing Authority under this Act, for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order as he thinks fit:

Provided that no such application shall be entertained in any case where an appeal lay against the order, but was not preferred."

This provision of law is analogous to Section 21 (1) of the Act which confers revisional powers on the Commissioner.

3. Section 21 of the U. P. Act provided as under:—

"Where the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax in any year, the Assessing Authority may, at any time within three years from the expiry of such year, and after issuing notice to the dealer and making such enquiry as may be necessary, assess the tax payable on such turnover."

4. This section corresponds to Section 11-A of the Act. In that case a Division Bench of Allahabad High Court had taken the view that Section 21 which imposed upon the assessing authority duty to exercise his power to assess turnover which escaped assessment within three years from the end of the year of assessment applied only to the order which the assessing authority made suo motu; where, he was directed to proceed by an order of the appellate or revisional authority under Sections 9 and 10 of the Act to reassess, the period of limitation had no application. While holding the view of the Division Bench of the Allahabad High Court to be erroneous, their Lordships of the Supreme Court observed as under:—

"In our view the High Court was in error in so limiting the operation of Section 21. That section imposes a restriction upon the power of the Sales Tax Officer: that officer is competent within

three years next succeeding the date to which the tax relates to assess tax payable on the turnover which has escaped assessment. But the section does not provide expressly, nor is there any implication, that the period within which reassessment may be made applies only to those cases where the Sales Tax Officer acts on his own initiative and not pursuant to the directions of the appellate or the revisional authority". Their Lordships relied on a judgment of the Privy Council in *Commr. of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas (a Firm)*, 65 Ind App 236 = 6 ITR 414 = (AIR 1938 PC 175) in support of their view.

5. In the instant case *Om Parkash Seth*, sole-proprietor of the firm *Kohinoor Woollen Silk Mills, Amritsar* is a registered dealer under the Act. He was required to furnish quarterly returns for the year 1958-59. He filed a return only with respect to the first quarter of the year and best judgment assessment was made by order dated February 16, 1960, by the assessing authority at an estimated gross turnover of one lac rupees. A sum of Rs. 1,000 was assessed as purchase tax for an estimated amount of purchases of Rs. 50,000 within the State. The amount of Rs. 1000 was paid by the assessee in two instalments of Rs. 500 each on July 7, 1960, and August 30, 1960. On December 16, 1960, another order creating the liability of Rs. 1000 was made by the assessing authority with regard to the same year. On December 15, 1962, a notice was sent by the Excise and Taxation Commissioner, Punjab, "exercising the powers under Section 21 (1) of the Act" to the petitioner intimating that he had decided suo motu to examine the legality and propriety of the assessment orders dated February 16, 1960, and December 16, 1960, and that the case would be heard and determined by the Additional Excise and Taxation Commissioner, Punjab, in due course. The case was heard by the Assistant Additional Excise and Taxation Commissioner, Punjab, Patiala, on March 15, 1963, in the presence of the Taxation Inspector on behalf of the State and *Shri Kidar Nath* who appeared for the respondent. The revising authority held that "the order passed by the Assessing Authority in this case is improper and is set aside. The Assessing Authority should have scrutinised necessary declaration forms before giving deductions under Rule 26 on account of sale to registered dealers. Since the case was being decided on best judgment basis, deductions on account of sale to registered dealers should not have been allowed. Moreover, suo motu powers are not cabined by any time limit. The case is, therefore, sent down to the Assessing

the hearing had begun the official referee allowed the plaintiff to amend and add to his claim the amount of the second instalment, which fell due on January 15, 1931, observing that there was no need to bring a new action for this amount. The defendant appealed from the decision of the official referee *inter alia* on the ground that he had no jurisdiction to allow an amendment of the statement of claim adding a claim which had arisen after the date when the action was begun. Dealing with this question Swift J. observed—

"But here the learned official referee seems to me to have gone much further than amending the proceedings. He has allowed the plaintiff to bring into this action an entirely fresh cause of action arising after this action had been started and he has done that without the consent of the defendants. In *Tottenham Local Board of Health v. Lea Conservancy Board*, (1886) 2 TLR 410, an action brought to restrain the Lea Conservancy Board from stopping the outlet of the effluents from the sewage works of the plaintiff Board into the River Lea, it was sought to amend the statement of claim by stating facts relating to some proposed new works, and adding an alternative claim for injunction to restrain the Lea Conservancy Board from interfering until it should be ascertained whether the proposed new works were efficient; Pearson, J., refused the application, and from that there was an appeal. Cotton, L. J., said he would give no opinion whether the Court had power to allow the proposed amendment, but that if there were power he thought it ought not to be exercised in the circumstances of that case. Bowen, L. J., said that it was not necessary to decide the point, but he had a very strong opinion that the amendment could not be allowed inasmuch as it related to a cause of action which did not exist at the time when the writ was issued. Fry, L. J., did not express any opinion upon the matter at all. So far as I know, Bowen, L. J.'s remarks in that case are the only authority which is to be found in this country, with the exception of an observation of Sir George Jessel in a case to which I will immediately allude upon the point whether or not a writ can be amended so as to include a cause of action which was not in existence at the time when the writ was issued, I can find nothing in the rules which justifies such an amendment. To bring in such a cause of action does not seem to me to be amending the proceedings at all, it admits a new cause of action and one which could not have been sued upon at the time the writ was issued. An Irish case; *Creed v. Creed* (1913), 1 Ir R. 48 at p. 50 — seems directly to decide that such an amendment cannot be made. The headnote is that 'A, B, believing that X died intestate took out administration intestate to him, and commenced an action as such administrator against C. D. C. D., who had been aware that X

left a will, appointing him executor, declared that fact for the first time in his defence, and thereupon A, B, took out administration with the will annexed (C, D, having renounced), and sought to amend the pleadings accordingly. Held, that A, B's application must be refused as at the date of the issue of the writ she had no title to sue.' Barton, J., said: 'I am of opinion that this summons should be dismissed with cost, as the plaintiff's letters of administration were void 'ab initio'; and she had no title to sue when the action was brought.' Here there was no right on the part of the plaintiff in this action to sue for the second instalment when the action was brought, and (1913) 1 Ir R 48 at p. 50 — is helpful in the absence of any express rule on the matter in our own courts or in our own Rules of procedure, as showing that such a cause of action cannot be added to the writ here".

Swift, J., then dealt with the judgment of Jessel, M. R. given in *Original Hartlepool Collieries Co. v. Gibb*, (1877) 5 Ch D 713. After giving a quotation from the learned Master of the Rolls' judgment, Swift, J., said that Jessel, M. R. had made this observation at page 719:

"By the leave of the Court you can do anything. That is another matter; because the Court can give leave to amend on both sides, and can easily amend the writ. There I respectfully differ. It is not correct to say 'By leave of the Court you can do anything.' It is certain that by leave of the Court you cannot do everything. The Court is limited in giving its leave to the powers which are conferred upon it by the Rules and by the statute under which those Rules are made, and I cannot see how, without the consent of the parties, the Court can so amend a writ as completely to change the cause of action so as to bring in a cause of action which was non-existent at the time the writ was originally issued."

This case went up in appeal. The judgment of the Court of appeal is given in the same volume of the Report (1932) 1 KB and begins at p. 423. At p. 429, Scrutton, L. J., said:

"When the writ was issued only the first instalment was due, but when the case came on for hearing the second instalment had fallen due. The Official Referee allowed the plaintiff to amend the writ by adding to his claim the second instalment. This was, I think, contrary to the universal practice."

It will thus be seen that the Court has no power either under Section 153 or under Order 6, Rule 17, Civil Procedure Code to allow an amendment of the plaint so as to include a cause of action which had not accrued on the date of the institution of the suit. It has however been held in some decisions that Courts are not precluded from taking cognizance of facts that occur since the laying of the action and granting relief to the parties on the basis of the altered situation under

exceptional circumstances in the exercise of their inherent powers under Section 151, Civil Procedure Code,

10. In *Appalasuri v. Kannamma Nayudralu*, AIR 1926 Mad 6 one of two Hindu widows brought a suit for partition of her husband's property and possession of a share against the co-widow (defendant No. 1) and defendant No. 2 to whom a part of the property was sold by defendant No. 1. The suit was decreed by the trial Court. On appeal it was remanded for fresh trial and a decree was again passed in favour of the plaintiff. In the interval defendant No. 1 died. There was again an appeal. The plaintiff prayed for amendment of the plaint and prayed for possession of the entire estate as a result of defendant No. 1's death. The amendment was allowed. This amendment was upheld by the Division Bench with the following observations —

"That events that happened, even after the filing of the suit — including those that add to the title of the plaintiff — may be taken notice of has been established by several cases Specially in partition suits, it will be very inconvenient, if the general principle of confining the suit to the cause of action, in the plaint, is rigidly adhered to, as can be seen from a simple case, where A filed a suit against his two brothers for partition and seeks to recover a third share, and during the pendency, one of the brothers dies, to say that the plaintiff cannot be awarded half, instead of a third, and that the decree should be limited to a one third, he being compelled to file another suit for one-sixth is to be technical with a vengeance No doubt, the discretion ought not to be exercised, when there is a change of jurisdiction, when there is a great delay in making the application, and may not be exercised if a fresh enquiry on other facts is necessary. But when these features do not exist, in our opinion the amendment ought as a general rule, to be allowed, to avoid multiplicity of proceedings. In all such cases, the only question of consequence is one of Court-fees, a matter with which the parties are not concerned and the opposite party is not deprived of any defence, which is obviously open to him." It will thus be seen that no amendment can be allowed if a fresh enquiry on other facts is necessary.

11. The above decision was followed in *A. N. Shah v. A. Annapurnamma*, AIR 1959 Andh Pra 9. In this case a suit was filed for the eviction of the defendant on the ground of forfeiture of lease for non-payment of rent. During the pendency of the suit the term of the lease expired and the plaintiff applied for the amendment of the plaint adding a fresh ground entitling her to recover possession. This was allowed as the principles laid down in AIR 1926 Mad 6 were applicable, there being no necessity

of a fresh enquiry on any fact. The decision in 1932-1 KB 254 was distinguished on the ground that the facts in it did not fall within the exceptions laid down by a series of Madras decisions referred to in *A. N. Shah's case*, AIR 1959 Andh Pra 9.

12. In *P. Manga Rao v. C. Kishan Rao*, ILR (1963) Andh Pra 931 = (AIR 1963 Andh Pra 98) a decree was passed against the plaintiff who instituted a suit for contribution against the defendant without making payment of the amount due under the decree. It was however not disputed that during the pendency of the suit full satisfaction of the decree was recorded in execution. A certified copy of the execution proceedings was filed. There was no allegation that satisfaction was recorded by collusion, between the decree-holder and the plaintiff. In these circumstances relief was afforded to the plaintiff. The following observations were made —

"It is beyond the pale of controversy that a suit must be tried in all its stages on the cause of action that had arisen before the institution of the suit. This basic principle cannot be ignored in the decision of the question whether a suit should be decreed or not. However, Courts are not precluded from taking cognizance of facts that occur since the laying of the action and granting relief to the parties on the basis of the altered situation, under exceptional circumstances. This is an inherent power which a Court is required to exercise if it is conceived to advance the cause of justice. The power to give adequate relief to suitors in suitable cases in view of the changed circumstances after the filing of the suit cannot, therefore, be contested. This power should be exercised if it tends to shorten litigation and best subserves the ends of justice."

13. In *Ram Dayal v. Maji Devdiji of Riyan*, ILR (1953) 3 Raj 866 the suit for recovery of money was premature on the date on which it was filed. But cause of action to bring the suit accrued to the plaintiff during the pendency of it. It was contended on behalf of the defendant before the Division Bench that the suit should be dismissed as it was filed prematurely. On the other hand what was urged on behalf of the plaintiff was as the suit matured during the course of the trial and had been decreed by the trial court the decree should be maintained. The learned Judges observed as follows:

"As we understand the position, the general rule is that the rights of parties to a suit must be regulated with reference to their state at the date of the institution of the suit and a suit must be tried in all its stages on the cause of action as existed on the date of its commencement, and the relief claimed in the suit must be confined to matters existing at that date. See AIR 1945 PC 62. Although this is settled law as a general rule, it is equally settled that there are exceptions to this rule and it is open to a court in excep-

tional cases to take into consideration events which may have taken place subsequent to the filing of the suit and grant relief on their basis where the relief as claimed have become inappropriate by reason of altered circumstances and where this may appear to be necessary to shorten unnecessary litigation between the parties or tend to subserve the substantial interests of justice."

After referring to the special circumstances of the case which were cited before them in which the inherent power of the Court was exercised their Lordships considered whether the case before them could be taken properly to fall within the exception to the general principle referred to above. They came to the finding that the case was one in which having regard to its special circumstances they should exercise their discretion in favour of the plaintiff and take into consideration events which took place subsequent to the filing of the suit and treat the case on that footing although the suit was premature on the date it was filed.

14. It will thus be seen that in exceptional circumstances the courts may allow an amendment of the plaint in exercise of their inherent power as to include a cause of action which had not accrued on the date of the suit provided the following conditions laid down in AIR 1926 Mad 6 are satisfied:

- (1) There is no change of jurisdiction.
- (2) The application is not greatly belated.
- (3) No fresh enquiry on facts is necessary, and

(4) the opposite party is not deprived of any defence which would be open to it if a fresh suit on the new cause of action were to be brought.

In AIR 1959 Andh Pra 9 there is a specific reference to these conditions and 1932-1 KB 254 was distinguished on the ground that these conditions were not satisfied, a fresh enquiry being necessary on the question as to whether or not the second instalment was paid. In ILR (1963) Andh Pra 931 = (AIR 1965 Andh Pra 98) and ILR (1953) 3 Raj 866 also these conditions were all satisfied although there is no specific mention of them.

15. In two unreported cases Gopi Chand v. Khel Shanker, (Civil Revn. No. 191 of 1966, D/- 16-10-1968 (Raj) and Umardeen v. Chhagan Lal, (Civil Revn. No. 113 of 1967 D/- 18-10-1968 (Raj)) it was held by me that the trial courts had committed material irregularity in allowing similar amendments of the plaints. These revision applications were not seriously contested before me on behalf of the respondents and the reasons for the decisions given in them are not correct. The reason given in present revision applications are however fully applicable to those cases and the orders allowing amendments were rightly set aside.

16. In the two cases before me there is no special circumstance justifying the exercise of the inherent power of the Court. On

the other hand in both these cases the fact that there was a default after the institution of the suit is seriously disputed on behalf of the defendants and a fresh enquiry would be necessary if the plaints are allowed to be amended. Further amendment applications in both the cases are belated. In Civil Revision No. 469/1967 the default is alleged to have taken place on 24-5-66, but the amendment application was made only on 3-4-67. In Civil Revision No. 152/1968 the default is alleged to have taken place in 1962, but the amendment application was made in 1967. The trial courts therefore committed a material irregularity in allowing the amendments. It was incumbent on the trial courts to apply their minds to the case law which was shown to them on behalf of the parties and state their reasons for departing from the general principle before allowing the amendments.

17. On behalf of the applicants it was also contended that the amendments if allowed were likely to result in injustice to them inasmuch as they might be deprived of the right conferred on the tenant under Section 13(4) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 as amended by Act No. 12 of 1965 of having the ground of default struck off by depositing rent, interest and costs on the first day of hearing. It is argued that the amendment of the plaint relates back to the date of the institution of the suit and the first day of hearing referred to in the sub-section has already passed. It is unnecessary for me to express any opinion on this question as I have already held on other grounds that the trial courts committed a material irregularity in allowing the amendments.

18. I accordingly allow the revision applications, and set aside the orders of the trial court allowing the amendments.

19. In Civil Revision No. 469/1967 the plaintiff contested the revision application. The defendant is entitled to recover costs of this revision application from the plaintiff.

20. In Civil Revision No. 152 of 1968 the revision application was not contested on behalf of the plaintiffs. I accordingly leave the parties to bear their own costs of this revision application.

Petitions allowed.

AIR 1970 RAJASTHAN 83 (V 57 C 17)

C. B. BHARGAVA, J.

Bhonrilal, Petitioner v. Mst. Kaushaliya, Non-Petitioner.

Civil Revn. No. 188 of 1968, D/- 31-1-1969, against order of Senior Civil J., No. 1, Gangapur City D/- 18-3-1968.

(A) Hindu Law — Marriage — Essential ceremonies — Saptapadi — It is taking of seven steps by bridegroom and bride jointly

FM/GM/C610/69/HGP/B

before sacred fire — It is not taking of seven rounds of fire — Case law reviewed.

(Para 4)

(B) Civil P. C. (1908), O. 39, R. 2(3) — Injunction against husband restraining him from entering into second marriage — Disobedience of order — Contempt proceedings — Principle that strict proof is required in all criminal cases need not be extended to such a case — Proviso to S. 50, Evidence Act is not applicable — Nor is contemner a person accused of any offence — (Evidence Act (1872), S. 50 Proviso.)

(Para 5)

(C) Civil P. C. (1908), O. 39, R. 2(3) and S. 115 — Order for temporary injunction restraining husband from entering into second marriage — Disobedience — Contempt proceedings — Main concern of Court is to see how far act done in disobedience was in disregard to its authority — Both Courts below finding that husband acted in disobedience — Objection about validity of second marriage raised for first time in revision — There is no room for interference by High Court.

(Para 5)

(D) Civil P. C. (1908), O. 39, R. 2(3) — Scope — Proceedings under are not akin to criminal prosecution where proof beyond all reasonable doubt is required.

(Para 6)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 614 (V 53) =

1966 Cr LJ 472, Kanwal Ram v.

Himachal Pradesh Administration 2

(1965) AIR 1965 SC 1564 (V 52) =

1965 (2) Cr LJ 544, Bbaurao

Shankar v. State of Maharashtra 2

(1965) AIR 1965 J & K 105 (V 52) =

1965 (2) Cr LJ 640, Phankari v.

The State 2

(1959) AIR 1959 Bom 508 (V 46) =

1958 Nag LJ 10, Sitabai Sadashiva v.

Vithabai Namdeo 3

(1947) AIR 1947 PC 168 (V 34) =

1947 All LJ 480, Kashi Nath v.

Bhagwan Das 3

(1928) AIR 1928 Pat 481 (V 15) =

29 Cr LJ 1045, Canga Patra v.

Emperor 2

(1925) AIR 1925 Rang 328 (V 12) =

27 Cr LJ 651, Gopal v. The

Emperor 2

(1923) AIR 1923 Rang 202 (V 10) =

ILR 1 Rang 129, Rampiyar v.

Deva Ram 2

(1911) ILR 38 Cal 700 = 13 Bom LR

534 (PC), Mouji Lal v. Mt. Chandra-

bati Kumari 6

(1901) ILR 28 Cal 37 = 5 Cal WN

195, Surjymoni Dasi v. Kali Kanta

Das 2

(1898) ILR 20 All 166 = 1898 All

WN 7, Queen Empress v. Dal

Singh 2

(1898) ILR 22 Bom 509, Bai Diwali v.

Moti Karson 3

(1887) ILR 11 Bom 247, Khushalchand

Lalchand v. Bai Mani 3

(1886) ILR 12 Cal 140, Brindaban

Chandra v. Chundra Kurmoker 3

(1883) ILR 5 All 233 = 1883 All WN

1, Empress of India v. Kallu 2

(1880) ILR 5 Cal 566 = 5 Cal LR

597 (FB), The Empress v. Pitamber

Singh 2

(1869-70) 13 Moo Ind App 141 =

3 Beng LR 1 (PC), Inderun Valun-

gypooly Taver v. Ramasawmi Pandia

Talrauer 6

C. L. Agarwal, for Petitioner; P. N. Dutt,

for Non-Petitioner.

ORDER The petitioner having been found guilty of disobedience of order of injunction restraining him from entering into second marriage, has been ordered to be detained in the civil prison for one month, by the Munsif, Gangapur City, by his order dated 24-3-1967. The said order has also been confirmed in appeal by the Senior Civil Judge, No. 1 Gangapur City.

2. Non-petitioner Mst. Kashaliya filed a suit against the petitioner with the allegation that she was his legally wedded wife and had been living with him till four months before the filing of the suit. As the petitioner severely heat her, she came to her father's house. Thereupon the petitioner informed her father that he would marry again and had in fact arranged a second marriage with the daughter of Bhonrilal of Malarnadoongar. She, therefore, prayed for the issue of a permanent injunction restraining the petitioner from marrying the daughter of Bhonrilal of Malarnadoongar or any other girl. On the application of the non-petitioner under Order 39, Rule 2, C. P. C. the petitioner was restrained from entering into second marriage till the final disposal of the suit. The order of injunction was passed by the court on 28th May, 1966 in the presence of the petitioner and was duly communicated to him.

On 2nd June, 1966, the non-petitioner submitted an application under Order 39, Rule 2(3) C. P. C. to take proceedings against the petitioner for disobedience of the order of injunction inasmuch as he had married Smt. Tofa daughter of Bhonrilal of Malarnadoongar on 29th May, 1966. Notice was issued to the petitioner and in reply he submitted that on account of the prohibitive order passed against him he gave up the idea of second marriage, but as the daughter of Bhonrilal of Malarnadoongar had already been anointed with oil, she was married to his younger brother Bimsingh and not with the petitioner. No objection about the legality of the marriage was taken in this reply.

The learned Munsif held an enquiry to find out whether Mst. Tofa daughter of Bhonrilal of Malarnadoongar was married to the petitioner or to his younger brother on 29th May, 1966. Both parties produced evidence in support of their rival contentions, and it is significant to note that neither the petitioner gave his own statement nor did he

examine Mst. Tofa as his witness. However, Rambilas who had conducted the marriage as a priest, was examined on his behalf. The learned Munsif on a careful scrutiny of the evidence produced by the parties arrived at the conclusion that Mst. Tofa was married to the petitioner and he had thus intentionally disobeyed the order of injunction issued against him on the previous day i. e., on 28th May, 1966.

On appeal by the petitioner the learned Senior Civil Judge concurring with the finding of the learned Munsif, dismissed the appeal. It is against this order that the present revision application has been filed and it has been contended on behalf of the petitioner that the Courts below wrongly found the fact of marriage of the petitioner with Mst. Tofa proved without there being any evidence that the ceremonies essential for a valid marriage had been gone through. It is contended that two ceremonies essential to the validity of a marriage as noted by Mulla in his book 'Principles of Hindu Law', Thirteenth Edition are whether the marriage be in the Brahma form or the Asura form, namely— (1) invocation before the sacred fire, and (2) saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire. The marriage may also be completed by the performance of ceremonies other than those referred to above where it is allowed by the custom of the caste to which the parties belong. It is pointed out that in the present case the non-petitioner did not set up any custom of the caste to show that any other ceremonies were considered sufficient as constituting the marriage and so it was essential to prove the aforesaid two ceremonies,

It is further contended that in a case of the present nature where the question of liberty of a citizen is involved by his being detained in a Civil prison, proof of marriage as is necessary, in Criminal Prosecution for offences under Sections 494 and 497 of the Indian Penal Code is required. Reliance is placed on Bhaurao Shankar v. State of Maharashtra, AIR 1965 SC 1564, Kanwal Ram v. Himachal Pradesh Administration, AIR 1966 SC 614; Gopal v. The Emperor, AIR 1925 Rang 328; Ganga Patra v. Emperor, AIR 1928 Pat 481; Phankari v. The State, AIR 1965 J and K 105; The Empress v. Pitamber Singh, (1880) ILR 5 Cal 566; Empress of India v. Kallu, (1883) ILR 5 All 233 and Queen Empress v. Dal Singh, (1898) ILR 20 All 166 which relate to prosecutions under Secs. 494, 497 and 498 of the Indian Penal Code and on Rampiyar v. Deva Rama, AIR 1923 Rang 202; Surjyamon Dasi v. Kali Kanta Das, (1901) ILR 28 Cal 37 which relate to suits for restitution of conjugal rights.

It is contended that in the present case there is no evidence of Saptapadi i.e., taking

of seven steps by the petitioner and Mst. Tofa jointly before the sacred fire. The evidence led by the non-petitioner only shows that phera ceremony was performed and a priest was called for that purpose. This is however, not sufficient to constitute a valid marriage.

3. On the other hand learned counsel for the non-petitioner urges that the question of the validity of marriage performed on 29th May, 1966 in the house of Bhonrilal was never called in question by the petitioner in the courts below. Even in the revision petition this objection has not been taken and it is for the first time that this question has been raised during the course of arguments. It is urged that in the court below the controversy was confined to the fact whether Mst. Tofa was married to the petitioner or to his younger brother Bhimsingh. It is next urged that once the fact of marriage is established it shall be presumed that it was a valid marriage and all the ceremonies essential for constituting a valid marriage had been performed. Reliance is placed on Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver, (1869-70) 13 Moo Ind App 141; Brindabun Chandra v. Chundra Kurmoker, (1886) ILR 12 Cal 140; Khushalchand Lalchand v. Bai Mani, (1887) ILR 11 Bom 247; Bai Diwali v. Moti Karson, (1898) ILR 22 Bom 509; Mouji Lal v. Chandrabati Kumari, (1911) ILR 38 Cal 700 (PC); Sitabai Sadashiva v. Vitthabai Namdeo, AIR 1959 Bom 508 and Kashi Nath v. Bhagwan Das, AIR 1947 PC 168.

It was also urged that in the present case there was evidence that a marriage party reached the house of the bride's father, a priest was called and phera ceremony took place. It is urged that Phera ceremony is tantamount to the taking of seven steps by the bride and the bridegroom jointly.

4. As to the last submission it may be pointed out that under the Hindu Law the ceremony called the 'Saptapadi' is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire and it is not to be confused with taking of seven rounds of the fire. The distinction in the two is borne out from the following description of the Samskara of marriage given by Kane in the History of Dharmasastra, Vol. 2 Pt. 1 at page 531:

"There are certain rites that are preliminary, there are then a few rites that are of the essence of the samskara viz., Panigrahana, homa, going round the fire and the saptapadi and there are certain rites like the seeing of the Pole Star and c. that are subsequent to the central rites. The essential rites are mentioned by all sutrakaras, but as to the preceding and subsequent rites there is a great divergence in the details. Even as regards the essential rites the sequence in which they take place differs. For example, the Asv. gr (1.7.7) describes going round the

fire before saptapadi, while the Ap. gr. describes saptapadi (IV. 16) before the act of going round the fire (V. 1)."

The learned authority then explains 'Agni-parinayana' as (the bride-groom going in front takes the bride round the fire and water jar). It is while doing this that he utters the words 'amohasmi', and 'Saptapadi' (taking seven steps together). This is done to the north of the fire, there are seven small heaps of rice and the bridegroom makes the bride step on each of these seven with her right foot beginning from the west.

5. However, the important point to be considered is whether in the absence of proof of the ceremony of Saptapadi having been gone through the petitioner can be held liable for disobedience of the injunction issued against him. No doubt having regard not only to Section 50 of the Evidence Act, but to general principle that strict proof is required in all criminal cases it has been held that in all offences where marriage is an ingredient of the offence there must be proof that marriage had been celebrated strictly in accordance with the requirements of custom and law applicable to the parties. But no decision has been cited to show that the above principle should also be extended to contempt proceedings for disobeying the order of injunction.

Proviso to Section 50, Evidence Act is not applicable to contempt proceedings and the contemner is also not a person accused of any offence. I am, therefore, of the view that the decisions relied upon on behalf of the petitioner are not helpful to him in the present proceedings. The main concern of the court in proceedings under Order 39, Rule 2 (3) is to see how far the act done in disobedience of the order is in disregard to its authority. The two courts below found on evidence that the petitioner had acted in disobedience of the order of injunction and there is no room for interference by this Court in revision application.

6. Another reason why interference with the lower court's order is not called for is that the objection about the validity of marriage was not taken by the petitioner at any earlier stage. The petitioner in reply to the notice only denied his own marriage with Mst. Tofa and asserted that the marriage was performed with his younger brother Bhumsingh a fact which the courts below have found untrue. The petitioner cannot therefore, be allowed to turn round and question the validity of the marriage at this stage. There is no reason to suppose that the petitioner who was keen to enter into second marriage, as is clear from his reply, would have gone through it without due performance of ceremonies necessary for a valid marriage according to law or usage of his caste. If the objection about validity of marriage had been taken at the earliest stage in reply to the notice given by the court, the non-petitioner would have had the opportunity to

meet the objection and prove that all the ceremonies necessary to constitute a legal marriage had been performed. The proceedings under O. 39, R. 2 (3) cannot be regarded as akin to a criminal prosecution where the prosecution is required to prove its case against the accused beyond all reasonable doubt.

7. The revision application has, therefore, no force and is hereby rejected. In the circumstances of the case I make no order as to costs.

Revision application rejected.

AIR 1970 RAJASTHAN 86 (V 57 C 18)

P. N. SHINGHAL, J.

Firm Alwar Iron Syndicate, Appellant v. Union of India, Respondent.

Second Appeal No. 237 of 1962, D/- 5-2-1969. from judgment of Dist J., Alwar D/- 19-12-1961.

Partnership Act (1932), Ss. 69 (2), 4 — 'Firm' — Suit by partnership firm — Names of some partners not included in Register of firms — Non-compliance of S. 69 (2) — Suit not maintainable — Not only persons actually signing plaint but all partners of firm on the date of suit, should be shown in Register of firms: AIR 1959 Punj 530, Dissented from — Civil P. C. (1905), O. 30.

A firm as such is not an entity in law and is not a "person" within the meaning of Section 4 of the Partnership Act. Its name is therefore a more abbreviated name of all its partners: It is for this reason that special provisions have been made in Order 30 C. P. C. regarding suits by or against firms and persons carrying on business in names other than their own. Therefore even if a suit is brought in the name of a firm, it is really a suit by all its partners under the firm name. In other words, the persons suing are all the partners of the firm at the relevant date and none of them can, for obvious reasons, be left out for purposes of the suit. So it is incorrect to say that sub-section (2) of Section 69 merely requires that only the person or persons actually signing the plaint on behalf of the firm should be shown in the Register of Firms as its partners. The word "persons" in the sub-section has been used in the plural by design and serves an important purpose for it brings out the real nature of a partnership firm which cannot consist of a single person. Case law discussed. AIR 1959 Punj 530, Dissented from. (Para 6)

Therefore where in a suit by partnership firm it was found on disclosure of the names of existing partners of the firm under Order 30, Rule 3 that the names of some of the existing partners were not included in the Register of firms, the suit was, held, not maintainable. (Paras 1, 10)

Cases Referred:	Chronological	Paras
(1964) AIR 1964 Punj 270 (V 51) = ILR (1964) 1 Punj 872, Firm Buta Mal Dev Raj v. Chananmal		6
(1962) 66 Cal WN 262 = 1962 Cal LJ 230, Hansraj Manot v. Gorak Nath Champalal Pandey		6
(1959) AIR 1959 Punj 530 (V 46) = 61 Pun LR 434, Durga Das Janak Raj v. Preete Shah Sant Ram		5, 6, 7
(1956) AIR 1956 SC 354 (V 43) = 1956 SCR 154, Dulichand Laxminara- yan v. Commr. of Income-tax, Nagpur		6
(1956) AIR 1956 Punj 24 (V 43) = ILR (1957) Punj 27, Dr. V. S. Bahal v. S. L. Kapur and Co.		6, 8
(1955) AIR 1955 Andhra 12 (V 42) = 1954 Andh LT (Civil) 121, M. Sudarsanam v. Bogoru Vishwanadham Brothers		5, 8
(1952) AIR 1952 Nag 57 (V 39) = ILR (1952) Nag 764, Kapur Chand Bhagaji Firm v. Laxman Trimbak		6
(1944) AIR 1944 Oudh 37 (V 31) = 1943 Oudh WN 368, Sardar Singar Singh and Son v. Sikri Brothers		5, 8
(1940) AIR 1940 Bom 257 (V 27) = ILR (1940) Bom 715, Pratapchand Ramchand and Co. v. Jahangirji Bomanji		5, 7
J. P. Jain, for Appellant; H. C. Jain, for Respondent.		

JUDGMENT: It is not disputed that the plaintiff was a partnership firm. A consignment which is said to have been purchased by it and was deliverable at Alwar, was lost in transit. Pleading that the Western Railway was responsible for the loss, the plaintiff raised the suit against the Union of India on December 3, 1955 through Mohanlal Lohia who signed the plaint as a partner and manager of the firm. The claim was denied by the defendant and a number of issues were framed for trial. It will be sufficient to say that the trial court took the view that the names of three partners Kunj Bihari Lal, Shyam Bihari Lal and Mansingh were not included in the Register of Firms and the suit was not maintainable under Section 69 (2) of the Partnership Act. On appeal, the learned District Judge took a similar view in his judgment dated December 19, 1961 and this is why the plaintiff has preferred the present second appeal.

2. The names of the partners of the plaintiff firm were not disclosed in the plaint or until the framing of the issues. An application was therefore made by the defendant under Order 30 Rule 2 C. P. C. on March 24, 1958, before the closure of the plaintiff's evidence, praying that the plaintiff may be asked to declare in writing the names and places of residence of all the persons constituting the plaintiff firm. Thereupon a detailed reply was made on April 17, 1958 stating that the firm was constituted in

November, 1944 and was registered in April, 1950 as a partnership firm having the following partners:—

- (1) Narayan Das Lohia,
- (2) Ram Nath Lohia,
- (3) Mohan Lal Lohia,
- (4) Kanhaiya Lal Lohia,
- (5) Badri Prasad and Ram Jiwan Lohia,
- (6) Sampat Ram Lohia,
- (7) Madan Lal Vaishya.

It was clarified that Badri Prashad withdrew before the suit transaction, while Ram Jiwan withdrew thereafter, and that while Kanhaiya Lal died before the suit transaction, Narayan Das died in September, 1955. All the same, it was further stated that "the partnership continues with the consent of Shri Kunj Bihari Lal and Shri Sham Bihari Lal, the sons and legal representatives of Narayan Das and Shri Mansingh son and legal representative of Kanhaiyalal". It was declared that the "existing" partners of the plaintiff firm were as follows:

1. Kunj Behari Lal, Shyam Behari Lal sons of Narain Dass Lohiya of Toli Ka Kua, Alwar.
2. Ram Nath Lohiya of Lohiyapari, Alwar.
3. Mohan Lal Lohiya near Town Hall, Alwar.
4. Man Singh Lohiya of Mohalla Shivpura, Alwar.

5. Madan Lal Vaishya of Lohiyapari, Alwar.

It was thus admitted that the above mentioned persons constituted the partnership "in their personal and individual capacity". This reply of the plaintiff was important because it had a correlation with the provisions of Order 30, Rule 1 C. P. C. That rule provides that any two or more persons claiming or being liable as partners may sue or be sued in the name of the firm of which they were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners of such firm. It would thus appear that the disclosure having been made under Order 30 Rule 2 C. P. C. had the purpose and effect of showing the names and the places of residence of the partners of the plaintiff firm on whose behalf the suit had been instituted, for sub-rule (3) of Rule 2 of Order 30 C. P. C. makes it clear that where the names of the partners are declared under sub-rule (1), the suit shall proceed in the same manner, and the same consequence in all respects shall follow, as if they had been named as plaintiffs in the plaint.

3. When such is the position as regards the names of the persons who raised the present suit, all that remains to consider is whether the defendant was entitled to raise the bar of Section 69(2) of the Partnership Act. That sub-section provides as follows:

"69 (2). No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

The question is whether the requirements of sub-section (2) could be said to be fulfilled. On this point also, there is no dispute as regards the facts. It is the admitted case of the plaintiff that, at any rate, the names of Kunj Behari Lal and Shyam Behari Lal were not shown in the Register of Firms as partners. As such there was no compliance with the provisions of sub-section (2) of Section 69 of the Partnership Act and the defendant is quite justified in raising its bar against the maintainability of the suit.

4. There has, however, been a controversy before me on the question whether it is the correct meaning of sub-section (2) of Section 69 of the Partnership Act that all the partners of a firm should be shown in the Register of Firms as its partners at the time of the institution of the suit, or whether it would be sufficient if the person or persons actually signing the plaint on behalf of the firm are shown as partners in that register. I shall therefore deal with this point of controversy.

5. It has been argued by Mr. J. P. Jain on the basis of *Pratapchand Ramchand and Co. v. Johangirji Bomanji*, AIR 1940 Bom 257; *Sardar Singar Singh and Son v. Sikri Brothers*, AIR 1944 Oudh 37; *M. Sudarsanam v. Bogoru Vishwanadham Brothers*, AIR 1955 Andhra 12 and *Durga Das Janak Raj v. Preete Shah Sant Ram*, AIR 1959 Punj 530 that it is enough compliance of the provisions of sub-section (2) of Section 69 of the Partnership Act to show that the person or persons signing the plaint is or are shown in the Register of Firms as partners in the firm.

6. It appears to me, however, that there is really no room for any controversy in regard to the correct meaning and purpose of sub-section (2) of Section 69. It is well settled that a firm as such is not an entity in law and is not a "person" within the meaning of Section 4 of the Partnership Act. Its name is therefore a mere abbreviated name of all its partners: *Dulichand Laxminarayan v. Commr. of Income-tax, Nagpur*, AIR 1956 SC 354. It is for this reason that special provisions have been made in Order 30, C. P. C. regarding suits by or against firms and persons carrying on business in names other than their own. So it is beyond doubt that even if a suit is brought in the name of a firm, it is really a suit by all its partners under the firm name. In other words, the persons suing are all the partners of the firm at the relevant date and none of them can, for obvious reasons, be left out for purposes of the suit. So it is incorrect to say that sub-section (2) of Section 69 merely requires

that only the person or persons actually signing the plaint on behalf of the firm should be shown in the Register of Firms as its partners. The word "persons" in the sub-section has been used in the plural by design and serves an important purpose for it brings out the real nature of a partnership firm which cannot consist of a single person. This is the view taken in *Kapur Chand Bhagaji, Firm v. Laxman Trimbak*, AIR 1952 Nag 57 and *Dr. V. S. Bahal v. S. L. Kapur and Co.*, AIR 1956 Punj 24. The decision in *Dr. V. S. Bahal's case*, AIR 1956 Punj 24 does not appear to have been noticed in AIR 1959 Punj 530 on which reliance has been placed by Mr. J. P. Jain, but it has been followed in *AIR 1964 Punj 270*. It has also been followed in *Hansraj Manot v. M/s. Corak Nath Champalal Pandey*, (1962) 66 Cal WN 262 and, if I may say so with respect, these judgments lay down the correct law on the point.

7. In AIR 1940 Bom 257 cited by Mr. Jain, there were three partners at the date of the registration of the firm. One partner *Pratapchand Ramchand* died before the date of the suit transaction and it was held that notwithstanding his death, the firm should be deemed to have continued as a registered firm. As on that date the firm consisted of the two partners who alone raised the suit, it was rightly held that there was sufficient compliance with the provisions of Section 69(2) of the Partnership Act. The real opinion of the learned Judge who decided the case is to be found in the last paragraph of his judgment where he has observed that if additional partners had come into the firm as partners since the date of registration and these names had not been entered in the register in accordance with notice of a change in the constitution of the firm given to the Registrar, "it may well be that the firm as then constituted could not sue because although it was a registered firm some of the persons then suing would not be shown in the register of firms as partners in the firm at the date of the suit." That judgment cannot therefore be of any avail to the plaintiff-appellant in the present case.

7A. AIR 1959 Punj 530 is a case in which reliance has been placed on AIR 1940 Bom 257 but it appears to me that the important portion of the judgment of the Bombay High Court referred to above was not properly noticed by their Lordships. This is why they held as follows,—

"Applying the same test here which with respect, I accept as the correct one, it must be held that in the present case the requirements of Section 69(2) were fully satisfied inasmuch as the firm was registered and the name of the person through whom it sued appeared on the register as a partner at the relevant time which was the date of the institution of the suit." Their Lordships used the word "person" in the singular, and brought into consideration the words "through whom" the firm sued

even though they did not appear in Section 69(2) of the Partnership Act. It is of the essence of the sub-section that it has used word "persons" in the plural and has not used any words to suggest that the person suing can be one of its partners. On the other hand, as has been stated, it provides that "the persons suing" should be shown in the Register of Firms as partners in the firm. With all respect to the learned Judges who decided the case of M/s. Durga Das Janak Ram, AIR 1959 Punj 530, I am unable to subscribe to the reasoning or the view taken by them.

8. So far as AIR 1944 Oudh 37 is concerned, it will be enough to say that it has been considered in Dr. V. S. Bahal's case, AIR 1956 Punj 24 and I need not refer to it separately. AIR 1955 Andhra 12 was quite a different case in which the names of the existing partners were shown in the Register of Firms, though the Register showed two other persons as partners, one of whom had died and the other had retired. That case cannot therefore be said to support the argument of the learned counsel for the plaintiff-appellant. It would thus appear the cases cited by Mr. Jain cannot avail the plaintiff-appellant.

9. Faced with such a situation, the learned counsel for the plaintiff-appellant tried to argue that the plaintiff was entitled to the benefit of sub-section (3) of Section 69 of the Partnership Act because the plaintiff firm was dissolved at the expiry of the period of 5½ years for which it was constituted or, at any rate, at the death of Kanhaiyalal and Naraindas who were its two partners. I do not however think this point requires any serious consideration because, as has been stated, the plaintiff clearly took the plea in its reply dated April 17, 1958 under the provisions of Order 30, Rule 2 C. P. C. that the partnership continues and that the six persons mentioned in the petition were the "present partners of the plaintiff firm". I have extracted the relevant portion of the reply already. In fact a similar plea was taken in the plaint where it was averred that the plaintiff firm was a firm which had continued in existence up to the date of the suit. Mohanlal P. W. 7, who raised the present suit, has also stated in the trial court that the firm has continued to be in existence in spite of the death and retirement of some of the partners. It is therefore quite futile to contend that the suit was raised by a dissolved firm so as to attract the application of Section 69(3) of the Partnership Act.

10. There is thus no force in any of the arguments advanced by the learned counsel for the plaintiff-appellant and the appeal is dismissed. There will however be no order as to the costs. Leave to appeal is prayed for, but is refused.

Appeal dismissed.

AIR 1970 RAJASTHAN 89 (V 57 C 19)

KAN SINGH, J.

Shivram Singh, Petitioner v. State of Rajasthan, Respondent.

Civil Writ Petn. No. 36 of 1969, D/- 18-2-1969.

(A) Constitution of India, Article 226 — Sovereign power — Order before coming into Constitution — Writ does not lie.

The powers of the Raj Pramukh under a covenant before the coming into force of the Constitution, in the matter of recognition of succession to jagir arising from the covenant are in the nature of sovereign powers and are political in character being an incident of sovereignty and matter that has to be exclusively settled in exercise of such power cannot be the adjudication in a Civil Court. Similarly, if an order was passed by a competent authority namely, the Rajpramukh and the order that was passed partook of the character of an act of a sovereign authority, then in respect of such an order the powers of the High Court under Article 226 of the Constitution too cannot be invoked as the action of the Rajpramukh was a completed act prior to the coming into force of the Constitution. AIR 1956 SC 15, Rel. on; AIR 1957 Raj 372, Distinguished. (Para 5)

(B) Constitution of India, Article 226 — Laches — Order of escheat made some twenty years back — Representations made to Government in the matter not under any provisions of law — Held that the delay was abnormal and even if the representations were justified the petitioner waited for too long and delay could not be condoned. AIR 1952 Raj 79 and AIR 1953 Raj 22, Rel. on. (Para 6)

Cases Referred: Chronological Paras

(1957) AIR 1957 Raj 372 (V 44) =

ILR (1957) 7 Raj 670, Bahadur Singh v. Rajpramukh of Rajasthan 4

(1956) AIR 1956 SC 15 (V 43) =

1956 SCC 62, Umrao Singh v. Bhagwati Singh 5

(1953) AIR 1953 Raj 22 (V 40) =

ILR (1951) 1 Raj 888, Manohar Singhji v. State of Rajasthan 6

(1952) AIR 1952 Raj 79 (V 39) =

ILR (1951) 1 Raj 692, Firm Udairaj Bankatlal v. Commr., Civil Supplies Rajasthan 6

S. K. Mal Lodha, for Petitioner.

ORDER: By this writ petition the petitioner who claims succession to a jagir in the former Alwar State whose last holder expired in 1916, questions the validity of an order of the Rajpramukh of the former United State of Matsya dated 25-4-1949, by which the Rajpramukh ordered that the jagir has escheated to the State. He further challenges the orders disposing of his representations. The petitioner has also prayed that a direc-

tion be issued to the State Government to recognise the petitioner as successor of the jagir of Thukana Khora in accordance with Rule 14 of the Alwar State Jagir Rules and in consequence the State be commanded to restore the properties of the aforesaid jagir as also the income thereof to the petitioner.

2. The order of the Rajpramukh which is impugned has been quoted in para No. 8 of the writ petition and it runs as follows:

"His Highness the Rajpramukh has been pleased to order that Khora Thikana (Alwar Unit) may escheated to Matsya, with immediate effect.

By order of
His Highness the Rajpramukh
Sd/- R N Saxena,
Secretary to Administrator."

3. I have heard learned counsel for the petitioner at sufficient length. He contends that this order of the Rajpramukh of the former Matsya Union was bad, because according to Rule 29(d) of the Alwar State Jagir Rules hereinafter to be referred as the "Rules" the Government alone could have passed such an order. It is further contended that this order of the Rajpramukh was also bad for the reason that according to R. 29(d) the enquiry contemplated by the Hakim had not been completed nor were the papers submitted to the Government. The learned counsel maintains that the Rajpramukh could not have passed any orders without the conclusion of the enquiry more so for the reason that the Maharaja of Alwar whose opinion invited by the Rajpramukh had opined that there was no justification for resuming the jagir and that is why according to the minute recorded by the Maharaj of Alwar the matter remained pending for a long period. It was next urged by learned counsel that the petitioner had made representations to the Rajpramukh, but he did not know how they were disposed of. The petitioner submits that since 1955, fresh representations had been submitted to the Government of Rajasthan and some letters were issued by the Government to the petitioner in that connection saying that the matter was receiving consideration, but that all proved to be of no help and consequently the petitioner has to file the present writ petition.

4. At the very outset learned counsel for the petitioner was asked to explain: (1) how an order of the Rajpramukh of the erstwhile Matsya Union passed before the coming into force of the Constitution or the integration of the Matsya Union with the United State of Rajasthan could be challenged by the petitioner when that order was for escheating the Khora jagir; and (2) how the writ petition filed after a delay of almost 20 years since the order of the Rajpramukh was passed could be entertained.

Reg. 1: Learned counsel submitted that the order having been passed by the Rajpramukh and not by the Government of the day could be questioned as the same was not in accord-

ance with Rule 29 of the Rules. Learned counsel placed reliance on Th. Bahadur Singh v. Rajpramukh of Rajasthan, ILR (1957) 7 Raj 670 = (AIR 1957 Raj 372) in support of his contention. I have carefully gone through this case. In that case one Thakur Sheodan Singh who was a jagirdar of 6 annas share in the jagir of Dhiwara was succeeded by his son Gopal Singh. Thakur Gopal Singh having no male issue made an application to the Government of His Highness the Maharaja of Alwar on 24-2-1945 for permission to adopt one Basant Singh according to Rule 9 of the Rules. The permission for such an adoption was given by the Executive Council of the Alwar State on 2-5-1946. In the meantime Gopal Singh expired on 7-7-1946. Basant Singh who claimed to be the successor of Gopal Singh on the basis of adoption applied for recognition of his succession to Gopal Singh before the Hakim (Jagir). Against this application Basant Singh (Bahadur Singh?) filed his objections and claimed that he was the nearest of kin and should be recognised as the successor of Thakur Gopal Singh. The Hakim, Jagir gave the opinion that Basant Singh was entitled to succeed, but on an appeal the Home Minister remanded the case for further enquiry and report as to whether any adoption ceremony in respect of Basant Singh had taken place. This report was submitted by the Hakim, Jagir on 13-9-1947 and it was to the effect that no ceremony of adoption had taken place beyond the sanction of the administration. The judicial Secretary, who dealt with the matter, recorded his opinion to the effect that the mere sanction to adopt did not amount to an adoption without any ceremony of adoption. Accordingly, he recommended that succession be recognised in favour of the claimant other than Basant Singh who may be found to be entitled to succeed according to law. Basant Singh filed an appeal against this order of the judicial Secretary and the Council of Ministers of Matsya Union, which had come into existence by that time rejected the appeal. Basant Singh then filed a review application which remained undecided till merger of the Matsya Union into Rajasthan. This review petition was decided by the Rajpramukh of the United State of Rajasthan under Article 7 of the Covenant and on 16-9-1952 the Revenue Secretary conveyed the order of the Rajpramukh to the effect that succession in favour of Thakur Basant Singh be recognised in view of his adoption having been sanctioned by the administration. It was this order of the Rajpramukh passed on 16-9-1952 that came to be challenged in the Bahadur Singh's case, ILR (1957) 7 Raj 670 = (AIR 1957 Raj 372). This case is in my view, distinguishable from the present case. In the present case the impugned order was passed by the Rajpramukh of Matsya prior to the coming into force of the Constitution as well as the integration of

the Matsya Union with the United State of Rajasthan. Powers of the Rajpramukh as they were prior to the coming into force of the Constitution arising from the covenant were not the same as the powers of the Rajpramukh flowing from the Constitution.

5. In *Umrao Singh v. Bhagwati Singh*, AIR 1956 SC 15 their Lordships of the Supreme Court had occasion to deal with the powers of the Rajpramukh under the covenant before the coming into force of the Constitution. Their Lordships observed that the powers of the Rajpramukh in the matter of recognition of succession to jagir arising from the covenant were in the nature of sovereign powers, and were political in character being an incident of sovereignty and a matter that had to be exclusively settled in exercise of such a power cannot possibly be the adjudication in a Civil Court. I am not unmindful of the fact that their Lordships were dealing with a civil suit and not a matter arising under Article 226 of the Constitution but all the same if an order was passed by a competent authority namely, the Rajpramukh and the order that was passed partook of the character of an act of a sovereign authority, then in respect of such an order the powers of this court under Article 226 of the Constitution too cannot be invoked as the action of the Rajpramukh was a completed act prior to the coming into force of the Constitution. Learned counsel for the petitioner wants to argue that according to Rule 29(d) the matter could have been dealt with only by the Government as distinct from the Rajpramukh. I may read the relevant sub-rule:—

“Rule 29(d) After making necessary inquiries about the claims referred to in clause (b) the Hakim Jagir shall as soon as possible submit for the orders of His Highness’ Government his report and recommendations about succession.”

In the period prior to the Constitution the term “His Highness Government” and the term “Ruler” were almost synonymous. The Constitution of the erstwhile Indian State of Alwar was that the Ruler of Alwar was the repository of all legislative, judicial and executive powers. In other words, the Ruler of Alwar was the sovereign for the internal administration of the State. No distinction whatsoever, in my view, can be made between what is termed as “His Highness Government” and “His Highness” or “Ruler”. The position would change after the coming into force of the Constitution. Thereafter there will be no sovereign authority vesting in the Rajpramukh or the Governor and in that context the term “His Highness Government” will be deemed to be substituted by the successor Government who will be entitled to exercise statutory powers apart from sovereign powers. This, however, cannot apply to the period preceding the Constitution as already observed. In these circumstances it is hardly of any consequence whe-

ther it was the Government of Matsya Union which passed the order or the Rajpramukh of the Union was passed the order. In either case the order will be in the name of the Rajpramukh duly authenticated by an officer empowered to authenticate such order. In these circumstances I do not find force in the contention sought to be raised by learned counsel for the petitioner.

6. As regards the delay, learned counsel for the petitioner submitted that the petitioner had been making representations to the State Government from time to time and the letters received from the State Government showed that the matter was under consideration of the Government. He has cited *Firm Udairaj Bankatlal v. Commr. Civil Supplies Rajasthan*, ILR (1951) 1 Raj 692 = (AIR 1952 Raj 79) and *Manohar Singhji v. State of Rajasthan*, ILR (1951) 1 Raj 888 = (AIR 1953 Raj 22). I have gone through these cases as well. It is noteworthy that the delay in the present case is abnormal and even if the making of representations afforded any justification the petitioner has obviously waited for too long. Such a delay of almost two decades is not fit to be condoned. It is further noteworthy that these so-called representations were not under any provision of law.

7. In view of these considerations therefore, I am not inclined to entertain the present writ petition which I hereby reject in limine.

Petition dismissed.

AIR 1970 RAJASTHAN 91 (V 57 C 20)

P. N. SHINGHAL, J.

Jaipur Vastra Vyopar Sangh Ltd. (In liquidation) and another, Applicants v. Shyam Sunder Lal Patodia, Respondent.

Company Petn. No. 24 of 1963, D/- 18-4-1969.

(A) Companies Act (1956), Sections 295, 34 and 325 — Liability of past director for money owed by him to company — Company alone entitled to sue.

A past director is liable for money owed by him to the Company. He is also liable in action by the Company if he has been negligent or has committed some breach of his duty towards the Company. In the normal course, only the company is entitled to sue on any such cause of action. (1869) LR 8 Eq 381 & (1878) 12 Ch D 738 & (1843) 2 Hare 461 & (1956) Ch 565, Rel. on. (Para 20)

(B) Companies Act (1956), Section 543 — Application for investigation into conduct of a past director — Misapplication of funds of company alleged — Earlier suits brought by company for recovery of money against Director dismissed for default of plaintiff's appearance — No allegation of breach in

KM/AN/F452/69/GGM/P

the earlier suits — Application under Section 543 not barred as it is neither a suit nor is it for the same cause of action. AIR 1933 All 205 & AIR 1928 Bom 67 & AIR 1948 Mad 51 & AIR 1966 Ker 121 & (1878) 10 Ch D 118 & (1878) 9 Ch D 595 & (1880) 15 Ch D 507 & (1882) 21 Ch D 519, Rel. on. (Paras 22, 23, 29)

(C) Civil P. C. (1908), Order 4, Rule 1 and O. 9, R. 9 — Word 'suit' — Meaning — Application under Section 543, Companies Act is not a suit.

The word 'suit' has not been defined in the Civil P. C. or in the Companies Act but as will appear from the provisions of O. 4, R. 1, C. P. C., every suit is instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. The word 'suit' ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint. Therefore a proceeding which is not required to be treated as a suit under any other law, is not a suit. As such when there is no provision in the Companies Act that an application under S. 543 would be a suit, it cannot be said that it would be a suit within the meaning of Order 9, Rule 9, C. P. C. AIR 1933 PC 63 & AIR 1934 Mad 103 (2) (FB), Rel. on. (Paras 22, 23)

Cases Referred: Chronological Paras

- (1988) AIR 1966 Ker 121 (V 53)= 30
- 1966 Ker LJ 248, Official Liquidator, Palai Central Bank Ltd., Ernakulam v. K. Joseph Augusti
- (1958) 1956 Ch 565, Palvdes v. Jenson 20
- (1948) AIR 1918 Mad 51 (V 35)= 20
- 1947-1 Mad LJ 234, Official Liquidator v. V. N. Krisnaswami Iyengar
- (1946) AIR 1946 All 269 (V 33)= 30
- ILR (1948) All 98, Benaras Bank Ltd. v. Sri Prakasha Bhagwan Das
- (1934) AIR 1934 Mad 103 (2) (V 21)= 30
- ILR 57 Mad 271 (FB), N. K. R. M. Rajagopala Chettiar v. Hindu Religious Endowment Board
- (1933) AIR 1933 PC 63 (V 20)= 21
- 60 Ind App 13, Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.
- (1933) AIR 1933 All 205 (V 20)= 21
- ILR 55 All 250, Official Liquidator v. Liaqat Hussein
- (1928) AIR 1928 Bom 67 (V 15)= 22
- ILR 52 Bom 111, Sridhar Sadba Powar v. Ganu Mahadu Kavade
- (1928) 1928 Ch 861= 140 LT 219, 24
- In re Elic Ltd.
- (1882) 21 Ch D 519= 52 LJ Ch 217, 23
- Flitcroft's case
- (1880) 15 Ch D 507= 49 LJ Ch 541, 23
- Burgess's case
- (1878) 9 Ch D 595= 47 LJ Ch 801, 23
- In re, Whitehouse & Co.
- (1878) 10 Ch D 118= 48 LJ Ch 163, 23
- In re, National Funds Assurance Co.

- (1878) 12 Ch D 738= 38 LT 345, 20
- Nant-y-Glo and Blaina Ironworks Co. v. Grave
- (1869) LR 8 Eq 381 = 17 WR 1037, 20
- Joint Stock Discount Co. v. Brown
- (1843) 2 Hare 461= 67 ER 189, 20
- Foss v. Harbottle
- D. P. Gupta, for Applicants; M. D. Bhargava, for Respondent.

ORDER.— This is an application under Section 543 of the Indian Companies Act, 1956, by the Official Liquidator of Messrs. Jaipur Vastra Vyapar Sangh Ltd., in liquidation hereinafter referred to as "the Company", for examination of the conduct of respondent Shyam Sunder Lal Patodia, who is a past director of the Company, and for an order compelling him to restore the money, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the Company by way of compensation in respect of misapplication, retainer or breach of trust as the Court may think proper.

2. The Company was registered under the Jaipur Companies Act of 1942. It is not in controversy that the provisions of that Act were similar to those of the Indian Companies Act, 1913, and that the respondent was the Managing Director of the Company from March 21, 1946 to December 31, 1948.

3. The Company is a public company and it has been alleged that, taking undue advantage of his position as its managing director, the respondent took and utilised Rs. 2,07,832/- for his personal use and thereafter transferred the money in the name of his father Rameshwar Das Patodia on April 29, 1948. It has also been alleged that the respondent took Rs. 19,588/4/6 from the funds of the Company. Both the sums were not repaid, and this is why it has been contended that the respondent has misapplied, retained and became liable and accountable for the money of the Company. An order for the winding up of the Company was made on March 9, 1960, and it has therefore been prayed that this Court should examine into the conduct of the respondent and make the aforesaid order under Section 543.

4. The respondent has filed a reply in which he has denied the allegation that he had taken any undue advantage of his position as the managing director of the Company. He has stated that the sum of Rs. 2,07,832/- was treated as a loan and a lien was created under Article 16 of the Articles of Association of the Company which was recognised and confirmed by the District Judge. As regards the sum of Rs. 19,588/4/6, it has been stated that the amount was taken "against the commission of the managing directorship" and only a formal adjustment remained to be made. Further, it has been stated that it was the business of the Company to advance loans to

members and create liens on their shares. The respondent has also pointed out that the Company filed two suits for the recovery of these amounts: Civil Original Suit No. 20 of 1953 was filed for the recovery of Rupees 2,37,299/11/6 against Rameshwar Das and others, but it was dismissed in default of the plaintiff's appearance on October 15, 1959. Civil Original Suit No. 21 of 1953 was filed for the recovery of Rs. 24,571/8/- and it was dismissed in default of the plaintiff's appearance on July 15, 1958. It has therefore been urged that these amounts cannot be recovered by the present application under Section 543 and the Company is estopped from making the recovery on account of a resolution of the Company dated April 16, 1948, and also because of the bar under Order 9, Rule 9, C. P. C. as well as the bar of limitation.

5. A rejoinder was filed by the Official Liquidator and the points in controversy between the parties were drawn up in consultation and with the agreement of their learned Counsel as follows,—

1. Has respondent Shyam Sunderlal as managing director of M/s. Jaipur Vastra Vyopar Sangh Limited, Jaipur, misapplied or retained or became liable or accountable for the sums of Rs. 2,07,832/- and Rupees 19,588/4/6 during the period March 21, 1946 to April 29, 1948?

2. If so, at what rate of interest he should be compelled to repay the money?

3. Is the present petition not maintainable on account of the dismissal of civil original suits Nos. 20 of 1953 and 21 of 1953 by the Senior Civil Judge of Jaipur?

4. Is the petition not maintainable as it has been filed after great delay?

The Official Liquidator has recorded his own statement in support of the application, while the respondent has examined himself. There is also some documentary evidence on the record. I shall consider the evidence while dealing with the points *ad seriatim*.

6. Point No. 1:

As has been stated, it is not disputed that the respondent was the managing director of the Company from March 21, 1946 to December 31, 1948 and the first point for consideration is whether he misapplied, or retained, or became liable or accountable for the sums of Rs. 2,07,832/- and Rupees 19,588/4/6 during that period.

7. So far as the sum of Rs. 2,07,832/- is concerned, a perusal of Article 99 of the Articles of Association of the Company shows that the business of the Company was managed by the managing director or directors subject to the control of the Board of Directors. The respondent was therefore in a position to manage the affairs of the Company. The Official Liquidator has stated that the respondent withdrew a sum of Rs. 1,00,000/- from the funds of the Com-

pany as per entry Ex. 1 and debited the amount to the account of Mahaveer Cotton Spinning and Weaving Mills, Delhi, as per Entry Ex. 2. He has also stated that on April 29, 1948, the amount due to the Company from the Mahaveer Cotton Spinning and Weaving Mills, Delhi was Rs. 1,03,180/12/- and that it was then transferred to the account of the respondent under Entry Ex. 3.

He has made a reference to "khata" Entry Ex. 5 and has stated that the amount due from the respondent in that account on April 29, 1948, was Rs. 2,07,832/- because some other amounts were also withdrawn by the respondent from the funds of the Company for himself, and also because of accumulation of interest at 6 per cent per annum. The Official Liquidator has produced transfer Entry Ex. 6 in this respect, and has stated that the amount was thereafter transferred from the personal account of the respondent to the account of his firm Messrs. Rameshwar Das Patodia. There is a corresponding Entry (Ex. 7) at page 94 of "khata bahi" No. 6 for 1947-48 in the account of the respondent for Rs. 2,07,832/-. The debit entry of it in the ledger account of Messrs. Rameshwar Das Patodia is in the "khata bahi" and it has been marked Ex. 8.

The Official Liquidator has stated that the balance due on March 31, 1950, was Rupees 2,33,355/8/- which was acknowledged by the respondent in document Ex. 10 on April 15, 1950. It has been stated that this amount has not been paid by the respondent or his firm Messrs. Rameshwar Das Patodia. The liability in the present application has however been confined to Rupees 2,07,832/- because that was the amount which was due up to the period when the respondent functioned as the managing director of the Company. Nothing has been elicited in the cross-examination to shake the testimony of the Official Liquidator. On the other hand, a perusal of the respondent's statement shows that he has clearly admitted that the money was taken by him. He has also admitted that the 61 shares of the Company in the name of his father Rameshwar Das Patodia were owned by him. Further, he has admitted the execution of document Ex. 10 dated April 9, 1950, in which he clearly stated and acknowledged the fact that he was the owner of M/s. Rameshwar Das Patodia and the sum of Rs. 2,32,355/8/- on account of principal and interest was due up to the Company upto March 31, 1950. He further stated in that document that the Company's lien on his shares would remain unaffected by the acknowledgment.

The respondent has admitted in his statement in this Court that he was the managing director of Mahaveer Cotton Spinning and Weaving Mills, Delhi also, that the sum of Rs. 1,00,000/- was remitted to it by the Company and that, inclusive of interest, the amount rose to Rs. 1,03,180/12/- which was transferred to his personal account there-

after and a lien was created on his shares for the money when he did not deposit it in spite of notice by the Company. A perusal of entry Ex. 3 also shows that the amount was debited to the respondent under his instructions. The respondent has also admitted that he took more money from the Company from time to time and that Ex. 5 showing the liability for Rs. 1,03,180/12/- is correct, and so also subsequent entry Ex. 7 showing that the liability rose to Rs. 2,07,832/- thereafter. It cannot therefore be doubted that the Official Liquidator has succeeded in proving that the sum of Rs. 2,07,832/- was due from the respondent as he had withdrawn various sums of money from the Company from time to time. It is not at all in dispute that this amount has not been repaid so far.

8. It has however been argued on behalf of the respondent that it was the business of the Company to advance loans to its members and create liens on their shares, and that there is nothing in his conduct to attract Section 543 of the Companies Act. This argument is quite incorrect because a perusal of the Memorandum of Association of the Company shows that it was not the object of the Company to advance loans to its members. Moreover, Section 86D of the Jaipur Companies Act prohibited the Company from making any loan to a director or to a firm of which the director was a partner, so that it is quite obvious that the money was taken by the respondent in contravention of the objects of the Company and the law. It is true that a lien was created on the shares of the respondent, but he has admitted that the Company did so when he did not make the repayment in spite of notice. It cannot therefore be said that the creation of the lien recognised or authorised the withdrawal of the money by the respondent or created a fresh agreement between him and the Company so as to wipe off the earlier liability.

9. An attempt has been made to show that the money was taken by the respondent with the consent of the Board of Directors of the Company, for this is what the respondent has stated in this Court. He had however to admit that there was no such consent in writing. The plea regarding the consent of the directors is quite false because articles 95 and 97 of the Articles of Association of the Company clearly provided that any such resolution had to be in writing signed by a majority of the directors. Article 97 in fact required, inter alia, that all resolutions and proceedings of the directors had to be entered in the book provided for the purpose. The plea of oral consent of the directors must therefore be rejected as incorrect.

10. I have therefore no hesitation in holding that the respondent as managing director of the Company misapplied, or retained, or became liable or accountable for

the sum of Rs. 2,07,832/- which, it is admitted, has not been repaid to the Company so far.

11. I shall now deal with the other sum of Rs. 19,588/4/6. The Official Liquidator has stated that the respondent withdrew a sum of Rs. 20,000/- from the funds of the Company on July 26, 1948 in his personal account as per Entry Ex. 12 in the cash book of the Company. There is a corresponding entry in the respondent's ledger account at page 43 of "khata bahi" No. 7 of the relevant year and it is Ex. 13. The balance due from the respondent on this account was Rs. 20,613/12/- on March 31, 1950 according to Entry Ex. 15 in the "khata bahi". The Official Liquidator has however confined the liability to Rupees 19,588/4/6 as the respondent ceased to be the managing director of the Company after that amount had become due.

12. The respondent has admitted that he withdrew Rs. 20,000/- from the Company against entry Ex. 12, but has stated that he did so as the money was due on account of his commission as managing director. He claims that he was entitled to a commission at the rate of 10 per cent on the net profits. But he has also admitted that the commission was payable to him after settling the account for the whole of the year. Further, he has admitted that the final account was not settled upto the date when he withdrew the sum of Rs. 20,000/-. It is therefore quite apparent that the respondent was not entitled to take the money as it had not fallen due on the date when it was taken. Section 87C of the Jaipur Companies Act, which admittedly governed the matter, provided that the remuneration of the managing agent was to be the sum based on a fixed percentage of the net annual profits of the Company and that the net profits were to be calculated after allowing for all the usual working charges, interest on loans and advances etc., in each year. The respondent could not therefore calculate the remuneration at his own will and pleasure and withdraw it as he pleased. The balance-sheet (Ex. A. 0) of the Company was not ready until January 11, 1949, and the withdrawal of the sum of Rs. 20,000/- was therefore quite improper, unauthorised and illegal. This was in fact pointed out in portion A to B of the director's report to the shareholders while presenting the balance-sheet (Ex. A.6) and it was specifically stated in it that this was the reason why the respondent was removed from the office of managing director.

13. It has however been argued that the respondent withdrew the sum of Rs. 20,000/- with the consent of the Board of Directors. This contention is incorrect because the respondent has admitted that there was no such written consent and in view of the provisions of Articles 95 and 97 of the Articles of Association of the Company which

required the resolution or minutes to be in writing, the plea of oral consent of the Directors is quite unconvincing.

14. The respondent has admitted that in balance-sheet Ex. A-6 the commission of the managing director has been shown as Rupees 2,567/12/3 for the period ended May 31, 1948. This amount was credited to the respondent's account on April 29, 1948, and this is not disputed before me. It is therefore quite clear that the respondent was not justified in taking the sum of Rs. 20,000/- on that account and in withholding its repayment. He has taken the plea that the profit and loss account was not correctly prepared because a sum of Rupees 70,000/- was paid to the Government although it was not due to it and was wrongly shown as expenses. He has also stated that the directors undervalued the stock of cloth by about Rs. 70,000/-. He had however to admit in the cross-examination that it was simply his own opinion that the sum of Rs. 70,000/- was not due to the Government. Moreover, he admitted that the Government did not refund the money.

Similarly, he had to admit that his statement regarding undervaluation of the stock was based on memory. To say the least, it has not been supported by any documentary evidence on the record. On the other hand, there is no reason to disbelieve the balance-sheet and I have no hesitation in holding that the respondent was not entitled to take the sum of Rs. 20,000/- from the Company. The Official Liquidator has proved that the sum of Rs. 19,588/4/6 is due from the respondent in this respect and it is quite clear that this amount has been misapplied, or retained or that the respondent has become liable and accountable for it to the Company.

15-16. Point No. 2:

The next point relates to the question of interest. The Official Liquidator has stated that the liability of the respondent in regard to the initial withdrawal of Rs. 1,00,000/- stood at Rs. 2,07,832/- as per Entry Ex. 7. He has also stated that this "khata" entry included interest at 6 per cent per annum. It is therefore clear that interest at that rate was charged even during the period of the managing directorship of the respondent and there is no reason why it should not be allowed thereafter. So also, when it has been shown that the respondent unjustifiably retained Rs. 19,588/4/6, there is no reason why, in the absence of any evidence to the contrary, he should not be liable to pay interest at 6 per cent per annum on this amount from the date of the application until realisation. It may be mentioned that Section 235 of the Jaipur Companies Act and the Indian Companies Act of 1913, provided for the payment of interest, and so also Section 543 of the Companies Act of 1956 and nothing has been shown why the interest should be disallowed in the present case.

17. Point No. 3:

The third point for consideration is whether the present application is not maintainable on account of the dismissal of civil original suits Nos. 20 and 21 of 1953 by the Senior Civil Judge of Jaipur. In order to appreciate the controversy, it will be necessary to recapitulate the facts.

18. The respondent was the director of the Company from March 21, 1946 to December 31, 1948. The Company thought that he was liable for the two sums of money which he had withdrawn and in respect of which I have recorded the above findings in favour of the Company. It has been admitted before me that the Company filed two suits against the respondent. Suit No. 20 of 1953 was filed for the recovery of Rupees 2,37,299/11/3 under plaint Ex. A.3 on March 26, 1953, against respondent Shyam Sunderlal Patodia, Messrs. Rameshwar Das Patodia, Seth Rameshwar Das Patodia, Seth Sanwal Ram Patodia and Pandit Bhonra Sahai Sharma. Suit No. 21 of 1953 was filed for the recovery of Rs. 24,571/8/- under plaint Ex. A.8 on March 31, 1953, against the respondent. It is also admitted that suit No. 20 of 1953 was dismissed in default of the plaintiff's appearance on October 15, 1959, and no application was made for its restoration under Order 9, Rule 9, C. P. C. Suit No. 21 of 1953 was also dismissed in default of the plaintiff's appearance, on July 15, 1958. An application was filed on August 14, 1958 for its restoration under Order 9, Rule 9, C. P. C., but it was dismissed for default of appearance on January 16, 1959. The question is whether the present application under Section 543 of the Companies Act, 1956, is maintainable in these circumstances in spite of the provisions of Order 9, Rule 9, C. P. C.?

19. It is quite apparent that, on the admitted facts just referred, the two suits were dismissed under Order 9, Rule 8, C. P. C. because the plaintiff did not appear when the suits were called on for hearing. Order 9, Rule 9, C. P. C. provides that on such dismissal "the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action," but that he may apply for an order to set the dismissal aside. It has therefore to be examined whether the present application under Section 543 of the Companies Act is barred under this rule. In other words, the questions for answer are whether: (i) in making the present application the Official Liquidator has acted for or on behalf of the plaintiff in the two suits in question, (ii) the present application is a fresh suit, and (iii) it relates to the same cause of action? For reasons to be stated presently, these questions must be answered in the negative.

20. Now a past director is liable for money owed by him to the Company. He is also liable in action by the Company if he has been negligent or has committed;

some breach of his duty towards the Company: Joint Stock Discount Co. v. Brown, (1869) LR 8 Eq 381, and Nant-Y-Glo and Blaiva Ironworks Company v. Grave, (1878) 12 Ch D 738 but, in the normal course, only the company is entitled to sue on any such cause of action, as has been held in Foss v. Harbottle, (1943) 2 Hare 461 and Palvides v. Jensen, 1956 Ch 565. Some exceptions have been recognized to this rule but they have not been pleaded or proved in the present case. A perusal of the plaint in the two suits shows that in Civil Suit No. 20 of 1953, the Company took the plea that Shyam Sunder Das Patodia had paid Rupees 1,00,000/- to Mahaveer Cotton Spinning and Weaving Mills, Delhi, from the funds of the Company on June 6, 1947, and that on April 29, 1948 he got the amount of Rs. 1,03,180/12/3 standing to the debit of the Mahaveer Cotton Spinning and Weaving Mills transferred to his own account and took further amounts from the Company during the period from June 9, 1947 to April 29, 1948, and thus owed the sum of Rupees 2,07,832/- to the Company which was transferred to the account of Rameshwar Das Patodia. Mention was also made of the fact that the moneys were taken in violation of Section 86D of the Jaipur Companies Act, and there was a prayer for their recovery.

The allegation in Civil Suit No. 21 of 1953 was that Shyam Sunder Lal Patodia took away Rs. 20,000/- from the funds of the Company on July 28, 1948 and got the money debited to his personal account on that date. In this case also, reference was made to Section 86D of the Jaipur Companies Act and the suit was raised for the recovery of the money. It is therefore quite clear that both the suits were simple money suits and that, in fact and substance, the liability was not based on any misconduct of Shyam Sunder Lal Patodia as such. So also, there was no question of recovery of compensation or damages for his misconduct. Moreover, it was the Company which brought those actions, and not the Official Liquidator. In all these facts and circumstances it cannot be said that the present application under Section 543 of the Companies Act, 1936, is in the nature of a suit or that it has been brought by the same person who raised the two earlier suits, or that the cause of action is the same.

21. In fact the present application is not at all in the nature of a suit. The word "suit" has not been defined in the Code of Civil Procedure or the Companies Act but, as will appear from the provisions of O. 4, R. 1, C. P. C., every suit is instituted by "presenting a plaint to the Court or such officer as it appoints in this behalf". It is not in dispute that, in the present case, the application of the Official Liquidator under Section 543 of the Companies Act is not a plaint. The meaning of the word "suit" was considered by their Lordships of Privy Council in Hansraj Gupta v. Dehra Dun-Mussoorie

Electric Tramway Co. Ltd., AIR 1933 PC 63 and their Lordships held as follows:—

"The word 'suit' ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint."

Their Lordships were no doubt considering the question with reference to the provisions of Section 3 of the Limitation Act of 1908, but it is quite apparent from their judgment that they took this view on the basis of the general law, for they held that the explanation to Section 3 of the Limitation Act was not concerned with the question of what is a suit, and their observation cannot be said to be limited to that section. There is therefore high authority for the view that the word "suit" ordinarily means a civil proceeding instituted by the presentation of plaint, unless of course there is any thing repugnant in the subject or the context. In the present case, it cannot be said that there is any such repugnancy so as to exclude the application of the general view of their Lordships. Therefore a proceeding which does not commence with a plaint, and which is not required to be treated as a suit under any other law, is not a "suit"; N. K. R. M. Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras, AIR 1934 Mad 103 (2). So when there is no provision in the Companies Act that an application under Section 543 would be a "suit", it cannot be said that it would be a suit within the meaning of Order 9, Rule 9, C. P. C.

22. An application under Section 543 is based on the alleged misconduct of a past or present director, managing agent etc., and, by the express wordings of the section the right to present it does not vest in the Company, but in the Official Liquidator, liquidator, or any creditor or contributory of the company. This has to be so because the purpose of the application is to ensure that any past or present director, or managing agent etc., having a controlling interest in the company may not be able to evade his liability either by the weight of his influence in the affairs of the company or by pleading that under the law it is only the company which has the right to sue and not one else. As was held in Official Liquidator v. Liaquat Husein, AIR 1933 All 205, misfeasance proceedings under Section 235 of the Companies Act of 1913, (which was the counter-part of Section 543 of the Companies Act of 1956) was merely an examination by the Court into the conduct of an officer of the company, and as a result of that examination the Court was entitled to order the officer to restore the money or the property of the company, but that proceeding was not a suit. I have no doubt therefore that the present application is not a "suit".

23. So also, it cannot be said that the cause of action for an application under Section 543 is the same as for a suit by the

Company against a delinquent director or past director. By virtue of the winding up proceedings, the section gives new rights which did not exist before, and I consider it sufficient to refer here to the following passage from "Buckley on the Companies Acts", thirteenth edition, page 672,—

"As regards applications by the liquidator, the Act gives after winding up new rights which did not exist before winding up, and which can be enforced only in the winding up, so that it is not in this sense correct to say that the liquidator can recover only what the company could have recovered. But it is a correct statement that this Section is a procedure section only. It merely provides a summary method for enforcing such liabilities as might have been enforced by the company itself or by its liquidator by means of an ordinary action, including new rights created by the winding up."

This is what has been held in *Re National Funds Assurance Company*, (1878) 10 Ch. D. 118 at p. 125. In that case it has further been held that the new rights created by the winding up did not exist before the winding up and could be enforced only under the winding up proceedings. The same view has been taken in *Re Whitehouse and Co.* (1878) 9 Ch. D. 595, *Burgess's case*, (1880) 15 Ch. D. 507 and *Flitcroft's case*, (1882) 21 Ch. D. 519 at p. 530.

24. In fact Section 543 cannot be said to enable the company to recover from a director or past director a mere monetary claim owed to the Company. This is the view taken of the provisions of Section 333 of the Companies Act, 1948, in force in England (which is substantially similar to Section 543 of our Act), and I may only refer to *Re Etic, Ltd.*, 1928 Ch. 861 in this connection. For this reason also, it cannot be said that an application under Section 543 is based on the same cause of action.

25. Then there is one other feature which distinguishes the two proceedings. It has been stated regarding the court's discretion under Section 333 of the Companies Act, 1948, of England in "*Palmer's Company Law*", twentieth edition, page 575,—

"The court is given a discretion, both as to whether or not it will grant the relief sought, and as to the amount of relief which it gives. This is in contrast to an action by the company against a director, where the court would be bound to give judgment in accordance with the legal rights established."

It would be supererogation on my part to add to this observation, for it is sufficient to establish that an application under S. 543 is not based on the same cause of action as a simple suit for the recovery of money.

26. The provisions of Section 543 do not prevent a company from filing a suit against a delinquent director or past director etc. for the recovery of money or damages but, by its very nature, an action by way of such a suit has to be brought by the liquidator on behalf of the company, while an application under Section 543 has to be made by him in his own name, for it cannot, in terms, be brought in the name of the Company.

27. For all these reasons, it cannot be said that in presenting the application under Section 543 of the Companies Act, the Official Liquidator has acted in the capacity of a plaintiff, or that the application is by way of a suit, or that it relates to the same cause of action as the two suits of 1953. It follows therefore that the bar of O. 9 R. 9 C. P. C. cannot be raised against the application.

28. There is one more reason for this view. As has been stated, the orders of dismissal of the two suits were passed on October 15, 1959 (in respect of suit No. 20 of 1953) and July 15, 1958 (in respect of suit No. 21 of 1953). The winding up order was made on March 9, 1960, and by virtue of S. 441 of the Companies Act, 1956, it took effect from October 26, 1957 when the petition for the winding up of the Company was presented. Then Section 458-A of that Act provides that notwithstanding anything in the Indian Limitation Act, 1908 or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the Court, the period from the date of commencement of the winding up of the company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded. It was therefore open to the Official Liquidator to make an application under O. 9, R. 9 C. P. C. within this extended period of limitation, and it cannot be said that the application would have been barred by limitation on account of the expiry of the normal period of thirty days prescribed for it. Two alternative courses were therefore open to the Official Liquidator: (1) he could make an application under Section 543 of the Companies Act for recovery of damages from the delinquent past director, or he could apply under Order 9, Rule 9 C. P. C. for orders to set the dismissals of the suits aside. It cannot however be doubted that the former was the speedier remedy and the Official Liquidator cannot be blamed if he chose it in preference to the remedy under Order 9, Rule 9 C. P. C. It is not disputed, and is in fact admitted at the Bar, that the suits had not made any progress worth the name in the trial court and their restoration would have led to lengthy trials. That, in turn, would have delayed

ed the winding up proceedings. If therefore the Official Liquidator preferred the remedy by way of an application under Section 543 of the Companies Act, which had the added advantage of providing a longer period of limitation it cannot justifiably be argued that his application should be rejected simply because he did not choose to adopt the remedy under O. 9, R. 9 C. P. C.

29. What is barred under O. 9, R. 9 C. P. C. is another suit, but the bar cannot be raised where any other provision of the law intervenes. Thus it is well settled that the provisions of O. 9, R. 9 cannot override the provisions of Section 60 of the Transfer of Property Act and a fresh suit is permissible. *Shridhar Sadba Power v. Ganu Mahadu Kavade*, AIR 1928 Bom 67. *A fortiori*, the bar of Order 9, Rule 9 cannot debar the making of an application under Section 543 of the Companies Act to make a delinquent past director liable for misconduct.

30. It may be said to be quite well settled that even if action by way of a suit is found to be barred by the law of limitation in any particular case, the remedy by an application under Section 543 of the Companies Act is still available to the Official Liquidator (and others entitled to it) if the extended period of limitation prescribed by the section happens to be available to him. Reference may in this connection be made to the decisions in *Benaras Bank Ltd v. Shri Prakasha Bhagwan Das*, AIR 1946 All 269 at p. 273, *Official Liquidator v. N. Krishna-swami Iyengar*, AIR 1948 Mad 51 which make a reference to that case, and *Official Liquidator, Palai Central Bank Ltd., Ernakulam v. K. Joseph Augusti*, AIR 1966 Ker 121, in which both the cases were followed. There is no reason why any stricter view should be taken of the bar of Order 9, Rule 9, C. P. C. than of the bar under the Limitation Act.

31. For the foregoing reasons, I have no hesitation in deciding that the present application cannot be held to be barred because of the dismissal of the Civil original suits Nos. 20 and 21 of 1933, and the point is decided against the respondent.

32. Point No. 4: The last question for consideration is whether the petition could not be maintained as it was filed after great delay. Learned counsel for the respondent realised, however, during the course of the arguments that he could not sustain the objection to the maintainability of the present application on any such ground, and he did not therefore, press it for consideration. It will be sufficient to say however that sub-section (2) of Section 543 of the Companies Act provides, *inter alia*, that an application under sub-section (1) shall be made within five years from the date of the order for the winding up of the Company. As has been stated, it is not disputed that that order was

made on March 9, 1960, and as the present application was filed on November 5, 1963, it is undoubtedly within the prescribed period of limitation and the objection to the contrary is quite futile.

33. Finding that the odds were against him, Mr. Bhargava, learned counsel for the respondent, tried to raise the argument that because the Jaipur Companies Act of 1912 and Indian Companies Act of 1913 were repealed on the coming into force of the Indian Companies Act, 1956, the applicant lost any right he had to make an application under Section 235 of the repealed Acts or Section 543 of the Companies Act, 1956. The learned counsel made repeated reference to Section 6 of the General Clauses Act to support his argument. It is however quite unsustainable. No such objection was taken in the reply, and the point was not pressed for consideration when the points for determination were drawn up. Section 3 (1) (i) of the Indian Companies Act, 1956, defines "company" to mean a company formed and registered under that Act, or an "existing company" as defined in clause (ii). That clause defines an existing company to mean, *inter alia*, a company formed and registered under any of the previous laws relating to companies mentioned in the clause. It cannot be doubted, and has not been disputed, that the Company was a company within the meaning of that definition. It would therefore undoubtedly fall within the purview of Section 543 of the Companies Act of 1956. So, if in the course of its winding up, it appears that any past director has misapplied, or retained, or became liable or accountable for, any money of the Company, there is no reason why the official liquidator should not move the Court for action under Section 543 of the Companies Act, the more so when it has been admitted by Mr. Bhargava that the order for the winding up of the Company was made on March 9, 1960 under the provisions of the Companies Act of 1956. There is therefore no force in the argument of Mr. Bhargava and I have no doubt that it cannot save the respondent from his liability under Section 543.

34. In the result it is declared that respondent Shyam Sunder Lal Patodia has misapplied, or retained, or became liable or accountable for the sums of Rs. 2,07,832 and Rs. 19,588/4/6, making a total of Rs. 2,27,420/4/6. It is ordered that he shall repay to the Official Liquidator the said sum of Rs. 2,27,420/4/6. He shall pay interest at 6 per cent per annum on the sum of Rs. 2,07,832 from April 29, 1948 down to the date of payment. Similarly he shall pay interest at the same rate on the sum of Rs. 19,588/4/6 from November 5, 1963, which is the date of presentation of the present application down to the date of payment. The respondent shall also pay the

costs of and incidental to this application to the Official Liquidator.

Ordered accordingly.

AIR 1970 RAJASTHAN 99 (V 57 C 21)

P. N. SHINGHAL, J.

Firm Sitaram Agarwal, Appellant v. Harnath and another, Respondents.

Second Appeal No. 354 of 1962, D/- 25-2-1969 from judgment of Dist. J. Jaipur D/- 8-2-1962.

(A) Partnership Act (1932), Sections 69 (2), 58 and 59 — Scope — Requirements of Section 58 complied with by firm two months prior to its filing suit — Entry under Section 59 however made more than a month after that suit — Suit is barred under Section 69 (2) — AIR 1967 Andh Pra 99, Dis-sented.

Where the requirements of Section 58 of the Partnership Act are complied with by a firm two months prior to its instituting a suit but the entry under Section 59 is made more than a month after that suit, such suit is clearly barred under S. 69(2).

(Paras 6 and 10)

Mere despatch or delivery of the statement under S. 58 or the mere filing of the statement by the Registrar of Firms does not have the effect of registering the firm and such despatch or delivery cannot suffice for saving the suit from the bar under Section 69 (2).

(Paras 4 and 9)

Section 69 (2) prohibits the institution of a suit on behalf of a partnership firm unless the firm has been registered and the persons suing are or have been shown in the Register of Firms as partners of the firm. When the plaintiff-firm has not been registered under Section 59, the first requirement of Section 69 (2) is not fulfilled. Thus the suit by such a firm is clearly barred under Section 69 (2) and the registration of that firm after the suit will not save it from the bar of Section 69(2). AIR 1967 Andh Pra 99, Expl.; and Diss. from.; AIR 1935 All 898 and AIR 1955 Trav-Co 155 and AIR 1939 Pat 239 and AIR 1942 Mad 252 and AIR 1951 Nag 159 and AIR 1951 Bom 6 and AIR 1952 Punj 415 and AIR 1953 Cal 497 and AIR 1953 Madh Bha 42 and AIR 1960 J and K 101 (FB) and AIR 1961 Assam 2. Foll. Lindley on "Law of Partnership" 12th Edn. p. 812, Expl.

(Paras 6 and 10)

(B) Civil P. C. (1908), O. 23, R. 1 (2) — Power of appellate court — Bar to suit under S. 69 (2), Partnership Act affirmed in second appeal — Withdrawal of suit under O. 23, R. 1 (2) with liberty to institute fresh suit on same subject-matter prayed for — No written application made to show why that prayer was not made in lower courts though de-

fendant had specifically pleaded such bar — No grounds for grant of such prayer available — Hence such prayer cannot be allowed — (Partnership Act (1932), S. 69 (2)).

(Para 12)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Andh Pra 99 (V 54) =
1967-1 Andh WR 192, Jayalakshmi
Rice and Oil Mills Contractors Co.,
Angular v. Commr. of Income-tax,
Andh Pra 7, 8, 9
(1961) AIR 1961 Assam 2 (V 48) =
ILR (1958) 10 Assam 8, Union of
India v. Durgadutta Biswanath 10
(1960) AIR 1960 J and K 101 (V 47)
(FB), M/s. Jammu Cold Storage and
General Mills Ltd. v. M/s. Khairati
Lal and Sons 10
(1955) AIR 1955 Trav-Co 155 (V 42) =
ILR (1954) Trav-Co 1058, Bank of
Koothathukulam v. Ilten Thomas 8, 10
(1953) AIR 1953 Cal 497 (V 40) =
57 Cal WN 225, Dwijendra Nath
Singh v. Govind Chandra 10
(1953) AIR 1953 Madh Bha 42 (V 40) =
ILR (1953) Madh B 75, Nand
Kishore v. Maheshwari Mills Ltd. 10
(1952) AIR 1952 Punj 415 (V 39) =
ILR (1953) Punj 223, Firm Des Raj
Premchand v. Firm Hiralal Kali
Ram 10
(1951) AIR 1951 Bom 6 (V 38) = ILR
(1951) Bom 101, Prithvisingh
Devisingh v. Hasan Alli 10
(1951) AIR 1951 Nag 159 (V 38) =
ILR (1951) Nag 81, Abdul Karim v.
Ram Das Narayandas 10
(1942) AIR 1942 Mad 252 (V 29) =
ILR (1942) Mad 355, K. K. A.
Ponnuehami Goundar v. Muthuswami
Goundar 10
(1939) AIR 1939 Pat 239 (V 26) =
ILR 18 Pat 114, Firm Ladu Ram
Sagarmal v. Jamuna Prasad
Chaudhuri 10
(1935) AIR 1935 All 898 (V 22) =
1935 All LJ 1243, Firm Ram Prasad
Thakur Prasad v. Firm Kampta Prasad
Sita Ram 8, 10
C. L. Agarwal and R. S. Kejriwal, for Ap-
pellant; P. C. Bhandari, for Respondents.

JUDGMENT: This second appeal is by the plaintiff who has been unsuccessful in both the courts below.

2. The two courts below have not gone into the merits of the controversy regarding the claim for the recovery of money, but have taken the view that the suit is barred under Section 69 (2) of the Partnership Act. As this is the only point for consideration in this second appeal, it is not necessary to state all the facts. It will be sufficient to say that the plaintiff averred in paragraph 1 of the plaint that the plaintiff was a registered partnership firm of which Suraj Bux, Jagdish Narain, Nathulal and Sita Ram were the owners. This was denied by both the defendants. Defendant No. 2 pleaded

that the plaintiff was an unregistered partnership concern of which Murlidhar and Daluram were also partners. In paragraph 7 of the written statement it was stated that unless the plaintiff could establish that the firm was registered and the names of all its partners including Murlidhar and Daluram were shown as partners, the suit would be barred under Section 69 of the Partnership Act.

The first issue therefore related to the question whether the plaintiff was a registered partnership firm. It has been admitted in this connection by the plaintiff that the application for registration was made on April 29, 1957 and while the registration fee was fully paid up on May 15, 1957, the actual registration was made by the Registrar of Firms on August 26, 1957. The suit was filed on July 15, 1957. On these admitted facts, both the Courts below have taken the view that the suit is not maintainable on account of the bar of sub-section (2) of Section 69 of the Partnership Act. The question is whether this view is incorrect?

3. In order to appreciate the controversy, it will be desirable to make a reference to Sections 58, 59 and 69 of the Partnership Act for they are quite sufficient to show the scheme and the purpose of the provisions regarding the registration of firms and the effect of non-registration.

4. Sub-section (1) of Section 58 provides that the registration of a firm may be effected at any time by sending by post or delivering to the Registrar a statement in the prescribed form, along with the prescribed fee, giving the particulars mentioned in the sub-section. It is not disputed that such a statement was filed on behalf of the plaintiff on April 20, 1957 and the prescribed fee was paid on May 15, 1957. Thus these requirements of Section 58 were complied with before the institution of suit on July 15, 1957. But Section 59 of the Partnership Act is equally important for it provides as follows:—

"59. When the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statements."

The Section thus provides that the Registrar has to (i) satisfy himself that the provisions of Section 58 have been complied with, (ii) record an entry of the statement (sent or delivered to him under Section 58 of the Act) in a register called the Register of Firms, and (iii) file the statement. It is therefore quite clear that the mere despatch or delivery of the statement referred to in Section 58, or the mere filing of the statement by the Registrar of Firms, does not have the effect of registering the firm.

5. In the present case, as has been stated, it is admitted that the statement referred to in section 58 was filed on April 20, 1957,

and the prescribed fee was paid on May 15, 1957, so that the completed statement, in the form prescribed by Section 58, was made available to the Registrar on May 15, 1957, two months before the filing of the suit. But it is also admitted that the Registrar did not record an entry of the statement in the Register of Firms until August 26, 1957, that is, more than a month after the institution of the suit. It cannot therefore be said that the plaintiff was a registered firm on the date of the suit or, in other words, it is quite clear that the suit was brought by the plaintiff at a time when it had not been registered under Section 59.

6. What then would be the effect of such non-registration? This is provided in Section 69 of the Partnership Act, sub-section (2) of which reads as follows,—

"69(2). No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

Thus the sub-section prohibits the institution of a suit on behalf of a partnership firm unless two requirements are fulfilled: (i) the firm has been registered, and (ii) the persons suing are or have been shown in the Register of Firms as partners in the firm. As has been stated, it is beyond doubt that in the present case the plaintiff firm was not registered under Section 59 and the first requirement of sub-section (2) of Section 69 was not therefore fulfilled before the institution of the suit. The two courts below were quite justified in deciding the first issue against the plaintiff and ordering the dismissal of the suit in view of the clear provisions of sub-section (2) of Section 69.

7. The learned counsel for the plaintiff has however relied on the following observations in paragraph 10 of Jayalakshmi Rice and Oil Mills Contractors Co., Angular v. Commr. of Income-tax Andhra Pradesh, AIR 1967 Andh Pra 99 for the argument that mere presentation of the statement under Section 58 of the Partnership Act had the effect of completing the registration of the firm,—

"The words of the statute in Section 58 of the Partnership Act are express and clear that registration may be effected by delivering to the Registrar a statement. On the contrary, Section 59 mentions that the Registrar shall make an entry of the statement in the Register of Firms but does not say that, by such entry, registration is effected. Thus, the wording of the body of Section 59 is consonant with the wording of the body of Section 58 and the two sections indicate a scheme whereby the act of the party by way of presentation of statement under Section 58 makes effective registration whereas the action of the Registrar is only a clerical act of recording an entry in the Register of Firms and filing the statement regarding a

firm which had already become effectively registered."

It has therefore been argued that the firm had been effectively registered when the registration fee was fully paid up on May 15, 1957, and that the suit which was filed on July 15, 1957 was quite in order.

8. I have gone through the judgment of their Lordships of the Andhra Pradesh High Court but, with all respect, I am unable to subscribe to the view taken by them. Among other reasons, their Lordships relied on the following passage at page 812 of "Lindley on the law of Partnership" 12th edition, —

"It is apprehended that registration is complete as soon as the prescribed statement has reached the registrar; and that the filing of the statement and issue of the certificate are ministerial acts the omission of which would not deprive a limited partnership of the benefit of the Act."

But this view has been taken on the wordings of Sections 8 and 13 of the Limited Partnership Act, 1907 of England, which are quite different from the provisions in Sections 58 and 59 of the Indian Partnership Act. Section 8 of the English Act provides that the registration of a limited partnership "shall be effected" by sending by post or delivering to the registrar a statement containing the particulars prescribed in the section, while Section 58 of the Indian Act provides that registration of a firm "may be effected" by sending or delivering the required particulars so that there is this difference between the two sections. Moreover, whereas section 13 of the English Act provides that on receiving any statement made in pursuance of that Act the Registrar "shall cause the same to be filed" the Indian Partnership Act requires that the Registrar should be "satisfied" that the provisions of Section 58 have been complied with and then he has to "record an entry of the statement in a register called the Register of Firms," and file the statement.

I have already made a reference to these three requirements of Section 59 and they bring out the difference between the provisions of the Limited Partnership Act, 1907 and the Indian Partnership Act. It cannot therefore be said that the portion extracted by their Lordships in Jayalakshmi Rice and Oil Mills Contractors Co.'s case, AIR 1967 Andh Pra 99 can be a proper guide for the interpretation of the provisions of Sections 58, 59 and 69 of the Indian Partnership Act. Their Lordships disagreed with the view taken in (Firm) Ram Prasad Thakur Prasad v. Firm Kamta Prasad Sita Ram, AIR 1935 All 898 and Bank of Koothattukulam v. Itten Thomas, AIR 1955 Trav-Co 155 which followed (Firm) Ram Prasad's case, AIR 1935 All 898 on the grounds that in the first of these cases the question whether "the act of the Registrar under S. 59 amounted to a mere clerical act of recording or discretionary act was not raised, considered or decided". In

regard to the second case, they took the view that their Lordships of the Travancore-Cochin High Court did not give any reason for differing from the view of Lindley referred to above. In my opinion, however, both the cases dissented from by their Lordships of the Andhra Pradesh High Court were correctly decided and they fully support the reasoning adopted by me above on the wordings of Sections 58, 59 and 69 of the Indian Partnership Act.

9. I may in this connection give one more reason why it is not possible for me to subscribe to the view taken in Jayalakshmi Rice and Oil Mills Contractors Co.'s case, AIR 1967 Andh Pra 99. Their Lordships, in my humble opinion, did not fully appreciate that it is the requirement of sub-section (2) of Section 69 that not only the firm instituting the suit should be registered, but it should also be shown that "the persons suing are or have been shown in the Register of Firm as partners in the firm." This additional requirement of the sub-section cannot, for obvious reasons, be fulfilled merely by sending or delivering to the Registrar of Firms the statement required by Section 58, for it is necessary to show, with reference to the entry in the Register of Firms, that the persons suing are or have been registered as partners. It must therefore be held that the mere despatch or delivery of the statement under Section 58 cannot suffice for the purpose of saving the suit from the bar of sub-section (2) of Section 69.

10. I am therefore of the view that the appellants are not entitled to succeed because the registration of the firm after the institution of the suit will not save it from the bar of Section 69 (2) of the Indian Partnership Act. I am fortified in this view by the decisions in AIR 1935 All 898 and AIR 1955 Trav-Co. 155 to which I have made a reference already, and by the decisions in Firm Laduram Sagarmal v. Jamuna Prasad Choudhury, AIR 1939 Pat 239, K. K. A. Ponnuchami Goundar v. Muthusami Goundan, AIR 1942 Mad 252, Abdul Karim v. Ramdas Narayandas, AIR 1951 Nag 159, Prithvisingh Devisingh v. Hasan Alli, AIR 1951 Bom 6, Firm Desh Raj Prem Chand v. Firm Hiralal Kali Ram, AIR 1952 Punj 415, Dwijendra Nath Singh v. Govind Chandra, AIR 1953 Cal 497, Nand Kishore v. Maheswari Mills Ltd., AIR 1953 Madh Bha 42, M/s. Jammu Cold Storage and General Mills Ltd. v. M/s Khairati Lal and Sons, AIR 1960 Jammu and Kashmir 101, and Union of India v. M/s Durgadutta Biswanath, AIR 1961 Assam 2.

11. I have therefore no hesitation in holding that the present suit could not be instituted by or on behalf of the plaintiff firm because it had not been registered at the time of the institution of the suit. The two courts below were quite right in deciding issue No. 1 against the plaintiff and in dismissing the suit.

12. Faced with such a situation, Mr. Agarwal, learned counsel for the appellant, made a request, while replying to the arguments of the learned counsel for the respondents, that the plaintiff may be allowed to withdraw the suit under Order 23, Rule 1(2) C. P. C. with liberty to institute a fresh suit on the same subject-matter. This request has been opposed by the learned counsel for the respondents on several grounds. No written application has been made by the learned counsel for the plaintiff-appellants giving the reasons why such a request was not made in the trial court or the court of first appeal even though the defendants had specifically pleaded that the plaintiff was not a registered firm and could not institute the suit. There is also nothing to show why the request for withdrawal with liberty to institute a fresh suit should be granted. It is not therefore possible to entertain the request.

13. No other point remains for consideration. The appeal is dismissed, but there will be no order as to the costs in the circumstances of the case.

Appeal dismissed.

AIR 1970 RAJASTHAN 102 (V 57 C 22)

B P BERI, J

Dhiria and others, Petitioners v. Jainarain and another, Respondents.

Criminal Revn. No. 299 of 1968, D/- 27-2-1969 against order of S. J. Pali, D/- 27-8-1968.

(A) Criminal P. C. (1898) Ss. 540A, 4(1)(k) and 252 — Inquiry — Process issued to accused and called to appear — It is stage of inquiry — Application under S. 540A at that stage is not premature.

An application under Section 540A can be made at any stage of an inquiry. Thus where the Magistrate does not dismiss a complaint under Section 203 and the process is issued and the accused is called upon to appear in the case the provisions of Section 252 are attracted which require the Magistrate to proceed to hear the complainant and take all such evidence as may be produced in support of the prosecution. Such a stage is one of inquiry and an application at this stage is not premature. AIR 1914 Lah 561 (2) (FB) and AIR 1950 Raj 34, Rel on.

(Para 8)

(B) Criminal P. C. (1898) S. 540A — Application at the stage of inquiry — 29 agriculturists of famine-stricken area to travel 16 miles to attend court to answer charge — Held it was hardship which ought to have been ameliorated rather than aggravated and hence the order of rejection of the application by the Magistrate was not right.

(Para 11)

Cases Referred: Chronological Paras
(1950) AIR 1950 Raj 34 (V 37) = 51
Crl LJ 1522, Sarkar v. Madhoram .6
(1914) AIR 1914 Lah 561 (2) (V 1) =
16 Crl LJ 81 (FB), Hasta v. Emperor 6
J. K. Jain, for Petitioners; M. L. Shrimali,
for Respondent No. 1; C. M. Mehta, Dy. C.
A., for the State.

ORDER: This is a criminal revision application against an order whereby the bail-bonds and surety-bonds of 29 petitioners have been ordered to be forfeited by the Munsif Magistrate, Pali.

2. The Munsif Magistrate Pali took cognizance of an offence under Ss. 430/147 I. P. C. against 30 accused persons on a complaint moved by Jainarain. Warrants were issued for the appearance of the accused on the 23rd January 1968. One of the accused persons Sawaram appeared before the Munsif Magistrate but on behalf of the other 29 accused persons an application was made praying that their personal presence be dispensed with under Section 540A, Cr. P. C. and they may be permitted to appear through their pleader because it was sowing season and these 29 agriculturists were required to be present on their fields. The Magistrate dismissed the application by saying that there were no appropriate grounds for granting the applicants an exemption and simultaneously ordered the forfeiture of the bail-bonds and the surety bonds. The 29 petitioners before me moved a revision application and the learned Sessions Judge while observing that the learned Magistrate had dismissed the application for exemption lachonically and his order was not proper because no reasons for rejection of the application were set out. The learned Sessions Judge however declined to make a reference to the High Court because he thought that it was hardly worthwhile making a reference of such a small matter to the High Court as it was likely to take a long time. In his view, the ends of justice would have been met if another application was made to the learned Magistrate and it was considered by him in the light of the observations made by the learned Sessions Judge. Without making any such application before the Magistrate, the petitioners have come up before me.

3. Mr. Jain appearing for the applicants submits that these 29 villagers who are residents of village Rana, District Pali, a famine stricken area, were required to be present at their fields at the time in question, and it was a fit case where the powers under Section 540A, Cr. P. C. ought to have been exercised in their favour rather than an order of forfeiture of the bail bonds and surety bonds more particularly because the complainant itself is the result of vindictiveness.

4. Mr. Shrimali appearing for the opposite party Jainarain submitted that in this case warrants were issued in the first instance and therefore Section 205 Cr. P. C. was inapplicable. Section 540A, Cr. P. C. was also in-

applicable, submitted learned counsel, because it was only after an inquiry had commenced that such an application was possible. No inquiry could commence unless the accused were present before the court and, therefore, such an application in their absence could not have been made in the circumstances of this case.

5. Section 540A, Cr. P. C. reads as follows:

"540A (1) 'At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately." (The underlining (here into ' ') is mine.) The underlined words "At any stage of an inquiry" call for interpretation. The principal argument of the learned counsel for the opposite party is that it was premature for the applicants to have moved the Munsif Magistrate Pali.

6. The word 'inquiry' has been defined in Section 4(1)(k) Cr. P. C., which reads:

"'Inquiry' includes every inquiry other than a trial conducted under this Code by a Magistrate or Court".

This definition while including all inquiries within its ambit excludes trials from its circumference. I agree with Mr. Shrimali that the stage for trial had not reached in this case because as laid down in *Hasta v. Emperor*, AIR 1914 Lah 561 (2) (FB) when a charge has been drawn up and read and explained to the accused and he has pleaded that the 'inquiry' becomes a 'trial'. The same is the view of our High Court in *Sarkar v. Madhoram*, AIR 1950 Raj 34 where it has been observed that in warrant cases the trial can be said to begin only after the charge is framed and the proceedings before a charge is framed only amount to an inquiry.

7. The question which calls for consideration is whether on the 23rd January, 1968 when the accused applicants were required to appear before the learned Magistrate, was it any stage of an inquiry? In my opinion the answer to this question must be in the affirmative. My reasons briefly are that after cognizance was taken of an offence on a complaint under Section 190 (1) (a), the stage of Section 200 of the Code of Criminal

Procedure was reached when the complainant was examined and the witnesses present if any could also be examined. Under Section 202, the procedure provided is:

"Any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either 'inquiry' into the case himself or direct 'an inquiry' to be made by any Magistrate subordinate to him for the purposes of ascertaining the truth or falsehood of the complaint".

(Note:— The underlining (here in ' ') is mine).

If the Magistrate does not dismiss the complaint under Section 203, then process is issued under Chapter XVII the title of which reads: "Of the commencement of Proceedings before Magistrate".

8. After the process has been issued and the accused is called upon to appear in a case, such as the one before me, the provisions of Section 252 are attracted, which requires the Magistrate to proceed to hear the complainant and take all such evidence as may be produced in support of the prosecution. On 23-1-1968, it was this stage at which the application under Section 540A was made. The proceedings before the Magistrate commenced as soon as he took cognizance of the offence and examined the complainant under Sec. 200 and his witnesses under Section 202 Cr. P. C. In fact the word 'inquire' has been used in the Section 202 itself. The complaint not having been dismissed under Section 203 Cr. P. C. the enquiry continued when the process was issued and the stage of hearing the complainant in the presence of the accused was reached. The stage was clearly one of 'inquiry' as understood in the Criminal Procedure Code and it would have continued right upto the time when charge was framed or the accused were discharged. The application under Section 540A could, therefore, be made at this stage. It is at any stage of an inquiry that an application under Section 540A could be made and the application was, therefore, not premature.

9. From the language of S. 540A as well, a similar conclusion is deducible. Prior to the amendment of Section 540A in 1955, it was provided that where two or more accused were before the court and if the Judge or Magistrate was satisfied for reasons to be recorded that any one or more of such accused was or were incapable of remaining before the Court, the Magistrate or the Judge could if such accused was represented by a pleader, dispense with his attendance and proceed with his inquiry or trial in his absence. From the amendment of Section 540A it would appear that the legislature has introduced several changes and has imparted discernible liberality for the

exercise of the discretion in dispensing with the presence of the accused. The amendment has relaxed the restrictions which existed in the earlier section. It is no longer necessary that there should be two or more accused in the case or that they should be present in Court before any one of them could apply for personal exemption. Further the ground for personal exemption is also not confined to incapacity to remain before the Court. The amendment, in my opinion, therefore, liberalised the circumstances in which exemption from personal attendance could be granted to an accused and it would be detracting from that liberality to argue that the accused must be himself present at the stage of Sec. 252 Cr. P. C. before an application could be moved. In some cases such a construction may frustrate the very object which the amendment aimed to attain.

10. In the case before me, as I have observed above, inquiry had commenced and it was not interrupted by the dismissal of the complaint and the stage of Section 252, Cr. P. C., in my opinion was certainly a stage of inquiry. In this view of the matter, the application made by the applicants was not premature. The application by their pleader, without the accused being personally present, was perfectly competent.

11. The next question which calls for consideration is whether the learned Magistrate was right in rejecting such an application. I have no hesitation in saying that the order of the learned Magistrate was entirely erroneous. 29 agriculturists of a famine-stricken area to travel 16 miles to attend the Court to answer a charge, on the merits of which I do not wish to express any opinion, was a hardship which ought to have been ameliorated rather than aggravated.

12. Accordingly I quash the order of the learned Magistrate dated the 23rd January, 1968, and the order of the learned Sessions Judge dated the 27th August, 1968, and grant personal exemption to the 29 applicants before me. They need not personally attend the Court of the learned Magistrate unless specifically required by the learned Magistrate, for reasons to be recorded by him, and they are permitted to appear through their pleader.

Order accordingly.

AIR 1970 RAJASTHAN 104 (V 57 C 23)

D. M. BHANDARI C. J. AND V. P. TYAGI, J.

Bhanwarlal and others, Appellants v. Raja Babu and others, Respondents.

Civil Special Appeal No. 4 of 1964, D/- 19-2-1969 against judgment of C. B. Bhargava, J., in S. A. No. 65 of 1958, D/- 11-11-1963, reported in ILR (1964) 14 Raj 386.

FM/CM/C835/69/LGC/M

(A) Civil P. C. (1908), S. 11 and O. 23, R. 3 — Compromise decree — Section 11 is not applicable.

A compromise decree is not a decision of the court and as such section 11 C. P. C. is not applicable in its term to such a decision because such a decision cannot be said to have been given after the case had been heard and finally decided. AIR 1967 SC 591, Rel. on. (Para 5)

(B) Civil P. C. (1908), O. 23, R. 3 — Evidence Act (1872), Section 115 — Consent decree — Binding nature of — Principle of estoppel by judgment — Applicability.

When a judgment has been given in a particular case, then in spite of the fact that such a judgment is given by consent, the cause of action merges in the judgment and no further action can be brought on that cause except an appeal from that judgment or unless that judgment is set aside for collusion or otherwise. What has been decided by that judgment is final and binding on the parties. Case law discussed. (Para 7)

If the judgment in the previous suit could not have been passed without determination of the question which was put in issue in the subsequent case, the finding on that question would operate as estoppel. There may not be so much difficulty in determining what must be taken to be necessary finding for a judgment by admission in a case in which there is only one ground raised by a party to set up a claim. But when several grounds have been put forward by a plaintiff in the alternative for claiming a particular relief and the defendant admits that the relief claimed by the plaintiff may be granted without saying anything more, it becomes difficult to come to the firm conclusion as to which finding the defendant intended to accept while giving consent that the relief prayed for be granted. The test to be applied in such cases is that the court could not have passed that judgment without determining that particular point against the party who is raising that point over again. Case law discussed. (Para 9)

Where the plaintiff C had put forward several grounds for challenging the factum and validity of adoption of one M by R, widow of L, and on the admission of M and R that M be declared not to be the adopted son of L the suit was decreed but subsequently the widow executed another adoption deed purporting to adopt B a minor son of M and C filed a suit for declaration that B was not adopted son of L and the contention was that R had no authority to adopt and could not adopt without the authority of her husband.

Held that it could not be said that there was any admission by implication on the part of R that she could not adopt without the authority of her husband. The principle of estoppel by judgment was not attracted. (Para 9)

Logically a finding is necessary to arrive at a conclusion if that conclusion could not be arrived at without that finding. The particular finding that M was not adopted son of L could be maintained on other grounds as well. It might be that the adoption of M might not have in fact taken place or that it was invalid because no giving and taking ceremony could take place and the admission could have well been made by accepting any of those two grounds. (Para 9)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 591 (V 54) =

1964-2 SCR 310, P. Venkata Subbarao v. V. Jagannadha Rao 5

(1964) 1964 AC 993 = 1964-2 WLR 150, Kok Hoong v. Leong Cheong Kweng Mines Ltd. 10

(1956) AIR 1956 SC 346 (V 43) = 1956 SCR 72, Sailendra Narayan v. State of Orissa 6, 8

(1954) AIR 1954 SC 82 (V 41) = 1953 SCJ 693, Sunderabai v. Devaji Shankar 6

(1954) AIR 1954 SC 352 (V 41) = 1955 SCR 99, Shankar Sitaram v. Balkrishna Sitaram 6

(1939) 1939 AC 1 = 108 LKJB 115, New Brunswick Railway Co. v. British and French Trust Corporation Ltd. 10

(1936) ILR 63 Cal 550, Secy. of State v. Ateendranath Das 6, 8, 11

(1929) 1929 AC 482 = 98 LJPC 129, Kinch v. Walcott 6

(1912) ILR 36 Bom 283 = 13 Bom LR 950, Bhaishankar v. Morarji 6

(1912) ILR 35 Mad 75 = 21 Mad LJ 709, Kumara Venkata Perumal v. T. Ramaswamy Chetty 6

(1895) 1895-1 Ch 37 = 64 LJ Ch 189, In re, South American and Mexican Co., Ex parte, Bank of England 6

(1861) 10 CB (NS) 813 = 31 LJCP 146, Howlett v. Tarte 10

R. K. Rastogi with N. K. Jain, for Appellants; P. N. Datta, for Respondents.

BHANDARI C. J. : This is a special appeal under Section 18 of the High Court Ordinance. The suit out of which this appeal arises was filed by Gaindilal against Mst. Rajbai, Rajababu, Mannalal and three other persons in the court of Civil Judge Jaipur. The case set up by the plaintiff is that one Motilal husband of Mst. Rajbai died in the Samvat year 1971 and that according to the pedigree-table submitted in the plaint, the plaintiff was the next reversioner. Gaindilal plaintiff further alleged that in his lifetime Motilal had made an oral will in his favour bequeathing all his property in favour of the plaintiff and that after the death of Motilal Mst. Rajbai continued to live with the plaintiff. On 20th December, 1941 she executed an adoption deed purporting to adopt Mannalal. On this the plaintiff filed a suit which was dismissed in the trial Court and in the Court of first

appeal but was decreed by the High Court of the former Jaipur State on 5th April, 1944. In spite of this, Mst. Rajbai executed another adoption deed on 22nd November, 1945 purporting to adopt Rajababu minor son of Mannalal. The plaintiff stated that in fact Rajbai never adopted Rajababu. Mst. Rajbai who was a Hindu widow had merely a right of residence in the house left by Motilal and in the light of the averments made in the plaint, he prayed for a declaration that Rajababu was not the adopted son of Motilal and that he being the nearest reversioner was entitled to his property. After the death of Mst. Rajbai, the plaintiff amended his plaint and prayed for a decree of possession in respect of certain properties. The suit was contested by Rajababu.

2. The trial Court held that Mst. Rajbai who was a Jain widow had a right to adopt a son to herself and to her husband without any authority from her husband and that in fact, she had adopted Rajababu defendant to her husband. On the question of will the finding was against the plaintiff. The trial Court also decided issue No. 9 about res judicata against the plaintiff. With these findings, the suit was dismissed.

3. Plaintiff Gaindilal filed an appeal in the Court of District Judge, Jaipur City. During the pendency of the appeal, he died and his sons and widow were brought on record as his legal representatives. The learned District Judge dismissed the appeal holding inter alia that the bar of res judicata was not available in the present case. Thereupon the appellants filed a second appeal in this Court which was decided by Bhargava J. The only point argued before the learned single Judge was that of res judicata inasmuch as the question whether Mst. Rajbai could take a son to her husband in adoption without the authority of her husband must be taken to have been decided against her in the previous suit which was decreed by the High Court of the former Jaipur State. It may be mentioned that the judgment of the former Jaipur State High Court was based on the admission made by learned counsel for the respondent in that case that the suit may be decreed against the respondent but the defendant may be exempted from paying the costs incurred by the plaintiff. The learned single Judge held that the relief claimed in the previous suit was for declaration that Mannalal was not the adopted son of Motilal and that this relief could be granted to the plaintiff on this ground alone that Mannalal who was orphan was given in adoption by his brother and that it was quite unnecessary in the circumstances of the case to make any admission by counsel for Mst. Rajbai that Mst. Rajbai could not adopt any boy without the authority of her husband. He, however, granted permission under section 18 to the appellants to file a special appeal. In pursuance of this, they have filed this special appeal.

4. It is argued by learned counsel for the appellants that the judgment of the Jaipur High Court be held to operate as an estoppel by conduct against Mst. Rajbai on the point that she had no right to adopt to her husband as she had not the authority to do so. The judgment of the Jaipur High Court is based on admission of the counsel for the respondent No. 2 and it does not specifically say that Mst. Rajbai had in any manner admitted that she had no right to adopt a son to her husband. In the previous suit Gaudil plaintiff had challenged the adoption of Mannalal on several grounds including its factum and legality. The legality was challenged on the grounds that Mannalal was an orphan and could not be given in adoption and that Mst. Rajbai who was a Hindu widow could not adopt him to her husband as she had no authority to do so. It is contended by learned counsel for the appellants that all the defences raised by Mst. Rajbai must be taken to have been decided against her or in any event, she was now estopped from raising those very defences, and as one of the defences raised by her was that she had a right to adopt without the authority of her husband as she was a Jain widow, that defence must not be permitted to be raised again in the present suit.

5. We have to examine how far this contention is correct. It must be taken to be settled law that a compromise decree is not a decision of the court and as such Section 11 C. P. C. is not applicable in its term to such a decision because such a decision cannot be said to have been given after the case had been heard and finally decided. In this connection, we may refer to the following observations of their Lordships of the Supreme Court in Venkata Subba Rao v. V. Jagannadha Rao, AIR 1967 SC 591:

"The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the court on the agreement of the parties. The court did not decide anything. Nor can it be said that a decision of the court could be revocable, whether statutory under Section 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests."

6. It is, however, urged that a consent decree is as much binding upon the parties as a decree passed after contest. In this connection learned counsel has placed reliance on *Sunderabai v. Devaji Shankar*, AIR 1954 SC 82; *Shankar Sitaram v. Balkrishna Sitaram*, AIR 1954 SC 352 and *Sailendra Narayan v. State of Orissa*, AIR 1956 SC 346. He has particularly relied on the following observations of the Supreme Court made in the last case:

"The plea of estoppel is sought to be founded on the compromise decree, Ex. 'O' passed by the Patna High Court on 2-5-1945 in F.

A, No. 15 of 1941. The compromise decree is utilised in the first place as creating an estoppel by judgment. In *In re, South American and Mexican Co., Ex parte, Bank of England*, (1895) 1 Ch 37, it has been held that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case. Upholding the judgment of *Vaughan Williams, J.*, Lord Herschell said at page 50:

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end."

And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

To the like effect are the following observations of the Judicial Committee in *Kinch v. Walcott*, 1929 AC 482 at p. 493:

"First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal."

The same principle has been followed by the High Courts in India in a number of reported decisions. Reference need only be made to the cases of *Secy. of State v. Ateendranath Das*, (1936) ILR 63 Cal 550 at p. 558; *Bharshankar v. Morarji*, (1912) ILR 36 Bom 283 and *Kumara Venkata Perumal v. T. Ramasamy Chetty*, (1912) ILR 35 Mad 75. In the Calcutta case after referring to the English decisions the High Court observed as follows:

"On this authority it becomes absolutely clear that the consent order is as effective as an order passed on contest, not only with reference to the conclusions arrived at in the previous suit but also with regard to every step in the process of reasoning on which the said conclusion is founded."

When we say "every step in the reasoning" we mean the findings on the essential facts on which the judgment or the ultimate conclusion was founded. In other words the finding which it was necessary to arrive at for the purpose of sustaining the judgment in the particular case will operate as estoppel by judgment."

7. These observations show that when a judgment has been given in a particular case, then in spite of the fact that such a judgment is given by consent, the cause of action merges in the judgment and no further action can be brought on that cause.

except an appeal from that judgment or unless that judgment is set aside for collusion or otherwise. What has been decided by that judgment is final and binding on the parties.

8. Viewed in this light, the judgment of the Jaipur State High Court only decided that Mannalal be declared that he was not the adopted son of Motilal. There were various grounds on which the adoption of Mannalal was challenged by Gaindilal plaintiff in that suit. They were (1) that adoption had not, in fact taken place, (2) that he could not be validly adopted as he was an orphan and there was nobody to give him in adoption and (3) that Mst. Rajbai who was a Hindu widow had no authority from her husband to adopt. Mannalal could be declared as not adopted to Motilal on any one of the three grounds raised by Gaindilal plaintiff in that case. It is not clear either from the admission recorded in the judgment of the Jaipur High Court or from the judgment itself as to which ground operated for making that declaration. It is contended by learned counsel for the appellants that even if it be so, all the grounds raised for challenging the adoption of Mannalal should be taken to be impliedly admitted to be correct by Mst. Rajbai and Mannalal.

It has been urged relying on (1936) ILR 63 Cal 550 which must be taken to have been approved by the Supreme Court that not only the conclusion that was arrived at in that case that Mannalal was not the adopted son of Motilal was final and effective between the parties but also the judgment was final and effective with regard to every step in the process of reasoning on which the said conclusion was founded. In our opinion what is laid down in the Calcutta case is that if a finding is necessary to arrive for sustaining the judgment in a particular case, such finding may operate as an estoppel by judgment in the subsequent suit. The same may be expressed in other words by saying if the judgment in the previous suit could not have been passed without determination of the question which was put in issue in the subsequent case, the finding on that question would operate as estoppel. Their Lordships of the Supreme Court examined the facts of the case in AIR 1956 SC 346 *supra* on the basis whether the judgment in the previous suit could have been passed without examination of the question which was put in issue in the subsequent case in which the plea of estoppel in the previous judgment is raised.

9. There may not be so much difficulty in determining what must be taken to be necessary finding for a judgment by admission in a case in which there is only one ground raised by a party to set up a claim. But when several grounds have been put forward by a plaintiff in the alternative for claiming a particular relief and the defend-

ant admits that the relief claimed by the plaintiff may be granted without saying anything more, it becomes difficult to come to the firm conclusion as to which finding the defendant intended to accept while giving consent that the relief prayed for be granted. For example, in this case Gaindilal plaintiff had put forward several grounds for challenging the factum and validity of adoption of Mannalal. Mannalal and Mst. Rajbai when they admitted that Mannalal be declared not to be the adopted son of Motilal, it cannot be said that they necessarily admitted all the grounds put forward by the plaintiff Gaindilal in that case to be correct. There is no indication to that effect in the admission made by learned counsel on their behalf nor is such admission indicated by the judgment of the Jaipur High Court.

It may well be that the adoption of Mannalal may not have in fact taken place or that it was invalid because no giving and taking ceremony could take place, he being orphan and the admission could have well been made by accepting any of these two grounds. It does not necessarily follow that Mst. Rajbai and Mannalal in that case admitted the correctness of the third ground that Mst. Rajbai had no authority to adopt and could not adopt without the authority of her husband. Logically a finding is necessary to arrive at a conclusion if that conclusion could not be arrived at without that finding. In this case, the particular finding that Mannalal was not adopted son of Motilal could be maintained on other grounds as well. Thus it cannot be said that there is any admission by implication on the part of Mst. Rajbai that she could not adopt without the authority of her husband. The test to be applied in such cases is that the court could not have passed that judgment without determining that particular point against the party who is raising that point over again.

10. In England similar test has been applied in cases when the judgment is a judgment in default and which in India is covered by the terms of Section 11 C. P. C. It was observed in *New Brunswick Rly. Co. v. British and French Trust Corporation Ltd.* 1939 AC 1 that an estoppel based on default judgment must be very carefully limited and the principle in such a case seems to be that a defendant is only estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment. The Privy Council examined this question in connection with a judgment in default in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.*, 1964 AC 993. That was an appeal from Malaya. In that case in 1954 the appellant claimed arrears of rent for the hire of machinery under an alleged lease made in connection with written agreement of 1952. The respondent was refused leave to defend and the appellant obtained judg-

ment by default in 1957. The appellant commenced a second suit claiming arrears of rent from a date in 1955 when a fresh hiring agreement was made. The respondent pleaded that the appellant was a money-lender and that in fact in 1952 the appellant had advanced the respondent money and the respondent had purported to sell the machinery to the appellant and that the machinery was in fact security for the loan and the hire charges were in fact interest on the loan. The appellant denied that he was money-lender or that the transaction was a money-lending transaction and pleaded that the respondent was estopped from raising this plea by virtue of the earlier judgment in 1954. Their Lordships of the Privy Council approved the law laid down in 1939 AC 1 and observed as follows:—

"In their Lordships' opinion the New Brunswick Railway Co. case, 1939 AC 1 can be taken as containing an authoritative reinterpretation of the principle of *Howlett v. Tarte*, 1861-10 CBNS 813 in simpler and less specialised terms. This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and to use the words of Lord Maugham L. C., they can estop only for what must "necessarily and with complete precision" have been thereby determined

On the whole their Lordships think it impossible to say that there was anything in the first judgment which necessarily and with complete precision decided this issue against the respondent, and they hold consequently that the estoppel claimed cannot be maintained against it."

11. We do not mean to say that same test will be applicable in applying the rule of *res judicata* in India with respect to a default judgment. But these decisions are instructive for finding out the principle behind the doctrine of estoppel by judgment. In our opinion, the principle enunciated by the Privy Council must be taken to have been laid down by their Lordships of the Supreme Court with regard to the consent decree when they approved the decision of the Calcutta High Court in (1936) ILR 63 Cal 550.

12. Learned counsel for Rajababu has further pointed out that it is an accepted position in Rajasthan that a Jain widow can adopt without the authority of her husband and that in the circumstances of the case Mr. C. C. Kashiwal who was appearing for the respondents could not have made such a fatal admission against his clients. It is further urged that such an admission was an admission on a point of law and if erroneous was ineffective. It is also urged that such an admission was not intended to

be made may also be inferred from the other circumstances in this case inasmuch as soon after the judgment of the Jaipur High Court. Mst. Rajhai adopted Rajababu to her husband. These circumstances no doubt show that such an admission may not have been intended to be made. In our opinion, the principle of estoppel by judgment is not attracted in this case.

13. The learned Single Judge has rightly dismissed the appeal filed by the plaintiff. This appeal has therefore no force and is dismissed with costs.

Appeal dismissed.

AIR 1970 RAJASTHAN 108 (V 57 C 24)

JAGAT NARAYAN, J.

Pukhraj Ajayraj Oswal, Appellant v. Prabha Vanaji, Respondent.

Civil Execution Second Appeal No. 2 of 1966, D/- 13-3-1969, against judgment of Civil and Addl. S. J. Jalore D/- 24-9-1965.

Civil P. C. (1908), S. 60 (1) (c) — 'Agriculturist' — Who is — Held on facts that the judgment-debtor was agriculturist and the attached house was exempt from attachment and sale.

An agriculturist cannot cease to be an agriculturist in a year of scarcity when he is unable to grow sufficient food for his own necessities. If in normal years the main source of living of a person is agriculture, then he will be regarded as an agriculturist.

(Para 4)

Held on facts that the main source of the judgment-debtor was agriculture. He not only keeps his agricultural implements in the house, but he himself resides in it as an agriculturist. Hence the attached house was exempt from attachment and sale under Section 60 (1) (c). AIR 1961 SC 589, Applied; AIR 1938 Nag 366 and AIR 1961 All 183 (FB), Overruling AIR 1960 All 429, Ref. to.

(Paras 2, 5, 6)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 589 (V 48) =

1961 (2) SCR 163, Appasaheb v.

Bhalchandra 2

(1961) AIR 1961 All 183 (V 48) =

1961 All LJ 88 (FB), Smt. Chandra-

wati Tewari v. U. P. Government 3

(1960) AIR 1960 All 429 (V 47) =

1960 All LJ 177, Shiamlal v. Smt.

Sahodra Devi 3

(1938) AIR 1938 Nag 366 (V 25) =

ILR (1938) Nag 461, Cowardhandas

Surajmal v. Mohanlal Surajmal 3

S. K. Mal, for Appellant; L. R. Mehta, for

Respondent.

JUDGMENT: This is a decree-holder's Execution Second Appeal against an appellate order of the Senior Civil Judge, Jalore holding that a house belonging to Prabha

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judgment-debtor is exempt from attachment and sale under Section 60 (1) (c), C. P. C.

2. As to who is an agriculturist under Section 60 (1) (c) was laid down by their Lordships of the Supreme Court in Appasaheb v. Bhalchandra, AIR 1961 SC 589. It was held that:

"The word 'agriculturist' in this clause must carry the same meaning as the word 'agriculturist' in cl. (b) and the house must be occupied by him as such. Even if it is not necessary that a person must till the land with his own hands to come within the meaning of the word agriculturist he must at least show that he was really dependent for his living on tilling the soil and was unable to maintain himself otherwise. Where a person is an agriculturist in the widest sense of the term, he is not an agriculturist within the meaning of the clauses, if he is not really dependent for his maintenance on tilling the soil and is able to maintain himself otherwise".

3. The attention of the lower courts was not drawn to this decision. They have followed Smt. Chandrawati Tewari v. U. P. Government, AIR 1961 All 183; Shiamlal v. Smt. Sahodra Devi, AIR 1960 All 429 and Gowardhandas Surajmal Marwadi v. Mohanlal Surajmal, AIR 1938 Nag 366. The decision in Shiamlal's case, AIR 1960 All 429 was overruled by the Full Bench in Chandrawati's case, AIR 1961 All 183. The law laid down in the Full Bench case also is not quite the same as that laid down by their Lordships of the Supreme Court.

4. I have examined the evidence on record in the light of the decision of their Lordships of the Supreme Court. I find that the evidence shows that the main source of livelihood of Prabha was agriculture. The area where he resides is an area where only one crop is grown in a year in the rainy season. Rains are also precarious. An agriculturist is occupied in the work of agriculture only for four months in the year, and for the remaining eight months, he either earns something by labour or remains idle. Prabha stated that in the year 1964, he produced 2 kalsis of bajra, in the year 1963 the crop was of 10 seis and in the year 1962, it was 20 seis. 1962 and 1963 were obviously years of scarcity. An agriculturist cannot cease to be an agriculturist in a year of scarcity when he is unable to grow sufficient food for his own necessities. If in normal years the main source of living of a person is agriculture, then he will be regarded as an agriculturist.

5. The fields of Prabha are in village Leta, but the house is in Jalore. There is nothing on record to show that Jalore is so very far from village Leta. Prabha stated that he keeps his implements of agriculture in his house at Jalore which was attached. His witness Lachhiram stated that during the rainy season Prabha cultivates his fields and he keeps his implements at his field. That

implies, that for the remaining part of the year he keeps them in his house at Jalore. Prabha not only keeps his agricultural implements in the house, but he himself resides in it as an agriculturist. It has not been shown that he has any other house where he can reside.

6. I accordingly hold that the attached house is exempt from attachment and sale under Section 60 (1) (c), C. P. C. and dismiss the appeal. In the circumstances of the case, I leave the parties to bear their own costs.

Appeal dismissed.

AIR 1970 RAJASTHAN 109 (V 57 C 25)

JAGAT NARAYAN, J.

Pukh Raj, Appellant v. Parbha and others, Respondents.

Civil Execution Second Appeal No. 12 of 1966, D/- 13-3-1969.

Civil P. C. (1908), O. 21, R. 72 — Provincial Insolvency Act (1920) S. 52 — Execution — Sale—House purchased by decree-holder with permission of Court — Decretal amount is set off against price automatically — After sale but before confirmation one of the sons of deceased judgment-debtor applying for being adjudged insolvent — S. 52 held not applicable as sale had taken place before filing of adjudication application — Sale was, therefore, neither void nor voidable. AIR 1935 Lah 690, Rel. on; AIR 1933 Cal 561, Disting. (Para 3)

Cases Referred: Chronological Paras

(1935) AIR 1935 Lah 690 (V 22) =

160 Ind Cas 493, Charanjit Singh v.

Sardar Mohammad 3

(1933) AIR 1933 Cal 561 (V 20) =

ILR 60 Cal 696, Mahendra Kumar

Baishya v. Deeneshchandra Ray 2

Krishna Mal Lodha, for Appellant.

JUDGMENT: This is a decree-holder's appeal against an appellate order of the Civil Judge, Jalore.

2. A decree for money was passed against one Bhera on 16-1-59. The decree was executed against the two sons and a widow of Bhera after his death, and a house was sold in execution of the decree on 4-7-1965. The house was purchased by the decree-holder with the permission of the Court. After the sale had taken place, but before it was confirmed, one of the sons of Bhera namely Mota applied for being adjudged insolvent. His application was admitted and the executing Court was intimated about it on 6-8-65. On 7-8-1965 the Receiver applied to the Court for possession over the house and prayed that the sale be not confirmed. The executing Court did not confirm the sale, and by the order dated 9-10-65, directed that the possession over the house, which

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had been sold, be handed over to the Receiver. This order was confirmed on appeal by the Senior Civil Judge, Jalore. Both the Courts below purported to follow the decision of the Calcutta High Court in *Mahendra Kumar Baishya v. Deenesh-chandra Ray*, AIR 1933 Cal 561. That case is distinguishable inasmuch as the intimation about the admission of the insolvency application was received there before the sale had taken place. It was held that a sale by an executing court after notice of the admission of the insolvency petition was void.

3. In the present case, the sale had taken place before Mota applied for being adjudged as insolvent. The sale was therefore neither void nor voidable. Section 52 of the Provincial Insolvency Act, 1920 runs as follows:

"Where execution of a decree has issued against any property of a debtor which is saleable in execution and before the sale thereof notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court, shall, on application, direct the property, if in the possession of the Court, to be delivered to the Receiver, but the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered, and the Receiver may sell the property or an adequate part thereof for the purpose of satisfying the charge".

That section has no application to a case where the execution takes place before an application for adjudication is made. It was held in *Charanjit Singh v. Sardar Mohammad*, AIR 1935 Lah 690, that where the decree-holder has been given permission to bid, the decretal amount is set off against purchase price automatically by operation of law.

4. I accordingly allow the appeal with costs and set aside the orders of the courts below. I direct that the sale shall be confirmed in favour of the decree-holder.

Appeal allowed.

AIR 1970 RAJASTHAN 110 (V 37 C 26)

C. M. LODHA, J.

State, Petitioner v. Jagdish, Non-Petitioner.
Criminal Ref. No. 144 of 1968, D/- 15-3-1969.

(A) Probation of Offenders Act (1958), S. 4(1) — Conviction of accused — Court passing sentence of imprisonment and then observing that the accused is a young man directing his release on probation — Order is illegal — Order under S. 4(1) is not one of the various kinds of punishments described in S. 53, I. P. C. — Accused cannot be

punished and at the same time released on his entering into a bond — But apart from illegality of order, there being no attack on merits, held, that the discretion exercised by Magistrate in giving the accused benefit of Act was not wrong and as such setting aside of the sentence would make the order legal and proper — (Criminal P. C. (1898), S. 562) — (Penal Code (1860), S. 53.) (Para 5)

(B) Probation of Offenders Act (1958), Ss. 4(1) and 11(2) — Order under S. 4(1) is appealable under S. 11(2) — (However, High Court dealt with the case in reference since record was before it upon reference by Sessions Judge before whom State had filed revision) — (Criminal P. C. (1898), Ss. 435, 438 and 439.) (Para 3)

ORDER: This is a reference by the Sessions Judge, Pali.

2. The accused non petitioner was convicted by the Munsiff-Magistrate, Pali for offences under Sections 338, 429, 279 and 337, I. P. C. and sentenced to rigorous imprisonment for four months, six months, two months and two months respectively. All the sentences were made to run concurrently. Having convicted and sentenced the accused as mentioned above the learned Magistrate further gave benefit to the accused under Section 4 (1) of the Probation of Offenders Act and instead of sending him to jail he directed that the accused be released on bail on his entering into a bond in a sum of Rs. 1000 and a surety in the like amount to appear and receive the sentence when called upon during one year and in the meantime to keep the peace and be of good behaviour. Aggrieved by the order of the learned Magistrate the State filed a revision in the Court of Sessions Judge, Pali, praying that, that part of the order of the learned Magistrate whereby he gave the benefit to the accused under the Probation of Offenders Act be set aside and the accused be sent to jail for serving out the sentence. The learned Sessions Judge has recommended that the order of the learned Magistrate be set aside and he may be directed to convict the accused or either sentence him at once to any punishment or in the alternative direct the release of the accused under Section 4 (1) of the Probation of Offenders Act. According to the learned Sessions Judge the Magistrate was not competent to sentence the accused and simultaneously give him the benefit of the Probation of Offenders Act.

3. Since nobody has put in appearance in this Court the case has been put up in Chambers for orders. In the first place I think the order passed by the Magistrate giving the accused benefit under Section 4 (1) of the Probation of Offenders Act is appealable under Section 11(2) of the said Act. It provides that,

"(2) Notwithstanding anything contained in the Code, where an order under Section

3 or Section 4 is made by any Court trying the offender (other than a High Court), an appeal shall lie to the Court to which appeal ordinarily lie from the sentences of the former Court."

4. From the language of this sub-section it is clear that the right to prefer an appeal from an order under Section 4 of the Act has been conferred both upon the prosecution as well as upon the accused. It appears that this point escaped the notice of the Public Prosecutor, and the counsel for the accused as well as the learned Sessions Judge. In my opinion the order passed by the learned Magistrate was appealable and if the State felt aggrieved of it it should have filed an appeal. As the record has, however, been submitted to this Court on reference and the illegality in the order of the Magistrate has been brought to the notice of this Court, I proceed to deal with the case instead of wasting further time by sending the case back to the Sessions Judge.

5. As regards the legality of the order passed by the Magistrate the language of Section 4(1) makes it clear that the sentence of imprisonment imposed upon the accused while he was being released on probation to keep the peace and be of good behaviour was illegal. Under S. 4(1) of the Probation of Offenders Act the sentence of punishment is postponed and something which is not a punishment is substituted therefor. In my opinion an order under Section 4(1) of the Probation of Offenders Act directing the release upon probation of good conduct cannot be said to be a punishment. It is not one of the various kinds of punishments described in Section 53 of the Indian Penal Code. An accused cannot be punished and at the same time released on his entering into a bond with or without sureties to appear and receive the sentence when called upon and in the meantime to keep the peace and be of good behaviour. The order of the Magistrate does not seem to be in conformity with the provisions of Section 4(1) of the Probation of Offenders Act. Since he has not only convicted the accused under Sections 338, 279, 429 and 337, I. P. C. but has also passed a sentence of two months' rigorous imprisonment under each count and has then added the order of releasing the accused. This is illegal in view of the wordings of Section 4(1) of the Probation of Offenders Act.

The learned Sessions Judge has recommended that the order of the Magistrate should be set aside and he should be directed to pass a proper order according to law. From the record of the trial court it appears that the accused has admitted that he was driving the truck rashly and negligently as a result of which it struck against the bullock cart and caused injuries to the bullock as well as to Pemla and Bhagiya. In the application filed by the accused for giving him the benefit of Probation of Offenders Act also

it has been stated that he was trying to overtake the bullock cart when this accident took place. The learned Magistrate has also observed in his order that the accused is a young man though he has not mentioned his age and I too was not able to find out the age of the accused from the record. But the fact of the accused being a young man has not been challenged in the ground of revision filed by the State before the Sessions Court. Besides the only objection taken in the grounds of revision to the order of the learned Magistrate relating the accused is that the order is illegal. But apart from the question of its illegality, the order of the learned Magistrate has not been attacked on merits either in the grounds of revision nor any argument appears to have been advanced before the learned Sessions Judge on the merits of the order. Thus there does not appear to be anything wrong with the discretion exercised by the learned Magistrate in giving the accused the benefit of the Probation of Offenders Act. In these circumstances the sentences awarded by the Magistrate deserve to be set aside, and this would make the order legal and proper.

6. I, therefore, allow this reference and set aside that part of the order of the learned Magistrate whereby he has sentenced the accused under Sections 338, 449, 279 and 337, Indian Penal Code to 6 months, 4 months, 2 months and two months' rigorous imprisonment respectively. The rest of the order is maintained.

Order accordingly.

AIR 1970 RAJASTHAN 111 (V 57 C 27)

C. B. BHARGAVA, J.

R. B. Moondra and Co., Appellant v. Mst. Bhanwari and another, Respondents.

Civil Misc. First Appeal No. 42 of 1967 D/- 22-4-1969 against judgment of Workmen Compensation Commr. Jodhpur D/- 15-5-1967.

(A) Workmen's Compensation Act (1923), Section 3 — "Arising out of employment" — Meaning of — Question as to whether death was caused by added peril — Test.

The expression "arising out of employment" is not confined to the "nature of employment" but applies to the employment as such to its nature, its conditions, its obligations, and its incidents. Therefore, to find whether the death was caused by added peril, the relevant enquiry to make is whether the thing was within the sphere of employment and incidental to it, whether it was in the interest of the work of the employer and was simply done carelessly or negligently. If the answer to the above is in the affirmative, then the accident would be said to be out of and in the course of employ-

ment and the plea of added peril would fail. On the other hand if the answer is in the negative and if it is found that thing was foreign to the scope of employment, i.e., something to which the workman voluntarily exposed himself not about the business of the employer but about his own business then it would not be out of employment and it would be a case of added peril. (Para 16)

The deceased was employed as a driver on the appellant's truck used for the purpose of carrying petrol in a tank. On the previous day he had reported to the appellant that the tank was leaking and so water was put in it for detecting the place from where it leaked. The deceased was asked by the appellant to enter the tank to see from where it leaked. Accordingly the deceased entered the tank which had no petrol in it, but had been partly filled with water and for the purpose of detecting the place from where it leaked, he lighted a match stick, as a result of which it caught fire and the deceased received burns due to which he succumbed subsequently.

Held, that the accident arose out of the deceased's employment and the act of lighting the match stick even if it be held as a rash or negligent act, would not debar his widow from claiming compensation. (Para 17)

The deceased was at the place of his work and did something in furtherance of the employer's work when the accident occurred. It may be that instead of lighting a match stick he should have used a torch to detect the place of leakage, but for the reason that the tank was empty and had been partly filled with water on the previous night, he might have little foreseen the risk involved. In these circumstances the utmost that can be said is that the deceased acted negligently or rashly, but it cannot be said that the act done was outside the sphere of his employment. The distinction has to be kept in view in cases where the injury by accident is due to a risk assumed independently of the employment and outside it, as distinguished from by an injury which is the result of a mere act of negligence. (Para 17)

(C) Workmen's Compensation Act (1923), Ss. 14 and 2(1)(e) — Compensation payable by employer — Case not falling under S. 14 — Compensation cannot be awarded against insurance company.

The Act as appears from its preamble was enacted to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident. The term "employer" has been defined in the Act and the insurance company does not come within the ambit of that definition. Therefore the Commissioner appointed under the Act will have no jurisdiction to award compensation to a workman against the insurance company unless the case falls within Section 14 of the Act which deals with the liability

of the insurer when the employer becomes insolvent, where he has entered into a contract with any insurer in respect of any liability under this Act. (Para 18)

(C) Workmen's Compensation Act (1923), S. 2(1)(d) — "Dependent" — Widow — Remarriage — Does not disentitle her to claim compensation.

In the Act there is no such provision that after remarriage widow of the deceased would not be regarded as a dependent. Under Section 21 of the Hindu Adoptions and Maintenance Act, 1956, a widow remains a dependent, within the meaning of that section so long as she is not remarried. But the definition of the "dependent" under the Act is not so restricted and the fact that she has remarried will not disentitle her to claim compensation under the Act. (Para 19)

(D) Workmen's Compensation Act (1923), S. 3(1) Proviso (b) — Applicability of — Accident arising out of and in course of employment — Injury resulting in death — Question of wilful disobedience of any order or rule not material.

In order to claim compensation the employee has to show not only that at the time of the accident he was in fact employed on the duties of his employment, but further that the immediate act which led to the accident was within the sphere of his duties and not foreign to them. In case of death of an employee due to accident if it has arisen out of and in the course of his employment it is no defence to plead that there was wilful disobedience of any order or rule expressly given or framed for the purpose of securing the safety of the workman. Clause (b) of the proviso to sub-section (1) of Section 3 is limited to those cases where injury has not resulted in death. (Para 8)

Cases Referred:	Chronological	Paras
(1956) AIR 1956 Pat 299 (V 43) =	1956 BLJR 288, Bhuranga Coal Co. Ltd. v. Sahabian Mian	6, 12
(1912) 1942-2 All ER 562, Blanning v. C. H. Bailey Ltd.		14
(1910) 1910-2 All ER 383 = 109 LJKB 509, Nobel v. Southern Railway Co.		9
(1939) 1939 AC 71 = 160 LT 187, Harris v. Associated Portland Cement Manufacturers Ltd.		14
(1937) AIR 1937 Sind 288 (V 24) = 172 Ind Cas 486, Devidayal Ralyaram v. Secy. of State		6
(1933) AIR 1933 Cal 220 (V 20) = ILR 60 Cal 421, Corui Kinkar Bhakat v. M/s. Radha Kishan Cotton Mills		6, 11
(1932) 1932 All ER 458 = 102 LJKB 142, Thomas v. Ocean Coal Co. Ltd.		8
(1929) 1929 AC 570 = 98 LJKB 97, Stephen v. Copper		8, 13
(1917) 1917 AC 127 = 86 LJPC 102, Mrs. Margaret Thom or Simpson v. Sinclair		10

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